APPENDIX

TABLE OF APPENDICES

[1] Appendices E–H consist of documents contained in the Corrected Joint Appendix filed with the Federal Circuit in this case. Appendix I was filed with the Complaint as Exhibit 3.

Appendix A

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

JAMES DOYLE, DBA ROCKY MOUNTAIN VENTURES, DBA ENVIRONMENTAL LAND TECHNOLOGIES, LTD.,

Plaintiff-Appellant

v.

UNITED STATES,

Defendant-Appellee

2023-1735

Appeal from the United States Court of Federal Claims in No. 1:22-cv-00499-DAT,

Judge David A. Tapp.

Decided: December 18, 2024

ROGER J. MARZULLA, Marzulla Law, LLC, Washington, DC, argued for plaintiff-appellant. Also represented by NANCIE GAIL MARZULLA.

CHRISTOPHER ANDERSON, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by TODD KIM.

Before LOURIE, STOLL, and STARK, *Circuit Judges*.

STARK, *Circuit Judge*.

James Doyle owns land in an area in Utah that the United States Fish and Wildlife Service ("FWS") has designated as critical habitat for the Mojave desert tortoise. After years of failed efforts to obtain a permit necessary to allow him to develop his land, Mr. Doyle sued the federal government, contending that his property had been subject to a taking under the Fifth Amendment. The Court of Federal Claims found his claim was not ripe and dismissed his complaint. We affirm.

I

A

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44, "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA generally prohibits what it calls the "take" of an endangered species, defining a "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (emphasis added); see also id. § 1538(a)(1)(B) (prohibiting taking). Under regulations promulgated by FWS to implement the ESA, "harm" "may include significant habitat modification or degradation" injuring an endangered species. 50 C.F.R. § 17.3.

FWS is an agency within the Department of the Interior ("Interior"). The ESA authorizes the Secretary of the Interior ("Secretary") to issue "Incidental Take Permits," which allow, as relevant here, a taking "if

such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). The ESA sets out specific submissions that must be made by an applicant for an Incidental Take Permit and findings the Secretary must make. 16 U.S.C. § 1539(a)(2)(A) & (B). When these conditions are satisfied, an applicant becomes entitled to issuance of such a permit.

Among other things, an applicant for a permit is required to specify "the impact which will likely result from such taking," 16 U.S.C. § 1539(a)(2)(A)(i), by submitting a conservation plan detailing how the specific actions that would be allowed by the Incidental Take Permit will impact identified endangered species, see 50 C.F.R. § 17.32(b)(1) (describing contents of conservation plan, including impact of proposed activity, steps to be taken to minimize and mitigate effects of that activity, and alternatives to activity applicant considered). The required conservation plan is commonly referred to as a "habitat conservation plan" ("HCP"). *See, e.g., Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231, 1238 (11th Cir. 1998) ("As a prerequisite to receiving an incidental take permit, the applicant must submit a habitat conservation plan."). If the Secretary finds that the conditions identified in § 1539(a)(2)(B) are satisfied, the ESA directs that "the Secretary shall issue the permit." 16 U.S.C. § 1539(a)(2)(B) (emphasis added).

B

In 1990, FWS categorized the Mojave desert tortoise as endangered, making it a "listed" species. 16 U.S.C. § 1533(c). In 1994, as a consequence of this

determination, FWS designated 129,100 acres of land in Utah (the "Designated Area") as critical habitat for the Mojave desert tortoise.

Mr. Doyle owns land in the St. George area of Washington County in the State of Utah. All of Mr. Doyle's land is located within the Designated Area and, hence, is critical habitat for purposes of the ESA. He alleges that he has been attempting to develop his property since the 1980s.

Mr. Doyle worked with Washington County, which then separately applied to FWS for an Incidental Take Permit (the "County Permit") to allow certain actions, including land development, to be permitted within the Designated Area. The application for the County Permit included an HCP detailing how the permitted activities would impact the endangered Mojave desert tortoise and its habitat. The Secretary issued the County Permit in 1996.[1]

The County Permit expressly contemplated that individual landowners within the Designated Area, such as Mr. Doyle, could apply for their own Incidental Take Permits. Mr. Doyle had actually applied for such a permit in 1994, even before the County Permit had been issued.[2] Mr. Doyle never appealed FWS' rejection of his 1994 permit application.

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[1] The County Permit expired in 2016 and was not renewed until 2020. This four-year gap does not impact the issues involved in this appeal.

[2] Mr. Doyle faults the Court of Federal Claims for seemingly overlooking his 1994 application and wrongly stating that he had never filed a completed Incidental Take Permit application. See Open. Br. at 31-32. Any error the Court of Federal Claims may have committed in its statements about the 1994 application is

Instead, more than two decades later and without filing for a new permit, in 2015, Mr. Doyle filed suit against the government in the Court of Federal Claims, alleging a taking of his property. The Court of Federal Claims dismissed his complaint for lack of finality. *See Doyle v. United States*, 129 Fed. Cl. 147, 156-58 (2016) (citing *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004)). Mr. Doyle did not appeal.

Several years later, in March 2020, Mr. Doyle filed another Incidental Take Permit application, this time directed to the 266 acres he owned within the Designated Area.[3] He failed to include an individualized HCP with his application, attempting instead to rely on the HCP that was already part of the County Permit. See J.A. 739 (noting reliance on Washington County HCP for permit submission requirements); J.A. 744 (allowing applicants to rely on existing HCP to meet submission requirements); J.A. 745 (stating, in effort to meet HCP submission requirement, "[s]ee current Washington County HCP of 1996").

Consequently, the FWS informed Mr. Doyle his permit application was incomplete and could not be processed until he submitted an individualized HCP addressing his proposed incidental take, which was not addressed in the County Permit or its HCP. As the standard application specifically informs applicants,

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harmless, as Mr. Doyle presents no evidence that he appealed the 1994 denial, any appeal is barred by the statute of limitations, and the issues before us relate solely to his more recent application.

[3] Mr. Doyle had previously owned more land in the Designated Area but had transferred all but 266 acres.

FWS "cannot issue an Incidental Take permit under Section 10(a)(2)(A) of the Endangered Species Act unless the applicant submits a conservation plan," which must include (among other things) "the impacts that are likely to result from the incidental take *associated with the applicant's activity*." J.A. 742 (emphasis added); *see also* J.A. 745 (listing HCP requirements).

Instead of submitting a conservation plan, Mr. Doyle filed a new complaint in the Court of Federal Claims, in which he once again argued that his property had been taken, this time as a result of FWS' alleged failure to act on his 2020 permit application. To date, Mr. Doyle has still not submitted a complete application for an Incidental Take Permit for his current property.

The Court of Federal Claims dismissed Mr. Doyle's lawsuit, finding that Mr. Doyle had failed to obtain a final decision and his claim was not ripe. The trial court explained that before an aggrieved applicant for an Incidental Take Permit can sue, he must first file a complete permit application, in order "to first give FWS the chance to balance the interests at stake and reach a final decision on whether its regulatory enforcement obligations overcome the particular property interest at stake." J.A. 4-5. In reaching this conclusion, the Court of Federal Claims rejected Mr. Doyle's contentions that recent Supreme Court decisions eliminated the exhaustion requirement that had previously been a condition for bringing a takings suit based on an administrative agency action and that these decisions replaced the requirement with a "de facto" finality requirement that, he insisted, he satisfied.

Mr. Doyle timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review the Court of Federal Claims' dismissal for lack of ripeness de novo. *See McGuire v. United States*, 707 F.3d 1351, 1357 (Fed. Cir. 2013).

The Court of Federal Claims dismissed Mr. Doyle's complaint pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), for lack of subject matter jurisdiction. J.A. 9; *see generally Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1341 (Fed. Cir. 2021) (discussing when 12(b)(1) dismissal is appropriate). Mr. Doyle asserts that ripeness is not a jurisdictional requirement.

Opinions from the Supreme Court, as well as our own, show that it can be difficult to distinguish between ripeness cases that involve jurisdictional inquiries and those that turn instead on prudential concerns. *See, e.g., Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 733 n.7 (1997) ("[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.") (internal quotation marks omitted); *Martin v. United States*, 894 F.3d 1356, 1360 (Fed. Cir. 2018) ("The Court of Federal Claims is without jurisdiction to consider takings claims that are not ripe."); *McGuire*, 707 F.3d at 1358 ("[R]ipeness in the exhaustion context is not a jurisdictional question."). Resolution of this appeal does not require delving into these potential complexities because (as we explain below) Mr. Doyle's regulatory takings claim is unripe, and it is properly

dismissed for lack of ripeness regardless of whether that defect is jurisdictional, prudential, or both.

III

Mr. Doyle presses several arguments on appeal. First, he contends that his takings claim is ripe because the FWS decision is final based on the County Permit. Second, Mr. Doyle insists that recent Supreme Court decisions establish that he need only demonstrate "de facto" finality, which does not require completing the FWS permit process, rendering his suit ripe under this new, more lax, ripeness standard. Finally, Mr. Doyle raised additional points at oral argument, some of which merit discussion.

A

"[T]he initial denial of a permit is still a necessary trigger for a ripe takings claim." *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002).[4] The Court of Federal Claims found Mr. Doyle's claim is unripe because he never received a final decision on his permit application, since he did not submit a complete application. According to the trial court, finality here would have required "submitting an [Incidental Take Permit] accompanied by an HCP," but Mr. Doyle "never complied with this – one and only – prerequisite for challenging the United States' position." J.A. 9. We agree with the Court of Federal Claims that because Mr. Doyle's permit application was defective, and FWS could not come to a final

[4] An exception to this requirement may be applicable when there is "extraordinary delay in permit processing or bad faith on the part of the agency," *Boise Cascade*, 296 F.3d at 1347 n.6, circumstances Mr. Doyle does not contend exist here.

determination with respect to his property, his challenge to the agency action is not ripe. *See MacDonald, Sommer & Frates v. Yolo Cnty*., 477 U.S. 340, 348 (1986) ("[A]n essential prerequisite to [assertion of a regulatory takings claim] is a final and authoritative determination of the type and intensity of development legally permitted on the subject property.").

As Mr. Doyle acknowledges, FWS has a method for authorizing a "take" even where actions may have an impact on a listed species. An applicant must show that several factors will be satisfied – largely pertaining to the impact of the planned actions on the listed species – before the agency will issue an Incidental Take Permit. *See* 16 U.S.C. § 1539(a)(1)-(2). One of the requirements for an Incidental Take Permit is submission of a HCP. *See* 16 U.S.C. § 1539(a)(2)(A); *see also Loggerhead Turtle*, 148 F.3d at 1238. Without submission of an individualized conservation plan, an Incidental Take Permit application is not complete.

Mr. Doyle admits that he did not submit his own conservation plan, as he tried instead to rely on the HCP that had been included with the County Permit. But that HCP did not pertain to the development Mr. Doyle proposed to undertake on his land and did not show how his actions would impact the endangered species. His application, therefore, was incomplete. Accordingly, FWS was unable to carry out the analysis required to reach a conclusion as to whether Mr. Doyle was entitled to the Incidental Take Permit he was requesting. His takings claim, thus, is unripe and was properly dismissed. *See Howard W. Heck, & Assocs., Inc. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) ("[Plaintiff] had not provided the [federal

agency] with the information required by law. We therefore hold that the dismissal of the application as incomplete was not a final decision or a decision on the merits.").

B

The recent Supreme Court decisions on which Mr. Doyle relies do nothing to alter our conclusions. He points to *Knick v. Township of Scott*, 588 U.S. 180 (2019) and *Pakdel v. City & County of San Francisco*, 594 U.S. 474 (2021) as establishing the proposition that he need not exhaust all administrative remedies and his claim is ripe so long as he can show "de facto" finality. *Knick* and *Pakdel* are inapplicable here – but, even if they did apply, Mr. Doyle has failed to demonstrate even "de facto" finality.

Knick and *Pakdel* did not address federal administrative agency exhaustion, which here would ask whether Mr. Doyle has received a final decision from FWS on an Incidental Take Permit. These cases pertain, instead, solely to exhaustion of state remedies before a takings claim is ripe. *See Knick*, 588 U.S. at 194 ("[P]laintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.") (internal quotation marks omitted); *Pakdel*, 594 U.S. at 480 ("[A]dministrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position [under § 1983]"). In *Pakdel*, the Supreme Court expressly distinguished state-procedure exhaustion from federal administrative agency exhaustion, explaining that administrative exhaustion "requires *proper*

exhaustion – that is, compliance with an agency's deadlines and other critical procedural rules." 594 U.S. at 480 (internal quotation marks omitted). Neither *Knick* nor *Pakdel* dispense with the requirement that, in the context of judicial review of a federal agency action, there must be a "final" decision. *See Pakdel*, 594 U.S. at 478 ("[P]laintiff must show ... that there [is] no question ... about how the regulations at issue apply to the particular land in question.") (internal quotation marks omitted); *id*. at 475 ("When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision."); *Knick*, 588 U.S. at 188 ("Knick does not question the validity of this finality requirement, which is not at issue here.").

Quoting *Knick*, 588 U.S. at 189, Mr. Doyle asserts that the Supreme Court has held that "property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken," without having to apply for permits and exemptions with an applicable agency. Open. Br. at 17. Mr. Doyle argues that after the recent Supreme Court decisions, there is now only a "de facto" finality requirement. Mr. Doyle also contends he has shown "de facto" finality because there is no question that FWS will not allow him to develop his land as he intends. Specifically, he asserts that "once the [FWS] listed the tortoise as endangered, it instantly became unlawful to develop [his] land," because any change could "harm" the listed species. Open. Br. at 27. This is simply incorrect.

As the government explains, "Washington County's permits do not prohibit development of Mr. Doyle's

land" and "expressly contemplate that private landowners may obtain separate incidental take permits to allow for additional development of private lands in the reserve." Response Br. at 1. In pertinent part, the County Permit states:

> It is possible that a private landowner … may seek alternative means of ESA compliance, other than through this Amended HCP, and ultimately develop lands within the Reserve…. [A] private landowner would need to seek an alternative form of compliance with the ESA for incidental take resulting from their activities.

J.A. 430; *see also* J.A. 372 (Washington County 2020 HCP stating it "will place no restrictions on the use of [private] property within the Reserve").

Allowing for the possibility that development by individual landowners will be allowed, pursuant to an individual Incidental Take Permit, is consistent with the ESA. As the Court of Federal Claims rightly put it, the "ESA's prohibitions on activities that may endanger protected species are not absolute." J.A. 3. Rather, the agency "permit[s] otherwise prohibited take of listed species if FWS finds them to be 'incidental to, and not the purpose of,' any lawful activity." *Id*. (quoting 16 U.S.C. § 1539(a)(1)(B)). If the conditions listed in the statute are satisfied, there is no discretion – the Secretary *shall* issue the permit. 16 U.S.C. § 1539(a)(2). Therefore, there is still a possibility that Mr. Doyle could obtain – and, indeed, could under the ESA be *entitled to* – his own Incidental Take Permit.

Even the regulations on which Mr. Doyle relies undercut his argument that there is no chance he will be permitted to develop his land. In his opening brief, Mr. Doyle directs us to 50 C.F.R. § 402.01, which provides that any activity within a designated critical habitat area must not be "'*likely* to … result[] in the destruction or adverse modification of critical habitat.'" Open. Br. at 29 (emphasis added) (quoting 50 C.F.R. § 402.01). Plainly, this regulation contemplates that where an applicant can demonstrate that his activities are not "likely" to destroy or adversely modify critical habitat, then the applicant may very well obtain a permit. FWS has not had a chance to undertake this evaluation and, hence, has not arrived at any final decision. *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985) ("Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."), *overruled on other grounds by Knick*, 588 U.S. 180.

Suitum v. Tahoe Regulatory Planning Agency, also cited by Mr. Doyle, does nothing to compel a different result. The regulation at issue in Suitum "permit[ted] no 'additional land coverage or other permanent land disturbance.'" 520 U.S. at 729 (quoting Tahoe Regional Planning Agency Code of Ordinances, ch. 37 § 20.4). Thus, when the agency denied the landowner permission to build on her land, there was no ambiguity in its denial, and it was final. *See id*. at 739. Here, by contrast, there is still a possibility that Mr. Doyle could obtain a permit, so there is no "de facto" finality, and his takings claim is not ripe. *See Boise*

Cascade, 296 F.3d at 1348-49 ("[N]o taking occurred because the government never denied the permit."); *Morris*, 392 F.3d at 1376-77 (same).

In short, there is no finality, de facto or otherwise. Unless and until Mr. Doyle files a complete permit application, FWS is unable to make a decision with actual, or even de facto, finality, as to whether to grant or deny his application. His takings claim is unripe and the trial court properly dismissed it.

C

At oral argument, Mr. Doyle's counsel argued that the Court of Federal Claims overlooked "five essential facts." *See* Oral Arg. at 4:15-4:26, *available at* https://oralarguments.cafc.uscourts.gov/default.aspx?fl=231735_07102024.mp3. Four of these "facts" – that Mr. Doyle's land is in "Zone 3" congressionally-designated conservation area, that the area is a critical, essential habitat for the Mojave desert tortoise, that the County Permit precludes development, and that the Bureau of Land Management is attempting to acquire the land in the conservation area – were not ignored by the Court of Federal Claims, nor do they alter the finality analysis.[5] At best

[5] The fifth point, also raised in his briefing, is the suggestion that there has been a physical taking of Mr. Doyle's land through fences erected by the Bureau of Land Management. He did not present such a claim to the Court of Federal Claims and, therefore, forfeited it. *See Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("[T]his court does not 'review' that which was not presented to the district court."). Regardless, as the government points out any such fences were erected in 1996 by Mr. Doyle's own account and this claim would therefore be barred under the six-year statute of limitations. 28

for Mr. Doyle, they suggest that there may be good reason to suspect that even a complete permit application – one containing an individualized conservation plan – would have been denied by FWS. But such speculation does not render his taking claim ripe.

The same is true of another point Mr. Doyle emphasized during oral argument. He contends that if FWS were to allow him to develop his land, development rights in other parts of the Designated Area would have to be withdrawn. Even assuming this is true, it does not absolve Mr. Doyle of his obligation to submit a complete Incidental Take Permit application, to allow FWS to make a final decision on his request. In fact, Mr. Doyle's argument indicates that there is a world in which he could be granted a permit – and the County Permit could be modified. The record before the Court of Federal Claims does not permit a conclusion that there is "no question" his application would be denied. Thus, again, Mr. Doyle failed to show actual or even "de facto" finality, and his takings claim is unripe.

IV

We have considered Mr. Doyle's remaining arguments and find them unpersuasive. For the reasons stated above, we affirm the Court of Federal Claims' dismissal order.

AFFIRMED

U.S.C. § 2501; *see also Goodrich v. United States*, 434 F.3d 1329, 1336 (Fed. Cir. 2006).

Appendix B

James DOYLE, et al., Plaintiffs, v.

The UNITED STATES, Defendant.

No. 22-499

United States Court of Federal Claims.

Filed: March 24, 2023

Roger J. Marzulla and Nancie G. Marzulla, Marzulla Law, LLC, Washington, D.C., for Plaintiffs.

Paul G. Freeborne and Elizabeth McGurk, Trial Attorneys, Todd Kim, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., for Defendant.

MEMORANDUM OPINION AND ORDER

TAPP, Judge.

The Mojave desert tortoise takes 13 to 20 years to mature.[1] Plaintiff James Doyle's dispute with the United States dates back even longer, grows at a similarly slow pace, with maturity still to come.[2] Mr. Doyle alleges that in 1996 the United States deprived him of all economically beneficial use of his property when it designated his land as critical habitat for the

[1] U.S. Dep't of the Interior, Fish & Wildlife Serv., Desert Tortoise, https://www.fws.gov/species/desert-tortoise-gopherus-agassizii (last accessed March 16, 2023).

[2] The Court refers to the two plaintiffs in this case, James Doyle and his wholly owned limited partnership, Rocky Mountain Ventures and Environmental Land Technologies, Ltd., collectively as "Mr. Doyle."

Mojave desert tortoise under the Endangered Species Act ("ESA"). In 2016, the Court dismissed Mr. Doyle's first attempt at recovering for this alleged taking, finding that his claim was not ripe because he had not first sought a permit from the United States Fish and Wildlife Services ("FWS") exempting him from land-use prohibitions. Mr. Doyle now contends that his Fifth Amendment takings claim is ripe. The United States moves to dismiss the case for lack of subject-matter jurisdiction. It argues that the case remains unripe because Mr. Doyle only submitted an incomplete permit application and therefore FWS still has not reached a final decision on whether his exemption permit should be granted.

Because the Court finds that Mr. Doyle was required to obtain a final decision from FWS before bringing this challenge and because he still has not done so, the Court dismisses Mr. Doyle's Complaint as unripe for adjudication under RCFC 12(b)(1).

I. Background

The Mojave desert tortoise lives in desert valleys located between 1,000–4,000 feet in elevation. U.S. Dep't of the Interior, National Park Serv., *Desert Tortoise (Gopherus agassizii)*, https://www.nps.gov/moja/learn/nature/ desert-tortoise.htm (last visited March 18, 2023). The tortoises can live up to 60 or 80 years and, once mature, have few natural predators other than mankind.[3] *Id*. This tortoise is described as

[3] Unlike adult tortoises, hatchlings are susceptible to predation from a variety of species. U.S. Dep't of the Interior, Bureau of Land Management, *The Threatened Desert Tortoise*, https://www.blm.gov/sites/blm.gov/files/documents/Nevada_SNDO_Desert_Tortoise_Fact_Sheet_0. pdf (last visited March 18, 2023).

the largest wild reptile in the American southwest, growing up to 15 inches in length. *See* U.S. Dep't of the Interior, Bureau of Land Management, The Threatened Desert Tortoise, https://www.blm.gov/sites/blm.gov/files/documents/Nevada_SNDO_Desert_Tortoise_Fact_ Sheet_0.pdf (last visited March 18, 2023). In an appropriate habitat, tortoise populations range from a few per square mile to 200 per square mile. *Id*. They live the bulk of their lives in underground burrows. *Id*.

> The tortoise was listed [on the ESA] because of direct losses and threats to tortoise populations and habitat. Desert tortoises are directly impacted by increased raven predation on juveniles, collection by humans, vandalism, losses on roads and to off-highway vehicle (OHV) activities, and Upper Respiratory Tract Disease (URTD). Tortoise habitat is lost directly to urbanization, agriculture, road construction, military activities, and other uses. OHV use, rights-of-way, and grazing degrade habitat. All of these activities fragment tortoise habitat, which may reduce a tortoise population below the level necessary to maintain a minimum viable population.

Id.

The ESA, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531 et seq.), broadly prohibits actions such as harassing, harming, collecting, or pursuing—referred to as "the take"—of any listed species. 16 U.S.C. § 1532(19), 1539 (a)(1)(B). Once species are listed as endangered under the ESA, the Act requires

the Secretary of Interior ("the Secretary") to designate critical habitat areas that are "essential to the conservation of the [listed] species and … may require special management consideration or protection[.]" 16 U.S.C. §§ 1532(5)(A), 1533(a)(3). The ESA requires federal agencies to ensure that any agency action "is not likely to jeopardize the continued existence" of any listed species or "result in the destruction of adverse modification of [their] habitat." 16 U.S.C. § 1536(a)(2). However, ESA's prohibitions on activities that may endanger protected species are not absolute. The ESA authorizes the FWS to permit otherwise prohibited take of listed species if FWS finds them to be "incidental to, and not the purpose of," any lawful activity. § 1539(a)(1)(B). For example, if FWS finds that lawful land-use in a protected habitat will only result in an acceptable level of loss for protected species, it issues an incidental take permit ("ITP") to allow for the land-use despite its minimal impact and given certain assurances. *Id*.

Several conditions must be met before FWS approves an incidental take permit application, one of which is that the applicant must submit a conservation plan, known as a Habitat Conservation Plan ("HCP"). § 1539(a)(2)(A); 50 C.F.R. § 17.32(b)(1)(iii)(c). By submitting an HCP, the applicant describes the impact that they believe will "likely result" from their take and explain why their proposed plan for developing their property will only have an incidental impact on the protected species. 50 C.F.R. § 17.32(b)(1)(iii)(c). FWS regulations require an HCP to describe: the intended steps to mitigate the negative impact on protected species; alternative actions to such take which were considered; the reasons why

such alternatives are not being utilized; and any other measures that the Secretary may deem necessary or appropriate for purposes of the plan. *Id*. The Secretary may issue the incidental take permit that authorizes the otherwise-prohibited activity only "[u]pon receipt of a complete application." 50 C.F.R. § 17.32 (emphasis added).

Mr. Doyle is a real estate developer who embarked on a plan to develop 2,440 acres of property in the St. George area of Washington County, Utah, in the 1980s (located on the northern extension of the Mojave desert). (Pl.'s Resp. at 14, ECF No. 13). The City of St. George approved Mr. Doyle's design for developing a master-planned community of luxury homes anchored by nine golf courses. (Compl. at 1, ECF No. 1). However, in 1990, FWS listed the Mojave desert tortoise as threatened under the ESA and by 1994 designated 129,100 acres of land in Utah (10,500 acres of which were privately owned) as critical habitat, including all of Mr. Doyle's land. See Endangered & Threatened Wildlife & Plants; Desert Tortoise, 54 Fed. Reg. 42270 (Oct. 13, 1989); Determination of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820 (Feb. 8, 1994); see also (Pl.'s Resp. at 13).

Subsequently, in 1996, FWS approved a 20-year incidental take permit based on an HCP submitted by Washington County. (Def.'s Mot. Ex. 3, ECF No. 8). The incidental take permit authorized Washington County to develop up to 12,264 acres of the tortoise habitat on non-Federal land in the County and all other non-Federal land in the County outside the area known as the Beaver Dam Slope. (Def.'s Mot. Ex. 4).

In 2009, Congress sought to grant additional special protection to 44,725 acres of public land within the Red Cliffs Desert Reserve by designating that portion as the Red Cliffs National Conservation Area. Omnibus Public Land Management Act of 2009, Pub. L. No. 111–11, 123 Stat. 991 (March 30, 2009). Congress's stated aim was to conserve and protect "the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources," of that area. *Id*. This legislation authorized the Secretary of the Interior to sell public land and use the proceeds to purchase private land that remained in the conservation area. *Id*. Mr. Doyle's lands and several other private land holdings are located among the public lands in this designated conservation area. (Pl.'s Resp. at 15).

In 2016, Washington County's incidental take permit expired, and the County obtained approval from FWS for a new HCP in 2020. (Def.'s Mot. Exs. 5, 6). Pursuant to that HCP, FWS issued a new 25-year incidental take permit to the County. (*Id*.). In 2015, Mr. Doyle challenged FWS's decision to foreclose development on his land as a violation of the Fifth Amendment's takings clause. *See Doyle v. United States*, 129 Fed. Cl. 147 (2016). Mr. Doyle also claimed that the United States had obligated itself to purchase his land for fair value by approving the Washington County HCP and its failure to do so was a breach of contract. *Id*. The Court found that Mr. Doyle had failed to state a claim for breach of contract because Mr. Doyle's participation in the steering committee that worked to prepare the Washington County HCP was not enough to make Mr. Doyle a party to, or a third-party beneficiary, of the 1996 agreement that

was finally approved between FWS and Washington County. *Id*. at 156. The Court also rejected the argument that the 2009 designation of Red Cliffs National Conservation Area impacted Mr. Doyle's property rights, finding that the law did "not … place any express restrictions on development of private lands located within its boundary." *Id*. at 158. Most relevant here, the Court dismissed Mr. Doyle's 2015 action for lack of subject-matter jurisdiction finding that Mr. Doyle's claim was unripe because he had not submitted an incidental take permit application to FWS that included his proposed development plan before bringing the lawsuit. *Id*. at 156–58.

Subsequently, Mr. Doyle submitted his permit application to FWS in March 2020. (Def.'s Mot. Ex. 1). This time, the application did not include a personalized HCP, and FWS notified Mr. Doyle in June 2020 that the application was incomplete for that reason. (Pl.'s Resp. at 26). To date, Mr. Doyle still has not amended his application with a proposed HCP, instead insisting that the application incorporates Washington County's previous HCP. (*Id*.)

II. Discussion

Mr. Doyle filed his Complaint on May 6, 2022, claiming that the takings claim is now ripe because FWS has effectively denied his application by failing to act. (See Compl.). Mr. Doyle also argues that two decisions issued by the Supreme Court in the aftermath of his initial lawsuit introduce new standards that now render Mr. Doyle's takings claim ripe for adjudication.

Before proceeding to the merits, the Court must determine that it has subject-matter jurisdiction. *Steel*

Co. v. Citizens for a Better Envt., 523 U.S. 83, 88–89, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998). The plaintiff bears the burden of proving that subject matter jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83, 56 S. Ct. 780, 80 L.Ed. 1135 (1936). This Court has subject-matter jurisdiction over timely takings claims pursuant to the Fifth Amendment of the U.S. Constitution and the Tucker Act. U.S. Const. amend. V; 28 U.S.C. § 1491(a)(1). The Court does not have jurisdiction over claims that are not ripe. *See Howard W. Heck & Assocs., Inc. v. United States*, 134 F.3d 1468 (Fed. Cir. 1998).

As the Court previously stated, federal courts have jurisdiction to review takings claims related to ESA's enforcement but the path to the Courts is marked by two requirements: (1) that the plaintiff applies for an incidental take permit with FWS and (2) that the application includes an HCP for FWS's consideration and final approval. *See Doyle*, 129 Fed. Cl. at 156 (noting that "even where a plaintiff has been enjoined by a court from conducting an activity on its property because of the ESA, the Federal Circuit has required that the plaintiff seek an [ITP]," before the case is ripe) (citing *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1348 (Fed. Cir. 2002)); *see also Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1238 (11th Cir. 1998) ("a prerequisite to receiving an incidental take permit, [is for] the applicant [to] submit a habitat conservation plan."). The purpose of this process is to first give FWS the chance to balance the interests at stake and reach a final decision on whether its regulatory enforcement obligations overcome the particular property interest

at stake. *See Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1365 (Fed. Cir. 2009) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.") (quoting *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985), rev'd on other grounds by *Knick v. Twp. of Scott*, —— U.S. ——, 139 S. Ct. 2162, 204 L.Ed.2d 558 (2019)).

Mr. Doyle, however, argues that two recent Supreme Court decisions—*Knick*, 139 S. Ct. 2162 (2019) and *Pakdel v. City & Cnty. of S.F.*, —— U.S. ——, 141 S. Ct. 2226, 210 L.Ed.2d 617 (2021)—change the requirements for when FWS regulations can be challenged in federal courts. (Pl.'s Resp. at 27–28). In both *Pakdel* and *Knick*, the Supreme Court reconsidered the scope of its prior decision in *Williamson*, 473 U.S. 172, 105 S. Ct. 3108 (1985). In *Williamson*, property owners challenged the application of a local zoning ordinance and the land-use restrictions it imposed as a temporary taking. 473 U.S. at 175, 105 S. Ct. 3108. The Court in *Williamson* introduced two ripeness requirements for federal courts' review of certain takings claims: first, that the property owner obtains a final decision from the government entity in charge of enforcing the regulation (known as the finality requirement), and second, that the property owner first seeks just compensation under state law in state court before bringing a taking claims in federal courts (known as

the state-litigation requirement). *See Knick*, 139 S. Ct. at 2167–69 (summarizing the holding in *Williamson*).

In 2019, thirty-four years following *Williamson*, the Supreme Court revisited its earlier reasoning in the context of another local land-use ordinance. *Knick*, 139 S. Ct. at 2162. *Knick* found that *Williamson*'s state litigation requirement "imposes an unjustifiable burden on takings plaintiffs," who in many cases had to navigate conflicting jurisdictional rules to ensure their claims could ever be heard in federal courts. *Id*. at 2167–69. Acknowledging the "unanticipated consequences" of *Williamson*'s state-litigation requirement, the Supreme Court overruled that decision in part. *Id*. at 2178–79 ("The state-litigation requirement of *Williamson* is overruled."). The Supreme Court in *Knick* explicitly stated that *Williamson*'s finality requirement was not under review and therefore not disturbed. *See id*. at 2169 ("*Knick* does not question the validity of [*Williamson*'s] finality requirement, which is not at issue here."). Thus, *Knick* does not retroactively affect what this Court held in 2016, nor does it ripen Mr. Doyle's claim.

Two years after *Knick*, in *Pakdel*, the Supreme Court expounded on *Williamson* again, this time addressing the state-forum finality requirement. *Pakdel*, 141 S. Ct. at 2228–29. In *Pakdel*, the City of San Francisco had twice denied the property owners' request to be exempted from a land-use ordinance. *Id*. Yet, the Ninth Circuit found that *Williamson's* finality requirement barred the property owners from suing because the property owners' delays in seeking an exemption from the government entity denied the state agency the "opportunity to exercise its 'flexibility or discretion'" to reach a final decision. *Id*. Although

the Ninth Circuit compared *Williamson's* requirement for exhaustion of state remedies to the administrative exhaustion doctrine, the Supreme Court rejected that analogy. *Id*. at 2231.

The Supreme Court noted that, unlike the administrative-exhaustion doctrine which requires "proper exhaustion," meaning compliance with all agency requirements and "critical procedural rules," *Williamson* only mandates a "relatively modest" finality requirement. *Id*. at 2230 (emphasis added). Under this modest rule of finality, the property owners only need to show that "there is no question about the [the government entity's] position," on how the regulation at issue applies to their property. In other words, *Williamson's* finality requirement is met so long as it is clear to the federal courts that the initial decisionmaker has arrived "at a definitive position" on the issue, even if certain additional levels of administrative review remain unexhausted, and even if certain "administrative missteps" occurred on the way to obtaining that final decision. *Id*. at 2231. Together, *Knick* and *Pakdel* imply that federal courts can review takings claims once it is clear that the government entity has "firmly rejected [the property owners'] request for a property-law exemption." *See id.* at 2226 (finding that *Williamson* did not require the petitioners to show that they had also complied with agency's administrative procedures for seeking relief when they had shown that the City "had firmly rejected their request for property law exemption").

Mr. Doyle is correct that *Knick* states, in part, that "contrary to [*Williamson*], a property owner has a claim for a violation of the Taking Clause as soon as a government takes his property for public use without

paying for it." *Knick*, 139 S. Ct. at 2170 ("[t]he Fifth Amendment right to full compensation arises at the time of the taking …") (citing *Jacobs v. United States*, 290 U.S. 13, 54 S. Ct. 26, 78 L.Ed. 142 (1933)). But the Supreme Court did not offer that statement in a vacuum, and neither will this Court interpret it in a vacuum. Although *Knick* states that property owners may challenge government action as soon as their property has been taken, it does not define the moment of taking as the moment when the property owner subjectively feels affected by a potential taking. Instead, the Supreme Court cited *United States v. Dow*, 357 U.S. 17, 22, 78 S. Ct. 1039, 2 L.Ed.2d 1109 (1958), for the proposition that "the act of taking" remains the "event which gives rise to the claim for compensation." *Knick*, 139 S. Ct. at 2170. *Dow* itself held that the event that constitutes "the act of taking" is either when the government entity has physically entered and taken possession of the property, or when it has filed a declaration of taking for the property in question. *Dow*, 357 U.S. at 23, 78 S. Ct. 1039. In either case, such actions render the property owner's takings claim ripe because they reflect "a definitive position" by the government entity that it will interfere with the property owner's intended use. *Knick* did not disturb the test the federal courts have used for centuries to determine the moment of taking; it merely clarified that after "the act of taking," the property owners are no longer obligated to avail themselves of all "procedures the government puts in place to remedy [that] taking," (by way of providing just compensation) before seeking that remedy directly—and likely more expeditiously—in the federal courts. *Knick*, 139 S. Ct. at 2170.

Mr. Doyle's case is discernibly different from that of the property owners in *Pakdel* and *Knick*. In *Knick*, the city had already issued violation notices against the property owner for violating the local ordinance. *Id*. at 2164–65. Similarly, in *Pakdel*, the City had already twice denied the property owners' request for exemption. *Pakdel*, 141 S. Ct. at 2229. Therefore, in both *Pakdel* and *Knick*, there was no dispute that the government entity in question had reached a definitive position that the property owners were not exempted from the regulation. Conversely, FWS has never issued any decisions on how the existing regulations should apply to Mr. Doyle's specific proposed development. (Pl.'s Resp. at 35). And without the required HCP, as the Court noted in 2016, the FWS will not issue a decision. *See Doyle*, 129 Fed. Cl. at 156–158.

In addition, both *Pakdel* and *Knick* involved analyzing the ripeness requirement for actions brought under 42 U.S.C. § 1983, and the Supreme Court in both cases acknowledged that the ripeness analysis might differ in each case because Congress has the power to subject claims filed under other statutes to stricter finality requirements. *See Pakdel*, 141 S. Ct. at 2231.[4] ("Congress always has the option of imposing a strict administrative exhaustion requirement—just as it has done for certain civil-rights claims filed by prisoners.").[5] Unlike Section

[4] 42 U.S.C. § 1983 allows individuals to sue state government employees and others acting "under the color of state law" in the federal courts for civil rights violations.

[5] The Court has not identified any cases, nor has Mr. Doyle relied on any, where the standard introduced in *Pakdel* has been applied outside the context of Section 1983 actions brought to

1983 which does not anticipate an administrative review process, the ESA includes Congress's clear guidance on how and when FWS reaches a "conclusive position" on how the ESA's restrictions should apply to a particular land. As noted, 50 C.F.R. § 17.32(b)(1)(iii)(c) requires permit applicants to submit an HCP that, among other things, details the sufficient protection and mitigation measures they believe they can take to minimize the impact of their proposed development on protected species. Critically, this process also involves notice and an opportunity for public comment. 6 U.S.C. § 1539(a)(2)(A); see also 16 U.S.C. § 1539(c); 50 C.F.R. Parts 13 and 17. The process anticipated by Congress allows for both FWS and the public to review and balance the competing concerns of critical habitat protection and property development and reach a final determination.

As the Supreme Court noted in *Pakdel*, *Williamson's* finality requirement is "relatively modest," and is aimed at ensuring that property owners are not "prematurely suing over a hypothetical harm." *Pakdel*, 141 S. Ct. at 2230; *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08, 123 S. Ct. 2026, 155 L.Ed.2d 1017 (2003) (finding that ripeness prevents the courts from "entangling themselves in abstract disagreements over administrative policies," and protect the agencies from judicial interference "until an administrative

---

challenge exhaustion of state remedies such as those set up by local zoning ordinances. The absence of caselaw indicating that *Pakdel* supports full circumvention of *federal* administrative remedies required by Congress, such as a permitting process, further cautions against adopting Mr. Doyle's broad reading of *Pakdel*.

decision has been formalized and its effects felt in a concrete way by the challenging parties."). Mr. Doyle's response to the motion to dismiss is rife with contentions that neither FWS nor the public have had the chance to address. For example, Mr. Doyle claims that the tortoise population is "continuing to decline," and that the critical habitat in the area has been "significantly fragmented and reduced," by other construction and a series of wildfires. (*See* Pl.'s Resp. at 20). He asserts that, despite rigorous land-use restrictions, FWS's efforts to enhance the population of the Reserve "have been largely unsuccessful," and he expresses dissatisfaction that the United States has not "identif[ied] where or how Doyle could mitigate for any habitat disturbances that would result from his development …." (*Id*. at 9). Even if true, and these claims may be, 50 C.F.R. § 17.32(b)(1) provides the mechanism for obtaining both parties' positions on these issues and any evidence supporting their position, taking the case out of the realm of abstract disagreements. As the Supreme Court held in *Pakdel* the purpose of the finality requirement is to understand how far the regulation actually goes when the property owners are claiming that it could be going too far; to answer that question the Court must first know that the government entity is "committed to" enforcing the regulation in the manner that is under challenge. *Pakdel*, 141 S. Ct. at 2230. Mr. Doyle's blanket assertion that "there is no genuine question as to whether Doyle will be allowed to develop his land," cannot substitute for the Agency's own explanation. *See Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004) ("Evaluating whether the regulations effect a taking requires knowing to a reasonable degree of

certainty what limitations the agency will, pursuant to regulations, place on the property.").

The Court also rejects Mr. Doyle's argument that "actively participat[ing]" in creating and submitting Washington County's ITP and HCP, in lieu of submitting a personalized permit application, places him in the same legal position as someone who has had his permit application denied. (Pl.'s Resp. at 35). Mr. Doyle provides no legal support for such a conclusion. Indeed, the Court rejected this very argument in 2016, and Mr. Doyle elected not to appeal the Court's conclusion. *Doyle*, 129 Fed. Cl. at 155. The United States, on the other hand, as it did in 2016, correctly argues that the Washington County ITP was signed by representatives of Washington County, the State of Utah, the Town of Ivins, Bureau of Land Management, and FWS. (Def.'s Mot. at 10). Furthermore, the United States notes that the ITP application in this case explicitly states that "[n]o persons who are not parties or participating Cities are intended to be deemed third Party beneficiaries under [the] Agreement," and that the approved ITP "will have no legal effect on [private] property [nor] place [any] restrictions on the use of [private] property within the [r]eserve." (Def.'s Mot. Ex. 3, at 6, 25–26; Ex. 2 at 22).

The requirement for first obtaining a final agency decision does not condemn potential plaintiffs to endure years of inertia and gridlock before obtaining judicial relief; the Circuit has adopted and adhered to the standard that "an extraordinary delay in the permitting process" can always give rise to a compensable taking. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1349 (Fed. Cir. 2002). But in this case, FWS never received a full ITP

application from Mr. Doyle to begin its review process. Rather, Mr. Doyle's direct communications with FWS throughout the prolonged period of his dispute have been focused on negotiating (with limited success) the sale or exchange of his property, a process independent and separate from seeking a regulatory exemption. (See Pl.'s Resp. at 9 (noting that "over the last 25 years, the Bureau of Land Management has purchased much of the land within the tortoise reserve," and that "[o]ver the years, [Mr. Doyle] has engaged in repeated and extended unsuccessful negotiations with the Government in an effort to sell or exchange his remaining property.")); *see also, Doyle*, 129 Fed. Cl. at 157 ("The plaintiffs' decision to voluntarily forbear from seeking to develop their land during the negotiation period," to negotiate a sale "did not give rise to a taking.").

In his response, Mr. Doyle alludes to the book Catch-22 to describe the predicament he finds himself in.[6] (Pl.'s Resp. at 37). Mr. Doyle chides the "absurd bureaucratic constraints" surrounding his lengthy negotiations with the United States to sell his land and describes the alternative route of seeking a permit exemption as laborious and costly. (*Id.*). Indeed, nothing in the Court's opinion suggests that ESA plaintiffs are required to exhaust all just compensation negotiations with the United States before seeking their remedy at the United States Court of Federal Claims. The Court merely reiterates what it has said before: that the plaintiff must first obtain FWS's conclusive and definitive position on the regulation's application to their land before proceeding

[6] Joseph Heller, *Catch-22* 375 (Simon & Schuster 1999) (1961).

in the Court. *Pakdel*, 141 S. Ct. at 2230 ("The rationales for the finality requirement underscore that nothing more than de facto finality is necessary.") (quoting *Horne v. Dep't of Agric.*, 569 U.S. 513, 525, 133 S. Ct. 2053, 186 L.Ed.2d 69 (2013)). In this case, de facto finality entailed submitting an ITP accompanied by an HCP, and not merely "participat[ing] in one HCP process," submitted by another applicant and only binding on that party. In the last 25 years or so in which Mr. Doyle has actively pursued development of his land, he never complied with this—one and only—prerequisite for challenging the United States' position.

Instead of simply resting his claim on a duly filed—and presumably denied—ITP application in his own name, Mr. Doyle again argues that his claim is supported on the back of Washington County's 1992 ITP application, which is supported by Washington County's 1992 HCP, which was supported by Mr. Doyle's input as a member of the steering committee for drafting it, and that input itself was informed by a result "that [is] already known" from the face of the law and its regulations: that Mr. Doyle cannot construct residential housing in the most environmentally sensitive area for tortoise habitat protection. (Pl.'s Resp. at 22 (claiming that "the listing of the tortoise in 1990 immediately" constituted a taking)). In other words, Mr. Doyle's resurrected as-applied challenge is a facial challenge in disguise. *See Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1356 (Fed. Cir. 2002) ("[P]laintiffs pursuing a facial challenge must show that the provision is unconstitutional in all its applications, [while] plaintiffs pursuing an as-applied challenge must show

that the provision was applied to them in such a way that deprived them of their property."). Mr. Doyle requests that the Court takes his word on how the regulations in this case will apply to his specific plan and not to be concerned with the details. This approach effectively invites the Court to peer all the way down to FWS's original determination in 1994 and to examine the legality of the Agency's original decision to protect the tortoise population at all, but the Court cannot endorse Mr. Doyle's "turtles all the way down" theory of the case.[7]

III. Conclusion

For the stated reasons, the Court **GRANTS** the United States' Motion to Dismiss, (ECF No. 8), and dismisses this case under RCFC 12(b)(1). Plaintiff's motion for a status conference, (ECF No. 16), is **DENIED AS MOOT**. The Clerk is **DIRECTED** to enter judgment accordingly.

IT IS SO ORDERED.

/s/ Judge Tapp

[7] The old tale involves an Eastern guru who proclaimed that the earth is supported on the back of a tiger. When the Guru's inquisitive pupils asked what then supported the tiger, the guru said it stands on an elephant; and when asked what supported the elephant, he said it is a giant turtle. When asked, finally, what supported the giant turtle, briefly taken aback, the guru responded 'Ah, … after that it is turtles all the way down." *See e.g.,* Geertz, Thick Description: Toward an Interpretive Theory of Culture, in The Interpretation of Cultures 28-29 (1973).

Appendix C

RELEVANT STATUTORY PROVISIONS

16 U.S.C. §1531(b). Congressional findings and declaration of purposes and policy

* * *

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

* * *

16 U.S.C. §1532(5)(A), (19). Definitions

* * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

> **(i)** the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> **(ii)** specific areas outside the geographical area occupied by the species at the time it is

listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

* * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

* * *

16 U.S.C. §1533(a)(3)(A), (c). Determination of endangered species and threatened species

(a) Generally

* * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * *

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species.

Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

* * *

16 U.S.C. §1538(a)(1). Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * *

16 U.S.C. §1539(a)-(b)(1), (d). Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

* * *

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions

(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 1538(a) of this title to the extent the Secretary deems appropriate if such

person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of section 668cc–3[1] of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

* * *

(d) Permit and exemption policy

The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 1531 of this title.

* * *

[1] Repealed by Pub.L. 93-205, § 14, Dec. 28, 1973, 87 Stat. 903.

16 U.S.C. §1540(b). Penalties and enforcement

* * *

(b) Criminal violations

(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both.

* * *

Appendix D

RELEVANT REGULATORY PROVISIONS

50 C.F.R. § 17.3

§ 17.3 Definitions.

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

* * *

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

* * *

Covered activity means an action or series of actions that causes take of a covered species and for which take is authorized by a permit under § 17.22(b) and (c) or § 17.32(b) and (c), as applicable.

Covered species means any species that are included in a conservation plan or agreement and for which take is authorized through an incidental take or enhancement of survival permit.

(1) Covered species include species listed as endangered or threatened.

(2) Covered species may include species that are proposed or candidates for listing, at-risk species, or species that have other Federal protective status. An at-risk species is a non-listed species the status of which is declining and that is at risk of becoming a candidate for listing under the Act; at-risk species may

include, but are not limited to, State-listed species, species identified by States as species of greatest conservation need, or species with State heritage ranks of G1 or G2.

(3) An incidental take or enhancement of survival permit need not include a listed species.

* * *

Endangered means a species of wildlife listed in § 17.11 or a species of plant listed in § 17.12 and designated as endangered.

Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,

(2) Breeding procedures, or

(3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife

by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Incidental taking means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

* * *

Threatened means a species of wildlife listed in § 17.11 or plant listed in § 17.12 and designated as threatened.

* * *

50 C.F.R. § 17.32

§ 17.32(b)(1)-(2) Permits for threatened species.

* * *

(b)(1) *Application requirements for an incidental take permit*. A person seeking authorization for incidental take that would otherwise be prohibited by § 17.31 or §§ 17.40 through 17.48 submits Form 3–200–56, a processing fee (if applicable), and a conservation plan. The Service will process the application when the Director determines the application is complete. A conservation plan must include the following:

(i) Project description. A complete description of the project, including purpose, location, timing, and proposed covered activities.

(ii) Covered species. As defined in § 17.3, common and scientific names of species sought to be covered by the permit, as well as the number, age, and sex, if known.

(iii) Goals and objectives. The measurable biological goals and objectives of the conservation plan.

(iv) Anticipated take. Expected timing, geographic distribution, type and amount of take, and the likely impact of take on the species.

(v) Conservation program: That explains the:

(A) Conservation measures that will be taken to minimize and mitigate the impacts of the incidental take for all covered species commensurate with the taking;

(B) Roles and responsibilities of all entities involved in implementation of the conservation plan;

(C) Changed circumstances and the planned responses in an adaptive management plan; and

(D) Procedures for dealing with unforeseen circumstances.

(vi) Conservation timing. The timing of mitigation relative to the incidental take of covered species.

(vii) Permit duration. The rationale for the requested permit duration.

(viii) Monitoring. Monitoring of the effectiveness of the mitigation and minimization measures, progress towards achieving the biological goals and objectives, and permit compliance. The scope of the monitoring program should be commensurate with the scope and duration of the conservation program and the project impacts.

(ix) Funding needs and sources. An accounting of the costs for properly implementing the conservation plan and the sources and methods of funding.

(x) Alternative actions. The alternative actions to the taking the applicant considered and the reasons why such alternatives are not being used.

(xi) Additional actions. Other measures that the Director requires as necessary or appropriate, including those necessary or appropriate to meet the issuance criteria or other statutory responsibilities of the Service.

(2) Issuance criteria. Upon receiving an application completed in accordance with paragraph (b)(1) of this section, the Director will decide whether a permit should be issued. The Director will consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4). In making a decision, the Director will consider the anticipated duration and geographic scope of the applicant's planned activities, including the amount of covered species' habitat that is involved and the degree to which covered species and their habitats are affected. The Director will issue the permit if the Director finds:

(i) The taking will be incidental to, and not the purpose of, carrying out an otherwise lawful activity.

(ii) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.

(iii) The applicant will ensure that adequate funding for the conservation plan implementation will be provided.

(iv) The applicant has provided procedures to deal with unforeseen circumstances.

(v) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

(vi) The measures and conditions, if any, required under paragraph (b)(1)(xi) of this section will be met.

(vii) The applicant has provided any other assurances the Director requires to ensure that the conservation plan will be implemented.

* * *

50 C.F.R. § 402.01

§ 402.01 Scope.

(a) This part interprets and implements sections 7(a)–(d) [16 U.S.C. 1536(a)–(d)] of the Endangered Species Act of 1973, as amended ("Act"). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants ("listed species") and habitat of such species that has been designated as critical ("critical habitat"). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts

17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in

the destruction or adverse modification of critical habitat. Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR Part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

Appendix E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JAMES DOYLE, an individual, d/b/a Rocky Mountain Ventures, and Environmental Land Technologies, Ltd., a Utah limited partnership, Plaintiffs, v. UNITED STATES, Defendant.	Case No. 22-499 L Hon. _____

COMPLAINT FOR FIFTH AMENDMENT JUST COMPENSATION

In the early 1980s, Plaintiff, James Doyle, assembled 2,440 acres of prime development property in the rapidly growing St. George area of Washington County, Utah, together with preferential rights to acquire an additional 11,000 acres from the State of Utah. Doyle's designed envisioned a master-planned community of luxury homes anchored by nine golf courses, which the City of St. George had approved for annexation.

But, in 1990, the United States Fish and Wildlife Service suddenly decided to list the Mojave Desert tortoise as threatened under the federal Endangered Species Act—and designated all of Doyle's land as critical habitat for that species. Then, in 1996, Congress designated all of Doyle's land as part of the Red Cliffs Desert Reserve, an area of approximately 62,000 acres set aside to protect the tortoise and other species where no development is allowed. As a result of the Government's actions, Doyle's land lost all economically beneficial use and became an area set aside for the public purpose of species preservation.

Although the Government on numerous occasions promised to acquire and pay for Doyle's land, either in cash or a federal land exchange, it failed to do so (except for a few hundred acres). Doyle, unable to keep up payments on mortgages and carrying costs for the land he could not use, ultimately lost most of his property in a 2010 bankruptcy filing, and the rest in a 2020 bankruptcy filing. Today, Doyle owns only 115.72 acres of his original holdings, and that land continues to be designated as critical habitat for the desert tortoise—it cannot be developed or beneficially used for any other purpose.

In 2015, Doyle brought a Tucker Act suit in this Court to recover just compensation for the taking of his property, but the Court dismissed his claim for lack of ripeness because he had not sought a permit to exempt him from the Government's prohibitions on use of his land.[1] Doyle has since ripened his claim and, more importantly, the United States Supreme Court has ruled that the owner need not exhaust

[1] *Doyle v. United States*, 129 Fed. Cl. 147, 156-58 (2016).

administrative remedies before bringing a Fifth Amendment just compensation claim.[2]

By this suit Doyle now seeks to recover long-delayed Fifth Amendment just compensation for the Government's taking of his property to provide critical habitat for the Mojave Desert tortoise under authority of the federal Endangered Species Act.

PARTIES

1. Plaintiff James A. Doyle is a real estate developer who, through his wholly owned limited partnership, Plaintiff Environmental Land Technologies, Ltd. Doing business as Rocky Mountain Ventures, originally owned 2,440 acres and held preferential rights to an additional 11,000 acres of highly valuable development land in the rapidly growing St. George, Utah area. Today, Doyle owns only 115.72 acres of his original holdings, having lost the majority of his land in bankruptcy as a result of the Government's actions as described in this Complaint.

2. Plaintiff Environmental Land Technologies, Ltd., a Utah limited partnership, was registered with the Utah Department of Commerce as a Utah limited partnership on September 19, 1995. Environmental Land Technologies, Ltd. is the successor-in-interest to Rocky Mountain Ventures, which was a general partnership under Utah law. Both Environmental Land Technologies, Ltd. And Rocky Mountain Ventures are entities wholly owned by Plaintiff, James Doyle, and were the owners of record of the Doyle

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[2] *See Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019).

lands. Plaintiff, Doyle, often acted through one of these wholly owned entities, and their actions were the actions of Doyle. Doyle was the General Partner of Environmental Land Technologies, Ltd.

3. Defendant, the United States of America, is a republic formed under the Constitution of the United States, acting through the Department of the Interior, including the Bureau of Land Management, the Fish and Wildlife Service, and other federal agencies, departments, bureaus, and offices, and is subject to the constraints of the Constitution, including the Fifth Amendment, which provides that private property shall not be taken for public use, without just compensation.

JURISDICTION

4. This Court has jurisdiction over this case under the Tucker Act as a "claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of any executive department or upon any express or implied contract with the United States."[3]

[3] 28 U.S.C. § 1491.

STATEMENT OF FACTS

1981-1990: Doyle acquires land for a massive luxury home development in Utah

5. In 1981, Doyle began his lease/purchase acquisition of 2,440 acres of School Trust Lands north of St. George, Utah for a massive real estate development in the rapidly growing St. George area of Utah. The centerpiece of the development was nine golf courses surrounded by luxury homes. By 1985, Doyle had acquired title to 2,440 acres and held preferential rights to acquire an additional 11,000 acres for this development from the State of Utah.

6. On April 28, 1982, Doyle, doing business as Rocky Mountain Ventures, submitted his Master Concept Plan for his development to the Utah State Land Board.

7. At the March 9, 1983, meeting of the Board of State Land & Forestry, the State of Utah approved the Master Concept Plan for the project. The minutes show considerable activity on the part of both the State and the Washington County Commission. The Board met again in May of 1983, reviewed the development progress and later that year approved the entire 2240 acres for a pre-development lease.

8. By the mid-1980s, Doyle was already several years into the development of the land. Actions underway or completed by that time included engineering studies, proposal for transportation corridors, multiple golf course layouts, bubble diagrams for the various development units and a major transportation artery, onsite surveying and staking the roadways, golf courses, and developments,

utility layouts for water, sewer and power, negotiations of extensive rights of way, etc. This also involved significant work installing water wells – water storage tanks and primary water lines throughout the entire 11,000 acres in cooperation with the City of St. George.

9. From 1985 through 1989, Doyle spent considerable time, effort, and money converting the development lease into a fee title and obtaining additional water rights for the property. Doyle also applied for an additional 9,560 acres of State lands which application was being considered as part of the master plan development project. By the end of 1989, Doyle had lined up financial partners and was anticipating a ground- breaking for the initial phase of the project in the summer of 1990, all of which land was totally master planned and all utilities provided as in the original 2,440 acres. Indeed, one of the golf courses, Green Springs, had already been completed in cooperation with the city and a golf course agreement to start the second course was in place. There was a large dam completed which was to provide not only a water storage facility for the city, but also serve as lakes and reservoirs for the project. Doyle had also constructed infrastructure to provide water, power, and sewer service to the homes he planned to build.

10. On April 2, 1989, Doyle consolidated his holdings into a single entity known as James Doyle, dba Rocky Mountain Ventures.

11. Doyle spent over a decade and many millions of dollars in preparing the land for this development and obtaining the requisite governmental approvals and permissions. By 1989, Doyle had obtained all the

necessary permits and other authorizations from state and local governments and as discussed above, was prepared to break ground for the initial phase of home construction in the summer of 1990.

1990: The Government lists the desert tortoise as threatened and designates Doyle's land as critical habitat for the species

12. On April 2, 1990, the Service published a final rule listing the Mojave population of the desert tortoise as threatened under the Endangered Species Act. On February 8, 1994, the Service published a final rule designating 6.4 million acres, including all of Doyle's land, as critical habitat for the Mojave population of the desert tortoise.[4] These actions of the Government brought Doyle's development, and the development plans for most of Washington County, to an abrupt end because disturbance of habitat of a listed species is prohibited by the Endangered Species Act, on penalty of civil and criminal liability.[5]

13. In a vain attempt to salvage his development, Doyle spearheaded an effort together with local governments and other landowners to prepare and submit a Habitat Conservation Plan to the Fish and Wildlife Service, requesting an Incidental Take Permit that would allow development of some of Doyle's (and other owners') land while protecting the listed tortoise. But, in 1994, the Service rejected this permit application, thus leaving in place the Endangered

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[4] *Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mojave Population of the Desert Tortoise*, 59 Fed. Reg. 5,820 (Feb. 8, 1994).

[5] 16 U.S.C. § 1538.

Species Act's prohibitions on the use of Doyle's land and most other development that had been planned for Washington County.

1996: The Government adopts a Habitat Conservation Plan that allows no development on Doyle's land

14. To satisfy the Service's requirements, local governments, and landowners, including Doyle, went back to the drawing board and developed an entirely new Habitat Conservation Plan covering all of Washington County. This Plan created a 61,022-acre Mojave Desert tortoise reserve of highest-value tortoise habitat where no development would be allowed, while allowing development outside the reserve on land of lesser habitat value to the tortoise. The Service approved this Plan and on February 23, 1996, issued the Incidental Take Permit to Washington County and other local governments.[6]

15. The Habitat Conservation Plan adopted by the Government was founded on a large-scale land exchange that Doyle and other owners of private land had agreed upon with the Government. Called the "Superexchange" by the participants, the Plan called for the Government to exchange a large block of valuable but excess property the Government owned near Las Vegas, Nevada, for the privately owned lands within the boundaries of the tortoise reserve created by the Habitat Conservation Plan. However, after adopting the Habitat Conservation Plan, the Government failed to enact the legislation necessary

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[6] *Issuance of Permit for Incidental Take of Threatened Species*, 61 Fed. Reg. 26,529 (May 28, 1996).

to complete the Superexchange—leaving Doyle and other landowners without compensation for the lands the Government had taken over for tortoise preservation.

16. Until the Habitat Conservation Plan went into effect in 1996, it was not known which lands would be set aside, so Doyle continued with those development activities that did not require further physical alteration of the land. Based on discussions with Washington County and federal officials, Doyle believed the Habitat Conservation Plan would not include Doyle land. However, when the Habitat Conservation Plan was formally set in place, Doyle development land and other properties around this project were included in the Habitat Conservation Plan. Doyle then entered into a purchase agreement to acquire a project known as Paradise Canyon including a 36-hole Arnold Palmer project of 2,000 plus acres.

17. The Fish and Wildlife Service then decided they needed a large portion of the Paradise Canyon project to approve the Habitat Conservation Plan, which effectively killed the Paradise Canyon project and decimated Environmental Land Technologies, Ltd.'s remaining development business. All the foregoing land was chosen primarily because of the high concentration of tortoises and the fact that this population appeared to be the only population of tortoises without an upper respiratory disease that afflicted all the other Mojave tortoise populations.

1996: the Government takes physical control of Doyle's land

18. Shortly after approving the Red Cliffs Desert Reserve Habitat Conservation Plan, in 1996, the Government took physical control of Doyle's land. The Government constructed a fence that blocked access to the tortoise reserve, including Doyle's property. Since 1996, the United States has used and managed Doyle's property as its own to provide habitat for the Mohave desert tortoise, excluding Doyle from all economically beneficial use of his land. But, with minor exceptions, the Government has never paid Doyle for the land it took from him for the public purpose of tortoise preservation.

1996: The Government promises to purchase Doyle's and other private lands

19. A critical element of the Habitat Conservation Plan adopted by the Government was its promise to acquire and pay for Doyle's and other private lands within the reserve area that could not be developed. As the Bureau of Land Management stated: "[W]ith issuance by [the Service] of a Section 10 permit to Washington County and the adoption of the Habitat Conservation Plan and Implementation Agreement in February of 1996, [the Bureau] assumed an obligation to acquire from willing sellers upwards of 12,600 acres of non-federal land,"[7] including Doyle's land. Had the Government not made this promise, Doyle would have opposed the Habitat Conservation Plan and objected

[7] Ex. 1, Bureau of Land Management Acquisition Program for the Washington County Red Cliffs Reserve at 1.

to inclusion of his property within the undevelopable tortoise reserve.

20. In addition, the Government entered into an agreement on February 23, 1996, with the State of Utah, Washington County, and the City of Ivins to implement the terms of the Plan, including the requirement that the Bureau would exchange or otherwise acquire private lands within the Reserve, which included Doyle's land. The Implementation Agreement states:

> Both [the Bureau] and [the Service] will, to the maximum extent practicable, allocate sufficient staff and financial resources as may be necessary to accomplish these goals as required herein. [The Service] shall include in annual budget requests sufficient funds to fulfill its obligations under this Agreement and the [Habitat Conservation Plan]. [The Bureau] shall likewise include in annual budget requests sufficient funds to fulfill its obligations under this Agreement and the [Habitat Conservation Plan].[8]

21. The Government reaffirmed its commitment to purchase tortoise reserve lands, including Doyle's 2,440 acres, in a May 10, 2001, Senate committee hearing where Robert Anderson, the Deputy Assistant Director of the Bureau of Land Management, testified:

> Specifically at issue is the area known as the Red Cliffs Desert Reserve which provides critical habitat for the threatened desert tortoise. The Bureau of Land Management

[8] Ex. 2, Implementation Agreement at 12 (Feb. 23, 1996).

> (BLM) supports the important goal and desire to consummate the final, critical acquisitions in this unique and special place. . . .
>
> In closing, Mr. Chairman, the acquisition of these lands within the Reserve is a high priority for the BLM and the Fish and Wildlife Service because there is no question this area is critical to the protection and recovery of the Desert Tortoise. The [Habitat Conservation Plan] has provided a mechanism to protect listed species and allow for continued economic opportunities in Washington County, Utah. Completion of the land acquisition goals within the Reserve is supported by State and local officials, the Utah Congressional delegation and the Administration. We fully support the concept of transferring title to the land inside the reserve to the BLM in a manner that compensates the landowner in accordance with existing Federal law.[9]

22. From 1996 to the present, Doyle has worked tirelessly to try to obtain compensation for his land. Despite the Government's promises to compensate landowners like Doyle for land included in the tortoise reserve, the Government has in fact paid Doyle for only a small fraction of the land it took for the tortoise reserve in 1996 that is has been using ever since.

23. As an alternative to financial compensation, Doyle has been willing to accept title to unneeded Government land in exchange for the land the

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[9] S. Hrg. 107-67 at 3 (May 10, 2001).

Government took from him in 1996 for the tortoise reserve. Doyle has searched for and identified excess Government lands that would be appropriate for a land exchange, paid for surveys and appraisals of those lands, and prepared proposals to the Government for numerous possible land exchanges that would partially compensate him for the land the Government has taken. Although the Government has agreed to a few small land exchanges with Doyle, they compensate for only a small portion of the land the Government took from Doyle for the tortoise reserve in 1996 and has used as its own ever since.

24. Although the Government has used Doyle's land as its own since 1996, Doyle has retained title to that land so he can sell it to the Government or exchange it for other Government lands. But to retain title Doyle has been required to pay millions of dollars for mortgages, property taxes and other carrying costs since 1996. Doyle has used the compensation he received from the Government for the minor sales and exchanges since 1996 to pay these carrying costs so Doyle would not lose title to the rest of his land—and the chance to receive compensation for it.

2004: Doyle is forced into bankruptcy

25. Deprived of his land without receiving compensation for it, while continuing to pay millions of dollars in carrying costs, Doyle eventually exhausted all of his resources and was forced to put Environmental Land Technologies, Ltd., which held the land title, into bankruptcy on March 30, 2004. In 2010, to satisfy his creditors, the bankruptcy court required Environmental Land Technologies, Ltd., through Doyle, to transfer to his creditors all but 266

acres of his land. Doyle has never received any compensation for this land.

2016: Doyle's just compensation action is dismissed without prejudice for lack of ripeness

26. Having received no compensation for the lands he lost in bankruptcy, nor for the lands within the tortoise reserve to which he still held title, on June 5, 2015, Doyle filed suit in this Court seeking just compensation for the taking of his property.[10] On August 18, 2015, the Government moved to dismiss Doyle's suit on two jurisdictional grounds: the running of the statute of limitations and lack of ripeness.[11]

27. On November 30, 2016, the Court granted the Government's motion to dismiss, ruling that the statute of limitations had not run, but that the case was not ripe for adjudication under the rule set forth by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*.[12]

2019-2021: The Supreme Court overrules the case on which this Court relied on

28. However, in two recent cases the Supreme Court has overruled the Williamson County exhaustion of administrative remedies requirement on which this Court relied in dismissing Doyle's prior suit,

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[10] *Doyle v. United States*, Case No. 15-572 (Aug. 18, 2015), ECF No. 8.

[11] Mot. to Dismiss, *Doyle v. United States*, Case No. 15-572 (Aug. 18, 2015), ECF No. 8.

[12] *Doyle v. United States*, 129 Fed. Cl. 147, 156-58 (2016) (citing *Williamson Cty. Reg'l Plann. Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)).

holding that exhaustion of administrative remedies is not required to ripen a Fifth Amendment just compensation case.[13] Accordingly, Doyle's just compensation case is now ripe for adjudication by this Court.

29. Moreover, Doyle has exhausted his administrative remedies by making application to the Service for an individual Incidental Take Permit, which the agency has denied by failure to take action. On May 18, 2020, Doyle's counsel sent the attached letter requesting that the Government take action to approve or deny Doyle's application, But the Government never responded to either the letter or Doyle's application.[14]

2020: Doyle is again forced into bankruptcy

30. Deprived of his land without receiving compensation for it, thwarted in his suit filed in this court for just compensation, unable to obtain a permit from the U.S. Fish and Wildlife Service or Bureau of Land Management, and while continuing to pay millions of dollars in carrying costs, Doyle was forced to file a second, personal bankruptcy on August 19, 2020, case number 20-25049 in the United States Bankruptcy Court for the District of Utah. In his personal bankruptcy case, Doyle was forced to sell all but the remaining 115.72 acres of land in the Red Cliffs Desert Reserve to which he still held title to satisfy creditor claims. On March 31, 2022, with his

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[13] *Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019).

[14] *See* Ex. 3, Letter to R. Wallace (May 18, 2020).

personal creditors paid in full, Doyle's personal bankruptcy was terminated and dismissed.

2020-Present: The Government renews the Habitat Conservation Plan, again prohibiting development of Doyle's land

31. On January 13, 2021, the Government reaffirmed its prohibitions on all economically beneficial use of Doyle's land when the Service issued a new Incidental Take Permit to Washington County and entered an "amended and restated" Habitat Conservation Plan with the original parties. Under both the newly issued Incidental Take Permit and Habitat Conservation Plan, the Service required that Doyle's property remain within the Red Cliffs Desert Reserve where development is prohibited under the Plan.

32. Since the establishment of the tortoise reserve (now the federal Red Cliffs Desert Reserve) in 1995, the Government has repeatedly confirmed that it will not allow development within the reserve area. The Service candidly acknowledged that lands within the Reserve were critical to the recovery of the desert tortoise when the Reserve was created in 1995 and since its creation the Reserve has been subjected to severe pressures including fragmentation, drought, disease, and fire. In 2014, the Service also denied a landowner's request that his property be removed from the restrictions in the Reserve, explaining that the Service believes that acquisition of inholdings within the Reserve is necessary for the Reserve's long-term success.[15]

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[15] Ex. 4, Email from L. Crist to B. Brennan (Apr. 8, 2014).

33. Today, the decline in tortoise population has made preservation of the tortoise reserve in its natural state even more critical. Both the population of the desert tortoise and its habitat have declined since the Habitat Conservation Plan was approved by the Service in 1995.

34. The desert tortoise population in the Reserve has consistently been considered lower than at establishment and is now approximately 44 percent lower than the minimum abundance target set by the Service recovery office in 1994.[16] The desert tortoise population in Zone 3 of the reserve, where Doyle's land is located, had declined by 63% between 1998 and 2019.[17]

CAUSE OF ACTION

(Just compensation for property rights in land taken)

35. Doyle realleges and incorporates by this reference all of the proceeding allegations of this Complaint and further alleges:

36. The Fifth Amendment to the Constitution prohibits the United States from taking private

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[16] *Findings And Recommendations For The Issuance Of An Endangered Species Act Section 10(A)(1)(B) Incidental Take Permit For The Washington County Habitat Conservation Plan* at 37 (Jan. 13, 2021), available at https://fws.gov/media/findings-recommendations-incidental-take-permit-washington-county-utah-2021pdf.

[17] *Protest of the Northern Corridor Final Environmental Impact Statement and Proposed Resource Management Plan Amendments Submitted to the BLM and USFWS by the Red Cliffs Conservation Coalition* at 15 (Dec. 14, 2020), available at https://conserveswu.org/wp-content/uploads/2020/12/ PROTEST.pdf.

property for public use without payment of just compensation: "[N]or shall private property be taken for public use, without just compensation."

37. The direct, natural, and foreseeable result of the Government's actions has been to deprive Doyle's land of all economic and productive use for the public purpose of species protection, constituting a taking for which Doyle is entitled to just compensation.

38. To date, Defendant, the United States, has not provided Doyle just compensation for the land it has taken from him as required by the Fifth Amendment.

39. Doyle has applied for and been denied an incidental take permit to develop his property and has cooperated with and assisted the Service and the Bureau of Land Management in their efforts to either exchange federal land for his property or to purchase it outright, all to no avail. Doyle has thus concluded that further efforts to work with these agencies to obtain any use of his land, any exchange land, or any payment for his land would be futile.

40. As a direct, natural, and foreseeable result of the acts of Defendant, Doyle has been damaged in an amount equal to the just compensation due him under the Fifth Amendment, including interest thereon at a rate to be established by this Court.

41. As a further direct, natural, and foreseeable result of the taking of his property without just compensation, Doyle has been required to and has retained services of counsel to prosecute this action. Doyle has and will incur attorneys' fees, appraiser and expert witness fees, and costs and expenses of litigation in an amount yet unascertained.

PRAYER FOR RELIEF

Plaintiffs, James Doyle and Environmental Land Technologies, Ltd., pray for relief as follows:

1. A money judgment equal to the value of the land for which Doyle is owed just compensation, yet unascertained and to be determined according to proof at trial, as set forth in the cause of action;

2. Interest from the date of taking, as a component of just compensation, in an amount and at a rate to be proved at trial;

3. Reasonable attorneys' fees for bringing and prosecuting this action;

4. The expense of appraisers and other experts reasonably required to prosecute this action, together with the costs of this suit; and,

5. Any other or further relief as the Court may deem just.

Respectfully submitted,

s/ Roger J. Marzulla

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May 5, 2022

Appendix F

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JAMES DOYLE, et al., Plaintiffs, v. UNITED STATES, Defendant.	Case No. 1:22-cv-00499-NBF Hon. David Tapp

DECLARATION OF JAMES DOYLE

I, James Doyle, under 28 U.S.C. § 1746, hereby declare:

1. I am a real estate developer. Over my long and relatively successful career, I have developed projects throughout the United States and in several foreign countries. In the early 1980s, I began acquiring land and development rights in the area just north of rapidly growing St. George, Utah. The development was to have nine golf courses, surrounded by luxury homes and shopping.

2. Through my limited partnership, Rocky Mountain Ventures and Environmental Land Technologies, Ltd., I acquired 2,440 acres and preferential rights to an additional 11,000 acres of highly valuable development land.

3. In 1990, the United States Fish and Wildlife Service listed the Mojave population of the desert tortoise as threatened under the Endangered Species Act, and in response, I joined other affected landowners to obtain an incidental take permit under

Section 10 which we understood would allow us to continue developing our land.

4. On December 19, 1992, we submitted a Habitat Conservation Plan to the Fish and Wildlife Service that would have established a 27,000-acre reserve to protect the tortoise habitat but would have allowed development on my land. The Fish and Wildlife Service rejected that plan in 1994, requiring that the reserve be made larger, and insisted that my land and other private land be entirely off limits to development. Out of fear that substantially all development in the county (approximately 300,000 acres) would be brought to a halt, a Habitat Conservation Plan was prepared in 1995 by Washington County, Utah, comprised of approximately 62,000 acres (20 miles long and 6 miles deep) which, among other things, fenced in my land and prohibited me from any benefits of private ownership, development, or use.

5. Between 1997 and 2006, BLM managed to purchase or exchange about a third of the 2,440 acres I owned within the Reserve. Each of these exchanges was very costly, time-consuming, and complex. Many started and were never finished. The complexity, lack of cooperation, and consideration among government agencies made it almost impossible to get an exchange accomplished.

6. In the early 2000s, the matter of BLM exchanges was made controversial as certain public interest groups supporting improving the disposition of Utah School Trust lands, which, other than the BLM, was the largest landowner in the HCP, vigorously criticized BLM's land exchange process.

Even though my private lands were separate from the School Trust lands, the result was that the BLM land exchange program for private landowners like me was for all practical purposes shut down.

7. Nevertheless, by then the objectives of each of the government agencies involved had been met: The Fish &Wildlife Service had the desert tortoise under protection, Washington County had its HCP, which they branded "The Red Desert Reserve," in place and the land so set aside as tortoise habitat; lands within the School Trust lands renamed "State Institutional Trust Lands Authority" were eventually substantially exchanged pursuant to several acts of Congress consolidating School Trust land in exchanges with the Bureau of Land Management. So, the BLM obtained a significant holding with the HCP would be managed on its behalf by the HCP. But my objective, to get paid for my loss of land, which had been promised, and the loss of my business opportunity to develop it, was largely forgotten. There was no reasonable route to get my lands within the HCP acquired. The circumstances became so complicated that Washington County officials informed me that I would not receive any more offers on my land.

8. Out of desperation and a need to recoup the money I had invested into the land prior to the HCP, I made several efforts in the early 2000s to get a federal legislation remedy, none of which passed.

9. Throughout the 1990s and early 2000s, I was unable to develop or sell my land commercially. The government purchased some acreage for the Reserve, but most of the money I received from the few successful land sales/BLM exchanges went to paying

back loans that I had taken to develop the property, and later loans I was having to arrange with private persons to refinance the prior loans so I might just hold onto my land and try to pursue the land exchange process with the government. Eventually, with little income and a significant amount of debt, I ran out of funds. In 2010, I filed for bankruptcy to satisfy my creditors and was forced to transfer most of my land to my creditors, who had loaned money to me and held mortgages that were in foreclosure.

10. Ironically, after I was forced in bankruptcy to convey most of my land to my creditors, the Government went ahead and purchased the land I had transferred to them—so they got the value of that land, and I got nothing. Adding insult to injury, while the government was purchasing my former land from my former creditors, it did not purchase any land I still owned until many years afterward.

11. The HCP plan divides the lands inside the HCP into several zones. All of my remaining land is in Zone 3 of the Reserve, which according to the HCP excludes any residential development activity and cannot be developed. In fact, my land is enclosed by tortoise fencing installed by the government. A picture that I took of this tortoise fencing is included in this declaration.

The gate to my property is controlled by the government. I do not have a key to the lock that controls access to my own property.

13. I have pursued every reasonable regulatory and administrative process and have sought legislative remedies as well but have been largely rebuffed as it is clear that the government has long since reached a conclusive position that I am not to be even reasonably compensated for my loss.

I declare the foregoing to be true and correct under penalty of perjury.

/s/ James Doyle

James Doyle

Date Signed: November 3, 2022

Appendix G

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JAMES DOYLE, et al., Plaintiffs, v. UNITED STATES, Defendant.	Case No. 1:22-cv-00499-NBF Hon. David Tapp

DECLARATION OF TIMOTHY BURTON ANDERSON

I, Timothy Burton Anderson, under 28 U.S.C. § 1746, hereby declare:

1. I am the Managing Shareholder of the Southern Utah Branch Office at Kirton McConkie, Utah's largest law firm, headquartered in Salt Lake City, Utah. I have resided in St. George, Utah for my entire career of over 44 years. In addition to my area of focus in international commercial law, both as a practicing lawyer and an active member of the community, I am regularly involved in matters that arise from and affect the economy and environment of southern and rural Utah.

2. I represent Plaintiffs, James Doyle, an individual doing business as Rocky Mountain Ventures and Environmental Land Technologies, Ltd. (collectively "Doyle") in land sales and other matters and have done so since 1997. As such, I am quite aware of many of the facts and circumstances related to the

history of his land development activities and related challenges in Southern Utah.

3. Prior to 1990, Doyle acquired approximately 2,440 acres of private land for development and was in the advanced stages for negotiation of preferential rights to an additional 11,000 acres of highly valuable Utah State School trust lands. Doyle precured water rights, developed proposals for transportation corridors, planned golf courses and was planning to break ground on a highly anticipated community-changing development that had already largely secured the necessary zoning adjustments and permissions and annexation commitments.

4. As he was effectively moving forward to commence development, on February 8, 1994, all of Doyle's land was designated as a "critical habitat" for the Mojave Desert Tortoise.[1] This was a considerable shock to landowners within the critical habitat areas. Doyle originally worked with other landowners and county, state, and federal officials to cooperate with a federal government-imposed county-wide Habitat Conservative Plan ("HCP") that would have allowed him and other affected private landowners to develop a portion of their land. But the U.S. Fish and Wildlife Service (FWS) rejected that proposal because insufficient land was set aside to protect the tortoise.[2] Later, the federal government via the US Fish & Wildlife Service ("FWS") imposed an HCP prepared by Washington County that set aside 350,000 acres of

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[1] *Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mojave Population of the Desert Tortoise*, 59 Fed. Reg. 5,820 (Feb. 8, 1994).

[2] *Id.*

tortoise habitat, including a 61,022-acre area as Mojave Desert Habitat Reserve, also known as the Red Cliff Desert Reserve.[3] I use the term "imposed" because absent the county's creation of an HCP, much of the development in the greater county (beyond the boundaries of the HCP) would have been prohibited. On February 23, 1996, the U.S. Fish and Wildlife Service (FWS) issued an Incidental Take Permit (ITP) based on the HCP submitted by Washington County.[4] This allowed development in the greater county, but not within HCP, absent a subsequent Section l0(a) permit.

5. While seemingly simple on the surface, the actual process of obtaining a Section 10(a) permit is complex, costly, and lengthy. I am not aware of any landowner in the area over the years has even attempted such a permit.

6. Funding is a major issue for every HCP. Section 10(a) requires a demonstration that "adequate funding for the plan will be provided." For instance, a landowner in San Bruno Mountain, California, had to contribute over $1 million merely for the biological studies about butterflies and other grassland species on the mountain for its Section 10(a) permit. Additionally, a recent article in the Journal of the Society for Conservation Biology found that the median cost for the implementation stage of an HCP

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[3] *Issuance of Permit for Incidental Take of Threatened Species*, 61 Fed. Reg. 26,529 (May 28, 1996).

[4] *Id.*

was $71,018,570 for large-scale HCPs and $908,507 for project-scale HCPs.[5]

7. Doyle's land is within this Red Cliffs National Conservation Area, and because of its importance to the tortoise, Congress authorized the Secretary of Interior to purchase "private land (such as Doyle's) within the area."

8. Throughout the years, Doyle has engaged in repeated and largely unsuccessful negotiations with the Government in an effort to sell or exchange his remaining property. There were a few small BLM exchanges in the 1999-2004 era. But nothing done to address any significant portions of his holdings. He even attempted the enactment of a legislative exchange through Congress which, resulted in considerable expense but no exchange.

9. In the mid-2000s, controversies arose in Utah over the operations of School Trust lands, which included the largest portion of non-BLM land within the HCP area in Washington County, and the use of land exchanges with the BLM. Mr. Doyle's private land exchanges, although having no direct relevance to the School Trust land exchanges, were nevertheless caught up in the controversy which largely resulted in the shuddering of the BLM land exchange process thus resulting in further denial of a reasonable process to recover any of his lands for sale or resale.

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[5] Surrey et al., *Habitat Conservation Plans Provide Limited Insight Into the Cost of Complying with the Endangered Species Act*, JOURNAL OF THE SOCIETY FOR CONSERVATION BIOLOGY at 7 (Feb. 23, 2022) https://conbio.onlinelibrary.wiley.com/doi/pdf/10.1111/csp2.12673#:~:text=The%20median%20cost%20for%20the,for%20a%20 project%2Dscale%20HCP.

I declare the foregoing to be true and correct, under penalty of perjury.

/s/ Timothy Burton Anderson

Timothy Burton Anderson

Date Signed: November 3, 2022

Appendix H

SELECTED PORTIONS OF THE HABITAT CONSERVATION PLAN FOR WASHINGTON COUNTY, UTAH (OCTOBER 2020)

HABITAT CONSERVATION PLAN FOR WASHINGTON COUNTY, UTAH

Prepared for
Washington County Commission

197 East Tabernacle Street

St. George, Utah 84770

Attn: Mr. Cameron Rognan, Washington County HCP Administrator

Prepared by

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Restated and Amended October 2020

EXECUTIVE SUMMARY

Purpose and Need

Washington County, Utah, (the County) prepared a Habitat Conservation Plan (HCP) in 1995 that provided for the conservation of the Upper Virgin River population of the Mojave desert tortoise (Gopherus agassizii; MDT) (Washington County Habitat Conservation Plan Steering Committee and SWCA Environmental Consultants 1995; hereafter 1995 HCP). This document (the Amended HCP) restates and amends the 1995 HCP and supports the County's application for renewal of Incidental Take Permit (ITP) No. TE036719. A Renewed/Amended ITP is needed to extend the County's access to previously authorized, but unused, incidental take of the MDT for an extended term of 25 years. Amendments to the 1995 HCP are needed to incorporate developments in the best available science pertaining to the MDT, comply with current USFWS regulations pertaining to ITPs, incorporate current policy regarding amended HCPs (as applicable), and clarify the language to more accurately reflect the intent of the 1995 HCP. This summary provides a brief description of the Amended HCP. In addition, this Amended HCP documents the conservation successes of the County and its HCP Partners achieved during implementation of the 1995 HCP. If there are any discrepancies between this summary and other sections of the Amended HCP, the other section shall be viewed as controlling.

Extended Permit Term, Plan Area, and Permit Area

Based in part on planning projections of buildout potential (which occurs at a human population in Washington County of approximately 330,000), the County selected a 25-year duration for the Renewed/ Amended ITP Term. This Renewed/Amended ITP Term generally coincides with the long-term population projection for 2045 (approximately 356,000 people).

This Amended HCP will be implemented in Washington County, Utah (the Plan Area). The Renewed/Amended ITP will reauthorize incidental take within the portion of the Plan Area that is generally east of the Beaver Dam Mountains (the Permit Area).

Covered Activities

The activities addressed by this Amended HCP (the Covered Activities) are those otherwise lawful, non-federal land use or land development activities that are under the direct control of the County and performed within the Permit Area that are reasonably certain to take one or more MDT. Generally, Covered Activities consist of the following:

1. A broad set of land development and land use activities that occur on non-federal land outside the Red Cliffs Desert Reserve (Reserve), such as land clearing and building construction, grazing and farming, utilities and other infrastructure, resource extraction and renewable energy development, and others; and

2. A narrow set of land development and land use activities that occur on land inside of the Reserve and performed in accordance with the applicable protocols and other measures specified in the conservation program of this Amended HCP. These include recreation uses; utility, water development, and flood control activities; management of the Reserve; and certain other specific uses.

This Amended HCP does not expand the list of Covered Activities beyond those addressed in the 1995 HCP. The proposed Northern Corridor highway (the Northern Corridor) is not a Covered Activity of the

Amended HCP because it is federal in nature and, thus, requires consultation under Section 7 of the Endangered Species Act (ESA). However, this Amended HCP does not expressly prohibit uses of the Reserve that are not Covered Activities. Incidental take of the MDT that may be associated with such activities is not covered by this Amended HCP nor the Renewed/Amended ITP. Proponents of activities within the Reserve that are not Covered Activities are responsible for achieving compliance with the ESA through other means.

* * *

The County and the HCP Partners adopted a conservation program designed to "promote conservation and recovery" of the MDT (ITP No. TE036719:2) and meet substantially the recovery goals for the MDT in the UVRRU (1995 HCP:9, 120). In return, the 1995 HCP and Original ITP provided authorization for the incidental take of MDT within

the Permit Area.[1] The Original ITP authorized incidental take of MDT associated with Covered Activities that included otherwise lawful land use and land development activities across approximately 350,000 acres of non-federal lands outside the Reserve and a specific set of activities that could occur within the Reserve (i.e., certain so-called management prescriptions for the individual Reserve Zones). The 1995 HCP acknowledged that incidental take of MDT could occur when Covered Activities affected habitat suitable for use by the MDT, including areas with known use by MDT and areas where MDT occupancy had not yet been observed. Thus, the intent of the 1995 HCP was that all areas where MDT might occur within the Permit Area on non-federal lands outside the Reserve could be subject to Covered Activities, and all MDT using such areas were authorized to be incidentally taken.

In addition, the 1995 HCP intended to authorize incidental take of MDT associated with a limited set of Covered Activities inside the Reserve, including low-density development in Reserve Zone 1 (1995 HCP:25); the reconstruction of Skyline Drive (1995 HCP:38); water development (1995 HCP:44); flood control (1995 HCP:44); the maintenance, fencing, and improvement of certain roads (1995 HCP:44); and other utility corridor construction and maintenance (1995 HCP:44). The 1995 HCP included Utility Development

[1] The 1995 HCP acknowledged that the MDT may be found anywhere in the County, including areas where occupancy by MDT had not been documented or even where potential habitat was not present, and that "[t]he take permit is therefore necessary in all non-reserve areas to resolve the potential for conflict" (1995 HCP:47).

Protocols (UDPs). The UDPs were designed to avoid or minimize substantially the impact of water development and utility corridors within the Reserve (1995 HCP:43–44). The UDPs were updated in 2006 and consolidated with certain other conservation measures of the 1995 HCP (Development Protocols; **Appendix A**). Additionally, the Habitat Conservation Advisory Committee (HCAC) recommended and the Washington County Commission approved a Public Use Plan (PUP) to help manage recreation within the Reserve (Washington County Habitat Conservation Plan [HCP] Administration 2000; Washington County Ordinance No. 2007-949-0 Recreation in the Red Cliffs Desert Reserve; **Appendix B**).

The 1995 HCP and Original ITP provided authorization to take incidentally all MDT occurring within the Permit Area on non-federal lands outside the Reserve. At the time of the 1995 HCP, the best available information suggested that up to 12,264 acres of habitat occupied by MDT were present within the Permit Area on non-federal lands outside the Reserve (the 1995 HCP refers to this acreage as the incidental take areas). Estimates of MDT density suggested that approximately 1,169 adult MDT might have occurred in these incidental take areas. At the time, this was the total estimated population of MDT in the Permit Area on non-federal lands outside the Reserve. The 1995 HCP established special administrative procedures for performing Covered Activities in the incidental take areas (e.g., advance notification, with MDT surveys and translocation prior to development) and required the HCP Administrator to track the acres of incidental take areas that were released for Covered Activities. An

administrative release schedule ensured that land development in the incidental take areas did not outpace the implementation of certain conservation measures specified in the 1995 HCP (1995 HCP:114, 115).

* * *

Promptly addressing such events is essential to protect the overall conservation value of the Reserve and to protect human health and safety. These activities may, in certain circumstances, cause incidental take of MDT.

- **Zone-specific allowed uses**: This Amended HCP clarifies that the following zone-specific allowed uses are Covered Activities when performed in accordance with the conservation measures specified in **Chapter 6**. Reserve Zones 4 and 5 do not have zone-specific allowed uses.
    - **Reserve Zone 1**: Low-density residential development limited to a maximum overall density of one unit per acre with minimized surface disturbance during development, retention of native vegetation, and restrictions on exotic plant materials.
    - **Reserve Zone 2**: Existing state and local government uses are Covered Activities, including, but not limited to, existing public recreational access and use of related facilities and various infrastructure facilities (e.g., detention basins, wells, utility access roads).

- **Reserve Zone 3**: Existing state and local government uses are Covered Activities, including, but not limited to, the continued operation, use, and maintenance of facilities associated with the City of St. George law enforcement training range, the debris basin behind City Creek dam, Pioneer Park, and other various infrastructure facilities (e.g., detention basins, wells, utility access roads).

Some activities specifically allowed within the Reserve under the 1995 HCP are no longer relevant to this Amended HCP and have been removed from the list of Covered Activities. For example, the 1995 HCP covered the continued operation of the Moroni Feeds Turkey Farm in Reserve Zone 3 (1995 HCP:32).

However, the private lands associated with the former Moroni Feeds Turkey Farm in Reserve Zone 3 have been acquired for conservation purposes by UDWR, and the farming activity has been discontinued. The former site of the turkey farm is now part of an effort by UDWR and other conservation partners to restore native habitat (Keleher 2019). Similarly, the lands previously associated with a private residence and mining activities in Reserve Zone 4 (1995 HCP:38, 39) have been acquired by the BLM. Residential use in Reserve Zone 4 has been discontinued (Washington County Utah Recorder's Office 2019) and the lands of Reserve Zone 4 are now under federal ownership and managed by the BLM and are no applicable for Covered Activities. The retirement of these previously authorized uses and restoration of the associated lands creates a conservation benefit for the MDT in excess of that anticipated under the 1995 HCP.

Neither the 1995 HCP nor this Amended HCP expressly prohibit uses of the Reserve that are not Covered Activities. For example, the 1995 HCP stated:

> Landowners have been consulted throughout the HCP process and have been encouraged to participate in these land exchanges [for Reserve acquisition]. In the event they do not, the HCP will have no legal effect on their property and the HCP will place no restrictions on land use within the reserve. However, such lands will not participate in the benefits and protections inherent in an incidental take permit issued as part of this HCP, and therefore the landowner will be subject to the Section 9 enforcement provisions under the Act (1995 HCP:21, 22).

Incidental takings of MDT associated with activities that are not Covered Activities is not authorized by the Renewed/Amended ITP. Proponents of activities that are not Covered Activities, whether inside or outside the Reserve, are responsible for achieving compliance with the ESA through other means.

* * *

6.3.1.1.2 RESERVE ZONES

The Reserve is divided into five zones to facilitate management (Reserve Zones 1 through 5; see **Figure 11**), generally described as follows:

- Zone 1 extends from the Tribal lands east to Ivins and includes the Kayenta development where MDT occur in low densities. This zone also contains high-elevation pinyon-juniper

habitat in the Red Mountain Wilderness, where tortoises are not expected to occur.

- Zone 2 extends north from Ivins City and east to State Highway 18 and includes most of Snow Canyon State Park. This area contains a high density of MDT in some high-quality habitats.
- Zone 3 comprises the area between State Highway 18 and Interstate 15 and is fragmented into three subunits by tortoise fencing on Red Hills Parkway and Cottonwood Road. However, this Reserve Zone contains the largest block of contiguous MDT Habitat and is considered the core of the Reserve.
- Zone 4 is bounded on the west by Interstate 15 and Quail Creek Reservoir and on the south by the Virgin River. This Reserve Zone initially contained either no or very few MDT in 1995 and was included in the Reserve as a translocation site for MDT.
- Zone 5 is bounded on the north by the Virgin River and on the south by the City of Hurricane. Although small, this Reserve Zone contains the highest densities of MDT.

Table 16 summarizes the acreage and distribution of MDT Habitat within each Reserve Zone, based on the 2019 Reserve boundary.

Table 16. 2019 Reserve Zones and Mojave Desert Tortoise (MDT) Habitat Areas

Reserve Zone	Occupied MDT Habitat (acres)	Potential MDT Habitat (acres)	Other Suitable* or Non-Habitat (acres)	Total Size (acres)
Zone 1	1,018	196	4,899	6,113
Zone 2	2,411	31	7,866	10,308
Zone 3	25,037	2,396	11,934	39,367
Zone 4	3,753	1,697	61	5,511
Zone 5	429	0	283	712
Total Reserve	32,648	4,320	25,043	62,011

* Suitable MDT Habitat are lands identified by the U.S. Geological Survey model with at least 50% habitat probability that occur between 4,000 and 5,000 feet above mean sea level. Modeled habitat at these elevations is not included in the estimates of Occupied or Potential MDT Habitat used in this Amended HCP.

6.3.1.1.3 FRAGMENTATION AND CONNECTIVITY

The MDT Habitat present within the Reserve and the MDT individuals that occupy this habitat are relatively isolated from the rest of the MDT range by both human-made and natural landscape barriers. The southern and eastern boundaries of the Reserve largely abut developed or urbanizing lands associated with the communities of Ivins, Santa Clara, St.

George, Washington, Hurricane, and Leeds. The Virgin and Santa Clara Rivers also roughly parallel the southern and eastern boundaries of the Reserve. With the exception of Reserve Zone 1 (the Kayenta development), all private properties adjacent to the Reserve were fenced. Tortoise-proof fencing was not installed on Reserve Zone 1 to facilitate opportunities for gene transfer with MDT on adjacent Tribal lands and in support of a least-cost migration corridor which

* * *

This Amended HCP establishes that conservation easements are an acceptable tool for achieving Reserve acquisitions. The County and the HCP Partners anticipate that conservation easements associated with Reserve acquisitions should be in perpetuity. However, subject to USFWS approval, term conservation easements may be appropriate in circumstances where perpetual easements are not practicable. Reserve lands acquired through a conservation easement must be used and managed in accordance with this Amended HCP.

Consistent with the 1995 HCP, the County and the HCP Partners intend to rely on BLM land exchanges, federal assistance through the Land and Water Conservation Fund and the USFWS Cooperative Endangered Species Conservation Fund, funds generated from the sale of BLM-managed lands, and other sources as may become available to acquire and manage Reserve lands. The consolidation of Reserve lands into federal or UDNR ownership would not be possible, let alone practicable, without such federal support.

In recognition of SITLA's participation in this Amended HCP as a new HCP Partner, the BLM and USFWS acknowledge that they will continue to consider Reserve land acquisition as a top priority for federal land acquisition support in Utah. Furthermore, when SITLA is a willing seller, the BLM in Utah will prioritize the acquisition of SITLA Reserve lands to the maximum extent practicable.

The County and the HCP Partners emphasize that all Reserve acquisitions will be limited to those transactions involving willing participants. No entity will be required or compelled to sell, donate, transfer, purchase, or receive lands or interest in lands for the purpose of this Amended HCP. This Amended HCP acknowledges there are myriad circumstances affecting the availability and practicability of opportunities to complete Reserve acquisitions among willing parties that may vary over time and space. Therefore, this Amended HCP does not establish a timetable for completing Reserve acquisitions. However, the HCP Partners acknowledge that completing the Reserve acquisitions within the Renewed/Amended ITP Term is a priority conservation action under this Amended HCP and will prioritize the acquisition or, in SITLA's case, disposal of Reserve lands in their land transfer activities.

The County and the HCP Partners commit to coordinate through the deliberations of the HCAC to identify and advance potential acquisition opportunities until Reserve acquisitions are complete. Upon reissuance of the ITP, the County will direct the HCAC to create a standing subcommittee (i.e., the Land Acquisition Subcommittee) tasked with following up on the progress of Reserve land acquisi-

tions, engaging with private landowners and SITLA representatives on new potential opportunities, and creating collaborative partnerships for facilitating acquisition transactions. In general, this subcommittee will prioritize acquisitions in Reserve Zone 3 over those in other Reserve Zones. However, in accordance with the 1995 HCP, for those landowners who do not elect to participate in Reserve land acquisition efforts, this Amended HCP will have no legal effect and will place no restrictions on the use of such property within the Reserve. Unless explicitly provided for as a Covered Activity, activities on unacquired Reserve lands may not take advantage of the incidental take authorization provided by this Amended HCP and ITP.

The County will continue to support Reserve land acquisitions by facilitating coordination with the Reserve's private landowners and SITLA representatives regarding potential acquisition opportunities and mutually agreeable terms for acquisitions. The County will also commit financial resources toward offsetting costs associated with real estate transactions involving Reserve land acquisitions (i.e., appraisals, surveys, title searches, recording fees, and the like). SITLA has agreed to work with the BLM toward the eventual acquisition of its Reserve lands.

* * *

9.1.7 Private Lands in Reserve Become Developed

It is possible that a private landowner or SITLA may seek alternative means of ESA compliance, other than through this Amended HCP, and ultimately develop lands within the Reserve. Private development of

lands within the Reserve is not a Covered Activity of this HCP. Therefore, a private landowner would need to seek an alternative form of compliance with the ESA for incidental take resulting from their activities. The County anticipates that such independent permitting actions would generate mitigation provided by the private landowner in the form of additional conservation lands in the Plan Area or additional funds for supporting the conservation, management, and monitoring of MDT in the Plan Area. This Changed Circumstance will be triggered if a private landowner develops privately held lands within the Reserve boundary (see **Figure 8**, or as amended). The USFWS will notify the County of the occurrence of this Changed Circumstance.

In response to this Changed Circumstance, the County and the HCP Partners, through the HCAC, may consider amendments or modifications to this Amended HCP that may be appropriate to accommodate any mitigation lands or funds provided by the private landowner through such independent action inside the Reserve. This may include amendments to the Reserve boundary to include the third-party mitigation lands or modifications to the funding program to coordinate the use of third-party mitigation funds for Reserve management and monitoring. As this Changed Circumstance necessarily involves actions occurring outside the scope of this Amended HCP, the HCAC has no control over the amount or forms of potential third-party mitigation. In response to this Changed Circumstance, the HCAC may meet and confer with the USFWS to discuss the potential disposition of any forms of mitigations (e.g., funds or lands), as they relate to this Amended HCP

and its conservation program's goals and objectives. The County retains final authorization of any such agreements pending USFWS approval.

9.1.8 Non-Participating Municipalities

This Amended HCP assumes all municipalities within the County will fully participate as intended and that participation fees are collected by participating municipalities. However, it is possible that at least one municipality may choose to opt out of participation in the HCP or that a Municipal Partner fails to abide by the terms of its interlocal agreement with the County. Municipality nonparticipation could

* * *

May 18, 2020

The Honorable Rob Wallace
Assistant Secretary for Fish and Wildlife and Parks
U.S. Department of Interior
1849 C Street, NW
Washington, DC 20240

Re: Requested action on ELT application for incidental take permit for approximately 266 acres in Red Cliffs National Reserve, Utah

Dear Assistant Secretary Wallace:

This letter requests that the United States Fish & Wildlife Service make a final determination with respect to Environmental Land Technology's pending application for an incidental take permit to develop the approximately 266 acres it owns in the Red Cliffs National Conservation Reserve-the last remaining privately owned land in the Reserve. If, as various FWS personnel have indicated, the application is futile because ELT's land is essential to the conservation of the listed Mojave Desert tortoise and cannot be disturbed, we request that FWS so state to avoid the unnecessary waste of time and resources by the agency and the applicant.

History of the project

In the early 1980s, James Doyle, doing business as Environmental Land Technologies, Ltd., assembled 2,448 acres of land for a luxury home and golf course development in the rapidly growing Washington County area of Utah. Just as Doyle was about to break ground on the project, however, on April 2, 1990, FWS

published a final rule listing the Mojave population of the desert tortoise as threatened under the Endangered Species Act,[1] and thereafter on February 8, 1994, designated 6.4 million acres as critical habitat of which 129,100 acres were located in Utah.

acres, including all of ELT's land, as critical habitat for the species.[2] This put an end to Doyle's plans for developing his land.

The Desert Tortoise

The listed population of the desert tortoise (Gopherus agassizii) "occurs on the Beaver Dam Slope of southwestern Washington County, Utah. … [T]he population is continuing to decline because of habitat deterioration and because of past overcollection. ... The main threats to this unique population were said to be competition from grazing animals, overgrazed habitat, and problems with collection of individuals."[3]

The desert tortoise of the Mojave population was listed as threatened because of "significant population declines, loss of habitat from construction projects such as roads, housing and energy developments, and conversion of native habitat to agriculture.

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[1] Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Mojave Population of the Desert Tortoise, 55 Fed. Reg. 12,178 (Apr. 2, 1990).

[2] Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5,820 (Feb. 8, 1994).

[3] Endangered and Threatened Wildlife and Plants; Listing as Threatened With Critical Habitat for the Beaver Dam Slope Population of the Desert Tortoise In Utah, 45 Fed. Reg. 55654 (Aug. 20, 1980).

Livestock grazing and off-highway vehicle (OHV) activity have degraded additional habitat. Also cited as threatening the desert tortoise's continuing existence were illegal collection by humans for pets or consumption, upper respiratory tract disease (URTD), predation on juvenile desert tortoises by common ravens (Corvus corax), coyotes (Canis latrans), and kit foxes (Vulpes macrotis), fire, and collisions with vehicles on paved and unpaved roads."[4]

The "[d]esignated critical habitat for the desert tortoise encompasses portions of the Mojave and Colorado Deserts that contain the primary constituent elements and focuses on areas that are essential to the species' recovery."[5] The primary constituent elements include: space for individual and population growth; food, water, or other nutritional requirements; cover or shelter; and habitats protected from disturbances.[6]

Incidental Take Permit/Habitat Conservation Plan

The ESA listing and critical habitat designation scuttled Washington County's general plan for land development. So the County, together with a land-

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[4] Status of the Desert Tortoise-Rangewide, U.S. Fish & Wildlife Service (Oct. 22, 2008),

https://www.fws.gov/nevada/desert_tortoise/documents/misc/20080813.Rangewide_Stat us_of_Desert_Tortoise.pdf.

[5] Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5,820, 5,822 (Feb. 8, 1994).

[6] Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5,820, 5822 (Feb. 8, 1994).

owners group (of which Doyle was an active member) sought an area-wide incidental take permit that would preserve the portions of the County required for the conservation and recovery of the species, while allowing development of less critical lands, including portions of Doyle's property. FWS rejected this first application as insufficiently protective of the tortoise, but worked with the applicants to develop an approvable habitat conservation plan. Finally, on February 23, 1996, FWS issued the ITP, allowing development of 350,000 acres of Washington County land while setting aside for preservation 61,022 acres in which no development would be allowed in order to protect the tortoise.[7] In 2009, Congress designated this 61,022-acre tract as the Red Cliffs National Conservation Area.[8]

Portions of the lands within the set-aside area were owned by the United States and managed by BLM. Other portions were Utah state school lands, and still other parcels were, like the Doyle's property, privately owned. To insure proper management of the conservation area, the approved habitat conservation plan called for the United States to acquire title to all 61,022 acres by purchase or land exchange, to be managed by BLM to protect and conserve the species. Although the incidental take permit terminated in 2016, it has been extended by regulation until FWS acts on the pending application for renewal.

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[7] Issuance of Permit for Incidental Take of Threatened Species, 61 Fed. Reg. 26,529 (May 28, 1996).

[8] Omnibus Public Land Management Act of 2009, Pub. L. 111-11, 123 Stat. 991 (codified in 16 U.S.C. § 460www).

Under the terms of the habitat conservation plan, the United States has now acquired title to the land within the Red Cliffs National Conservation Area except for approximately 266 acres owned by Doyle, who has had no use of this land, which has been fenced off to protect the tortoise, since the 1990s. He is now 84 years old, and hopes that he can bring this project to a conclusion during his lifetime.

The takings lawsuit

Between 1996 and 2015, the United States acquired (or contracted to acquire) all of the privately owned and state-owned land within the tortoise conservation area-with the single exception of Doyle's 266 acres. (Doyle lost most of his land in a bankruptcy caused by his inability to develop after heavy investment in the development.) Stymied by the Government's failure to acquire Doyle's Red Cliffs land per the countywide incidental take permit, in 2015 Doyle sued in the U.S. Court of Federal Claims asserting a Fifth Amendment taking without just compensation. But the Court dismissed his suit as unripe, ruling that Doyle must first apply for an individual incidental take permit to see if he could develop his land despite the prohibitions of the ESA and the tortoise protection measures imposed by the countywide permit.[9]

Doyle then opened two channels of communication with the United States, proposing various offers to sell or exchange his property to BLM while simultaneously discussing with FWS the feasibility of obtaining an incidental take permit to develop his land. Larry Crist,

[9] *Doyle v. United States*, 129 Fed. CL 147 (2016).

the Field Supervisor for FWS's Utah Ecological Services Field Office, repeatedly informed Doyle that he had neither the time nor the resources to process such an application which could not be approved under Section 10 of the ESA because the adverse impacts of such development on the listed desert tortoise could not be mitigated, as the ESA requires. And Doyle's attempts to sell or exchange his property to BLM were unsuccessful.

Then Doyle applied for an incidental take permit to develop his land.[10] He has never received a response from FWS. Meanwhile, State Director Crist has retired. And Doyle understands there is scant chance his application will be approved, given the extended proceedings to renew the countywide incidental take permit, including the County's request to disturb a significant portion of the tortoise conservation area to construct a roadway (the northern corridor) that will require significant mitigation measures.

Doyle remains frozen in place while FWS takes no action on his permit application-which appears to have no realistic chance of approval given the critical importance of his land to tortoise conservation and recovery and the further adverse impacts to the species that FWS is wrestling with in the countywide incidental take permit renewal application. If Doyle cannot develop his land consistent with the ESA, he is entitled to know that rather than continue to expend time and funds—plus the resources of FWS—on a futile incidental take permit application.

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[10] See incidental take permit application attached as Exhibit 1.

I would be pleased to discuss this matter with you.

Yours truly,

/s/ Roger J. Marzulla

Roger J. Marzulla

Appendix J

James DOYLE, et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

No. 15–572L

United States Court of Federal Claims.

(Filed: November 30, 2016)

Roger J. Marzulla, Washington, DC, for plaintiff. Nancie G. Marzulla, Washington, DC, of counsel.

Jacqueline C. Brown, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC, with whom were John C. Cruden, Assistant Attorney General, for defendant. Daniela Arregui, Environment and Natural Resources Division,

U.S. Department of Justice, Washington, DC, of counsel.

OPINION

FIRESTONE, Senior Judge.

Pending before the court is a motion filed by defendant the United States ("the government") to dismiss the above-captioned case pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC") for lack of subject-matter jurisdiction and RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.[1] Plaintiffs James Doyle, a real

[1] On April 14, 2016, the court dismissed for lack of jurisdiction Count II of the complaint, which alleged that plaintiffs are entitled to compensation under the Wilderness Act. Pub. L. No.

estate developer doing business as Rocky Mountain Ventures ("RMV"), and his wholly owned limited partnership Environmental Land Technologies, Ltd. ("ELT"), filed this action claiming that the government had taken property owned in the name of ELT without paying just compensation in contravention of the Fifth Amendment of the Constitution. In the alternative the plaintiffs allege that the government breached a contract to acquire up to 2,440 acres of property that ELT owns or owned at the time of the alleged taking.[2]

These claims arise in connection with a government-approved Habitat Conservation Plan ("HCP") to protect and provide critical habitat for the Mojave desert tortoise under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq, in the area of Washington County, Utah. The ESA was enacted in 1973 to protect endangered and threatened species and the ecosystems on which they depend. *See id*. § 1531(b). The Act directs the listing as endangered or threatened those species that are "in danger of extinction throughout all or a significant portion of [their] range." *Id*. §§ 1532(6), 1533. Under the ESA, "critical habitat" necessary for the preservation of a listed species is generally designated at the time the species is listed. *Id*. §§ 1532(5), 1533(a)(3), (b)(6)(C).

88– 577–78 Stat. 896, (ECF No. 19). The plaintiffs agreed that their property was not subject to the Wilderness Act.

[2] Plaintiffs state that ELT owned the property in question. Compl. ¶¶ 1–2 (ECF No. 1). Only the owner of property, at the time of claim accrual, has standing to assert a regulatory takings claim. *Air Pegasus of D.C. Inc. v. United States*, 424 F.3d 1206, 1212 (Fed. Cir. 2005).

Under Section 9 of the ESA, it is unlawful to "take" a listed species. *Id*. § 1538(a)(1)(B).

The government argues that the plaintiffs' takings claim must be dismissed because it is not ripe for review. The government contends that under Federal Circuit precedent property owners may assert a takings claim based on government regulatory actions under the ESA only after the property owner has first sought and been denied permission by the federal government to develop land that is within an area designated as critical habitat. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1345–52 (Fed. Cir. 2002); *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), on remand, 92 Fed. Cl. 373, aff'd, 418 Fed.Appx. 920 (Fed. Cir. 2011). The government explains that while Section 9 of the ESA prohibits any unauthorized "take" of a listed species, including disturbance of a protected species' critical habitat, Section 10 of the ESA, authorizes individuals and non-federal entities to apply for an "incidental take permit" from the federal government to allow for development under specified conditions. *See* 16 U.S.C. §§ 1538–1539.[3] The government argues that until plaintiffs have sought and been denied an ESA Section 10 permit, plaintiffs cannot show the extent of any regulatory limits on development of their

[3] An applicant seeking an incidental take permit must submit to the United States Fish and Wildlife Service ("FWS") a HCP setting forth: (i) the likely impact of the take; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding to do so; (iii) what alternative actions to the take were considered and rejected; and (iv) what other measures the agency might require as necessary and appropriate. 16 U.S.C. § 1539(a)(2)(A); *see also* 50 C.F.R. § 17.32.

land and thus cannot establish a ripe Fifth Amendment takings claim. *See Seiber v. United States*, 364 F.3d 1356, 1365 (Fed. Cir. 2004) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001)) (finding that the "crux" of the ripeness analysis is whether "the permissible uses of the property are known to a reasonable certainty").

In 1996, the government approved a Habitat Conservation Plan and Implementation Agreement and issued an Incidental Take Permit for Washington County that allowed for development in some areas and precluded development in other areas, including areas where plaintiffs own land. However, the government argues that the permit held by Washington County does not prevent plaintiffs from seeking their own Section 10 permit to develop lands within the area now within the protected reserve established by the HCP. It is not disputed that plaintiffs have not sought or been denied an incidental take permit of their own to develop any portion of the ELT property at issue. The government argues that until plaintiffs seek a Section 10 incidental take permit from the federal government, the federal government has not made a final decision regarding what if any development of the plaintiffs' property will be approved. In such circumstance, the government argues that plaintiffs' Fifth Amendment takings claim is not ripe and must be dismissed.[4]

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[4] On September 9, 2016, the parties submitted a joint status report detailing the current status of the Section 10 incidental take permit issued to Washington County. The permit expired on March 14, 2016. In the same report the parties indicated that the government is still working on but has not yet completed a comprehensive plan for the long-term management of the Red

The government argues further that to the extent its actions under the ESA in listing the tortoise, designating critical habitat, or approving the HCP in 1996 gave rise to a taking of plaintiffs' property without just compensation, on the grounds that those actions are found to be binding on plaintiffs, the government's actions took place more than six years before the plaintiffs filed their complaint and thus the case is barred by the statute of limitations. 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). The government similarly argues that the inclusion of plaintiffs' property within the Red Cliffs National Conservation Area[5] occurred more than six years before plaintiffs filed suit and thus any takings claim based on that designation alone is also barred by the statute of limitations. *See* Omnibus Public Land Management Act of 2009, Pub. L. No. 111–11, § 1974, 123 Stat. 991 (2009).

Finally, the government argues that the plaintiffs' breach of contract claims based on alleged commitments by the government in the HCP or the

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Cliffs National Conservation Area which includes plaintiffs' land. Both parties however stated that there is no reason to stay the case pending the completion of the plan.

[5] As discussed infra, the Red Cliffs National Conservation Area was established in 2009 by the Omnibus Public Land Management Act § 1974. Plaintiffs' land was included within the boundaries of the Red Cliffs National Conservation Area, and the Secretary of the Interior was given authority to sell certain public lands in order to fund the purchase of private land within the area.

Implementation Agreement to buy plaintiffs' land must be dismissed for failure to state a claim.[6] Specifically, the government argues that the federal government never entered into a binding agreement with plaintiffs or otherwise agreed to purchase the plaintiffs' property under the HCP or Implementation Agreement. The government argues that the provisions in the HCP and Implementation Agreement only provide for voluntary land exchanges or sales between "willing buyers and sellers" and provide that landowners who do not enter into an exchange or sale are not bound by the HCP.

The plaintiffs argue in response that their takings claim is timely and ripe. They also argue that they have alleged sufficient facts to establish a breach of contract claim. Specifically, the plaintiffs contend that the HCP established a compensation mechanism for purchasing the plaintiffs' property and that it is the failure of that mechanism in 2010 or so that gives rise to the takings claim. Plaintiffs contend that the government took their property because they lost use of their land during the period in which negotiations for purchase of their land were ongoing having agreed to be bound by the HCP. They argue that they had only agreed to have their land included within the HCP's protected area in exchange for the government's

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[6] The Implementation Agreement was drafted in December 1995 alongside the HCP. The Implementation Agreement incorporated the HCP and was created to set forth the responsibilities of the parties in order to best accomplish the goals of the HCP. On February 23, 1996, the Implementation Agreement was signed by the Town of Ivins, the State of Utah (acting by and through the Utah Department of Natural Resources), BLM, FWS, and Washington County.

promise to either purchase or exchange plaintiffs' land for land outside the protected habitat area. They argue their takings claim is ripe because it would be futile for them to seek an incidental take permit from the federal government. According to plaintiffs, the government's failure to complete that acquisition process and either purchase or exchange property for plaintiffs' land gives rise to both a taking and breach of contract claim.

For the reasons that follow, the government's motion to dismiss is GRANTED.

I. FACTUAL BACKGROUND[7]

Mr. Doyle, acting through RMV and ELT, began acquiring land in the early 1980s in the area of St. George, Utah, in Washington County with the goal of constructing a real estate development including luxury homes and nine golf courses. Overall, plaintiffs allege that they acquired a total of 2,440 acres for development while holding preferential rights to an additional 11,000 acres. After procuring water rights, designing transportation corridors, and acquiring zoning rights, Mr. Doyle was prepared to break ground for the initial phase of his project. However, on April 2, 1990, the Fish and Wildlife Service ("FWS") listed

[7] Where subject matter jurisdiction is questioned, the court may consider evidence outside plaintiffs' complaint to determine whether it has jurisdiction without converting the motion to dismiss to one for summary judgment. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011). The facts set forth below thus include the undisputed facts the government has submitted in support of its motion to dismiss for lack of ripeness or in the alternative to dismiss on the grounds that the statute of limitations has run.

the Mojave population of the desert tortoise as "threatened" under the ESA. 50 C.F.R. §§ 17.11(h), 17.42I; Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Mojave Population of the Desert Tortoise, 55 Fed. Reg. 12,178 (Apr. 2, 1990). On February 8, 1994, all of the plaintiffs' land was designated as "critical habitat" for the tortoise. Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5,820 (Feb. 8, 1994).

According to the complaint, the plaintiffs worked with other landowners and Washington County, Utah to develop an HCP that would have allowed for some development of ELT's property under an incidental take permit. That HCP was, however, rejected by the FWS. A second HCP was submitted by Washington County and, on February 23, 1996, the FWS issued an incidental take permit that incorporated the revised HCP. The HCP called for the creation of a 61,022 acre "Mojave Desert habitat reserve" within Washington County. The revised HCP does not allow for development in the area of ELT's property. Issuance of Permit for Incidental Take of Threatened Species, 61 Fed. Reg. 26,529 (May 28, 1996). Both the HCP and the Implementation Agreement dated December, 1995 and signed in 1996, include language with regard to private lands in the area designated as habitat.

Section 3.1 of the HCP states "[t]he central element of this HCP is the creation of a Mojave Desert habitat reserve in Washington County. This proposed reserve will be of 61,022 acres in size and will be managed for the protection of the Mojave Desert tortoise and other

listed … species." Section 3.2 of the HCP includes an Acquisition Strategy which states:

> [A]pproximately two-thirds of the proposed reserve is under BLM or State Park ownership. The remaining third comprises parcels currently under State or private ownership that are needed to make the reserve contiguous and effective. Three acquisition strategies have been identified to facilitate the acquisition of these necessary private lands… *Land will be acquired or exchanged upon the principle of a willing seller and willing buyer. Landowners have been consulted throughout the HCP process and have been encouraged to participate in these land exchanges. In the event they do not, the HCP will have no legal effect on their property and the HCP will place no restrictions on land use within the reserve*."[8]

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[8] The plaintiffs claim that Congress endorsed the HCP's land acquisition strategies based on a 1996 provision regarding a potential exchange of land with the Water Conservancy District of Washington County, Utah. In that law, Congress stated that "[i]n acquiring any lands and any interests in lands in Washington County, Utah, by purchase, exchange, donation or other transfers of interest, the Secretary of the Interior shall appraise, value, and offer to acquire such lands and interests without regard to the presence of a species listed as threatened or endangered or any proposed or actual designation of such property as critical habitat for a species listed as threatened or endangered pursuant to the Endangered Species Act of 1973 (16 U.S.C. § 1531 et seq.)." Omnibus Parks and Public Lands Management Act § 309(f). Congress did not, however, allocate resources to purchase the private lands in the reserve. This provision was apparently enacted to ensure that that land would

(Emphasis added). The Implementation Agreement further states that no person who is not a party or participating city is to be deemed a third party beneficiaries and that no person other than a party or participating city has a right to enforce the agreement. Implementation Agreement at 22 ("No persons who are not parties … are intended to be deemed third Party beneficiaries under this Agreement …").

Using the acquisition authorities provided for in the HCP and Implementation Agreement, the federal government, between 1996 and 2006, acquired approximately 534 acres of plaintiffs' property for a total of $9,273,013 in exchanged land and money. Def.'s Mot. 7–8. Negotiations for further acquisition of the plaintiffs' property were unsuccessful, including negotiations from 1997 to 1998 for the acquisition of 1,865 acres, negotiations from 2000 to 2007 for the acquisition of 10 acres, and negotiations from 2008 to 2011 for 9 acres. Aside from the land acquired from plaintiffs, BLM has been able to successfully acquire 8,814 acres of land within the reserve, of which 5,219 acres were acquired from private landowners.

Congress established the Red Cliffs National Conservation Area in 2009. *See* Omnibus Public Land Management Act § 1974. The statute required the Secretary of the Interior to develop a comprehensive management plan for the area, which could incorporate the HCP, and authorized the Secretary of the Interior to sell certain public land and use the proceeds to purchase private land within the conservation area. *Id*. §§ 1974, 1978. The statute did

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be valued based on its former fair market value, as opposed to its present value under encumbrance of the ESA.

not place any additional restrictions on development by private land owners. As noted, plaintiffs' land falls within this National Conservation Area.

In 2010, the plaintiffs transferred all but 274 acres of the 2,400 acres at issue in this case to the plaintiffs' creditors under an approved bankruptcy plan. Compl. at 7. The government subsequently acquired approximately 29 acres of the transferred land from two of the plaintiffs' creditors for a total of $4,000,000 in land and money; those creditors also donated to the government land valued at $2,000,000.

A. District Court Action

On September 20, 2013, Mr. Doyle and ELT filed an action against Secretary of the Interior Sally Jewell, the FWS, the BLM, and Washington County in the United States District Court for the District of Utah. *Doyle v. Jewell*, No. 2:13–CV–861–CW, 2014 WL 2892828, at *1 (D. Utah June 26, 2014). Mr. Doyle and ELT asserted that the federal defendants "(1) ha[d] failed to implement a comprehensive management plan [for the Red Cliffs National Conservation Area] to [the plaintiffs'] detriment; (2) ha[d] unreasonably delayed acquiring [the plaintiffs'] property; and (3) ha[d] acted arbitrarily and capriciously in failing to comply with [the defendants'] commitments" in violation of the Administrative Procedure Act ("APA"). Doyle, 2014 WL 2892828, at *1.

On June 26, 2014, the district court granted in part and denied in part the federal defendants' motion to dismiss the plaintiffs' claims. The court noted that "while the Secretary is not required to purchase land," the Red Cliffs legislation requires her "to implement the management plan to address how land within the

area will be managed." *Id*. At *2. On May 19, 2015, Mr. Doyle, ELT, and the federal defendants filed a joint stipulation and motion for entry of judgment, in which they agreed that judgment could be entered against the federal defendants requiring the development of a comprehensive plan. The district court granted the motion on May 27, 2015, and ordered the federal defendants to develop a comprehensive plan for the long-term management of the Red Cliffs National Conservation Area as required by 16 U.S.C. § 460www(d)(1) on or before June 30, 2016. The federal government was given an extension of time and is still working on a long-term plan.

B. Litigation in this Court

The plaintiffs filed their complaint in this court on June 5, 2015. On August 18, 2015, the government filed a motion to dismiss (ECF No. 8). Plaintiffs' filed their response (ECF No. 9) on September 18, 2015, and the government filed its reply (ECF No. 10) in support of its motion on October 5, 2015.

The case was then stayed for a period of time to allow the parties to discuss settlement. Because those negotiations could not resolve all claims, the court met again with the parties and on April 14, 2016, the court issued an order requiring additional briefing on whether the 6–year statute of limitations set in 28 U.S.C. § 2501 bars plaintiffs' claims, as alleged by the government. The plaintiffs filed their supplemental brief (ECF No. 22) on May 20, 2016, the government filed its response (ECF No. 25) on June 24, 2016, and the plaintiffs filed their reply (ECF No. 26) on July 8, 2016. The parties on September 9, 2016, provided the court with a status report on the current status of

the incidental take permit, the HCP and Red Cliffs National Conservation Area comprehensive plan. Oral argument was heard on November 7, 2016.

II. JURISDICTION AND LEGAL STANDARDS

This court's subject matter jurisdiction over cases involving Fifth Amendment takings and contract disputes is set by the terms of the Tucker Act, 28 U.S.C. 1491(a). It is a plaintiff's burden to prove that subject matter jurisdiction is appropriate in this court by a preponderance of evidence. *Banks v. United States*, 741 F.3d 1268, 1277 (Fed. Cir. 2014) (citing *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)). In deciding whether jurisdiction is proper in a motion to dismiss under Rule 12(b)(1), the court accepts as true only uncontroverted factual allegations in the complaint. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011); *Cedars–Sinai Med. Ctr. V. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993). Where the jurisdictional facts are questioned, the court must consider and resolve the disputed jurisdictional facts. The court's consideration of facts outside the complaint in such cases does not convert the motion to dismiss into one for summary judgment. Engage Learning, 660 F.3d at 1355 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L.Ed.2d 1097 (2006)).

When deciding a motion to dismiss for failure to state a claim upon which relief may be granted, the court must accept as true all the factual allegations in the complaint. *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). A plaintiff opposing a motion to dismiss for failure to state a claim must

demonstrate that the complaint "state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (quotations and citations omitted). In deciding the motion, the court may "draw the reasonable inference that the defendant is liable for the misconduct alleged," and that the plaintiff is plausibly entitled to the relief sought. *Id*.

III. DISCUSSION

In Count I of their complaint, plaintiffs allege a regulatory taking of their land without just compensation. In Count III, plaintiffs allege a breach of contract when the government failed to pay for or exchange plaintiffs' land. "It has long been the policy of the courts to decide cases on non-constitutional grounds when that is available, rather than reach out for the constitutional issue." *Stockton E. Water Dist. V. United States*, 583 F.3d 1344, 1368 (Fed. Cir. 2009) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206, 129 S. Ct. 2504, 174 L.Ed.2d 140 (2009). Accordingly, the court shall first consider plaintiffs' breach of contract claim before addressing the takings claim.

A. Plaintiffs Cannot State a Claim for Breach of Contract.

Plaintiffs present two theories for breach of contract. Plaintiffs first argue that they were parties to the HCP and that the government breached the contract when it failed to pay just compensation for the land or provide land of equal value in exchange. Pl.'s Resp. 15–16. Alternatively, plaintiffs argue that they are third party beneficiaries under the HCP and the Implementation Agreement. *Id*. at 16–19.

In order to state a claim for breach of contract against the United States the plaintiff must allege facts to show that it is in privity of contract with the government. *See Pac. Gas & Elec. Co. ex rel. Brown v. United States,* 838 F.3d 1341 (Fed. Cir. 2016) (citing *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)). Ordinarily only signatories to a contract have privity of contract with the government. *See Anderson*, 344 F.3d at 1351; *Castle v. United States*, 301 F.3d 1328, 1339 (Fed. Cir. 2002) (finding that shareholders of a party were not parties to the contract because they "neither negotiated with, nor promised any performance to, the government."). The purpose of limiting breach of contract suits to parties to the contract is to prevent recovery from parties with whom the government did not negotiate and to whom the government did not intend to obligate itself. See generally *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (rejecting claims of subcontractors as lacking standing to sue under the Tucker Act).

However, the Federal Circuit has recognized that a plaintiff may state a claim if the plaintiff can show that it is a "third party beneficiary" of the contract. Sullivan v. United States, 625 F.3d 1378, 1380 (Fed. Cir. 2010). Designation as a third party beneficiary to a government contract is an "exceptional privilege" that "should not be granted liberally." *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230, 33 S. Ct. 32, 57 L.Ed. 195 (1912); *Flexfab L.L.C. v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005). In *Glass v. United States*, the Federal Circuit articulated the standard that a third party beneficiary can only state a claim by demonstrating that "the

contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." 258 F.3d 1349, 1354 (Fed. Cir. 2001); *see also Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (stating same). A prospective third party beneficiary need not be named as such in the contract, but must nevertheless demonstrate that the claimed benefit is not "purely incidental and not contemplated by the contracting parties," and that he falls within a class clearly intended by the parties to benefit from the contract." *Sullivan*, 625 F.3d at 1380; *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999). If a plaintiff can establish privity or third party beneficiary status, a plaintiff must also be able to establish "an obligation or duty arising out of the contract, a breach of that duty, and damages caused by the breach." *San Carlos Irrigation & Drainage Dist. V. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989) (citations omitted).

In interpreting a contract, the court looks first to the plain language of the contract. *See Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The plain language of the contract will be controlling if it is unambiguous. Coast *Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040–41 (Fed. Cir. 2003); *TEG–Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) ("When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." (internal quotation marks and citations omitted)).

Tested by these standards, plaintiffs cannot state a claim for breach of contract in this case. Plaintiffs contend that they are parties to the HCP and Implementation Agreement due to Mr. Doyle's participation as a voting member of the steering committee which worked in conjunction with Washington County, BLM, and FWS representatives to draft both documents. This argument is not supported. The fact that private individuals or entities served as members of the steering committee for an HCP does not make those persons parties to the Section 10 permit which then incorporates the HCP. The HCP was issued to Washington County only. By its terms the permit does not include Mr. Doyle or any of the other plaintiffs. In addition, the Implementation Agreement which was negotiated to implement the HCP does not include plaintiffs as parties to the Agreement. The parties to the Implementation Agreement by its terms are: the State of Utah, the Town of Ivins, BLM, FWS, and Washington County. Implementation Agreement at 25–26. As such, plaintiffs are not in direct privity with the united States based on either the HCP or the Implementation Agreement and thus their contract claim hinges on their being able to establish that they are third party beneficiaries under either document. The plain language of both the HCP and the Implementation Agreement, however, foreclose plaintiffs from stating a claim based on a third party beneficiary status.

The HCP clearly and unambiguously states with regard to private land that "Landowners have been consulted throughout the HCP process and have been encouraged to participate in these land exchanges. In the event they do not, the HCP will have no legal

effect on their property and the HCP will place no restrictions on land use within the reserve." HCP at 24. The Implementation Agreement goes on to state that "No persons who are not parties … are intended to be deemed third Party beneficiaries under this Agreement …." Implementation Agreement at 22. The Implementation Agreement goes on to explain that any benefits to third parties are "incidental," that persons not signatories to the Implementation Agreement shall not have the right to enforce it. Implementation Agreement at 22. Given the above-quoted plain language, plaintiffs cannot state a breach of contract claim as third party beneficiaries to either the Implementation Agreement or HCP.

Plaintiffs' contention that they should be deemed third party beneficiaries of the HCP because the HCP does not expressly discuss "third party beneficiaries" is without merit. The argument is expressly contradicted by the terms of the Implementation Agreement. Section III.A of the Implementation Agreement, which incorporates the HCP by reference, states that "[i]n the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the HCP shall be interpreted to be supplementary to each other." Because plaintiffs' argument that they are third party beneficiaries to the HCP is in "direct contradiction" to the Implementation Agreement it must fail.

Finally, even if they could show that they are beneficiaries of these documents and could thus enforce them, the plaintiffs cannot, as discussed above, state a claim for breach of any contract duty.

The plaintiffs are not bound by the HCP or Implementation Agreement. As discussed above, plaintiffs' participation in the acquisition mechanism established in the HCP was purely voluntary. Private landowners were "encouraged to participate" but not required to participate in the land exchange and acquisition program. More importantly, neither of the referenced documents imposed a mandatory duty upon the government to purchase plaintiffs' property. By their terms these documents make clear that participation by private parties is limited to voluntary transactions between willing sellers and willing buyers.[9] Here, the government and plaintiffs were able to agree to some purchases or exchanges of plaintiffs' property but not others. Nothing in the documents plaintiffs rely upon obligated the government to pay plaintiffs "fair market value" for plaintiffs' property if

[9] At oral argument plaintiffs suggested that the phrase "land will be acquired or exchanged upon the principle of a willing seller and willing buyer" (HCP at 23) should be read to mean only that plaintiffs are entitled to just compensation based on fair market value and not that the government was not obligated to buy their land when the parties could not agree on a price. The plaintiffs argue in effect that landowners are not free to walk away from the process identified in the HCP and Implementation Agreement and pursue their own land development strategy if negotiations with the government fail. This argument does not bear close scrutiny. The language of the HCP makes plain that if the government and landowners cannot reach agreement as willing buyers and sellers the landowners are free to walk away from the process. The HCP states on page 24 that landowners "have been encouraged to participate." It does not state that landowners are bound by the HCP. To the contrary, the HCP recognizes that if landowners do not participate with respect to certain land, "the HCP will have no legal effect on their property." HCP at 24.

they could not agree on a purchase price. Put another way, plaintiffs cannot show any legally enforceable duty on the part of the United States in the documents identified requiring the government to purchase their property when the parties failed to reach a voluntary agreement on price. As such, plaintiffs' breach of contract claim must be dismissed for failing to state a claim. The court will now turn to plaintiffs' takings claim.

B. Plaintiffs' Takings Claim is Not Ripe.

The Fifth Amendment to the United States Constitution states that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. In order to proceed on a takings claim premised on a regulation, a plaintiff must show that the takings claim is "ripe" for hearing. The Federal Circuit has held that a regulatory takings claim ordinarily is not ripe for consideration until the government entity charged with implementing the regulation has "reached a final decision regarding the application of the regulation to the property at issue." *Barlow v. Haun, Inc*., 805 F.3d 1049, 1058 (Fed. Cir. 2015). This means that where the regulatory takings claim involves a permitting process, plaintiffs must demonstrate that the proposed activity has been actually prohibited by federal law. *See Seiber v. United States*, 364 F.3d 1356 at 1363. With respect to takings claims involving restrictions imposed by the ESA in particular, the Federal Circuit has required plaintiffs to show that they have applied for and have been denied an incidental take permit in order to show their takings claim is ripe for consideration. *See Morris v. United States*, 392 F.3d 1372, 1374–75 (Fed. Cir. 2004) (rejecting as unripe regulatory takings claim where no

incidental take permit was sought). Indeed, even where a plaintiff has been enjoined by a court from conducting an activity on its property because of the ESA, the Federal Circuit has required that the plaintiff seek an incidental take permit in order to establish that the case is ripe. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1348 (Fed. Cir. 2002) (rejecting a Fifth Amendment takings claim brought after plaintiff was enjoined from logging without an incidental take permit under the ESA).

In the present case, the plaintiffs do not dispute that they have not sought or been denied an incidental take permit with respect to development of any of their property within the reserve, or the later-designated Red Cliffs National Conservation Area. Ex. 1, Crist Decl. at ¶ 4.[10] Accordingly, under established Federal Circuit precedent, plaintiffs' takings claim must be dismissed absent the court finding an exception to the incidental take permitting requirement.

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[10] Plaintiffs' argument that they did submit two incidental take permits through their participation in the steering committee with Washington County is unavailing. Plaintiffs' Response at 5–6. While it is true that Mr. Doyle was a member of the steering committee that was involved in the drafting of the HCP, including one that would have allowed some development of the plaintiffs' property, membership on the steering committee is not the same as personally submitting an incidental take permit application to your own land. The FWS issued the incidental take permit to Washington County that included work of the steering committee. The final submission was sent by Washington County only and not by any of the individual landowners. Thus, it cannot be said that plaintiffs have already applied for and been denied an incidental take permit that precludes development of their property.

Here, the plaintiffs contend that their claim is ripe Without having to seek an incidental take permit from the FWS because they were bound by the HCP and prohibited from developing the subject property when they agreed to negotiate for the sale or exchange of their land. In plaintiffs' view, because they participated in the acquisition and exchange process provided for in the HCP and under the Implementation Agreement, their land has been forever set aside for protection and they cannot obtain an incidental take permit without forfeiting the right to just compensation or possibly opening themselves to civil and/or criminal liability under the ESA. According to plaintiffs, by voluntarily agreeing to negotiate for the purchase of their property under the HCP, they are now bound by the terms of the HCP and will not be able to obtain an incidental take permit of their own. For the reasons that follow the court finds that this argument is without merit.

The plaintiffs' argument hinges on the mistaken notion that agreeing in the first instance to negotiate with the government for the sale or exchange of their property on a "willing buyer and willing seller" basis they were forever bound by the development limitations in the HCP. As discussed above, the HCP and Implementation Agreement specifically stated that the HCP has "no legal effect on property [belonging to private citizens who do not enter into land exchanges or sell their property to the government] and [places] no restrictions on use of their property." Implementation Agreement at 6.

Because plaintiffs always had the option of leaving the voluntary acquisition program established in the HCP they cannot argue that their property was taken

by the federal government when they agreed to enter negotiations with the government for acquiring their property within the reserve and now Red Cliffs Conservation Area. Plaintiffs made a voluntary decision not to develop their land or seek permission to develop their land in hopes that they would be able to reach an agreement with the federal government. Indeed, they have reached agreement for the sale of many acres. Where they could not agree on a price, the plaintiffs were free to seek permission to develop their land by seeking their own incidental take permit from the FWS. The plaintiffs' decision to voluntarily forbear from seeking to develop their land during the negotiation period did not give rise to a taking. By its terms, the HCP contemplated only voluntary arrangements between willing buyers and willing sellers. Thus, plaintiffs' decision to negotiate with the government for an extended period of time was not compelled by the HCP or Implementation Agreement. For this reason, the court concludes that plaintiffs cannot argue that the government took their property when the plaintiffs agreed to negotiate with the government for the sale or exchange of the land. Unless and until the government confirms the extent of the restrictions on plaintiffs' use or development of the subject property the takings claim is not ripe. *See Morris*, 392 F.3d at 1376 (citing *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985)); *Seiber*, 364 F.3d at 1365 (stating that Palazzolo established that the "crux" of the ripeness analysis is whether "the permissible uses of the property are known to a reasonable certainty").

The court also finds that the inclusion of plaintiffs' land within the designated Red Cliffs National Conservation Area as of March 30, 2009 does not alter the court's conclusion that there has not been a taking until plaintiffs seek an incidental take permit. By virtue of the National Conservation Area designation, the Department of the Interior is authorized to acquire private property within the area and limit certain uses of public lands within the designated area. The statute creating the Conservation Area did not however place any express restrictions on development of private lands located within its boundary. Under the terms of the statute, the Department of the Interior is authorized to sell federal lands located elsewhere in Washington County, in order to fund land acquisitions within the National Conservation Area. *See* Omnibus Pub. Land Mgmt. Act § 1978. The statute does not contain any proclamations with respect to specific rights or obligations as to plaintiffs' land. The conservation designation is thus not in and of itself a bar to development. As such, plaintiffs do not know the extent of any restrictions on their ability to develop their land until they seek an incidental take permit.

Plaintiffs further argue that they were not required to apply for an incidental take permit because such application would be futile. The court finds this argument unavailing. The Federal Circuit has noted that "[f]utility is an exception to the agency final decision requirement for ripeness." *Schooner Harbor*, 92 Fed. Cl. at 381. "Once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 533 U.S.

at 620, 121 S. Ct. 2448. Plaintiffs' argue that any application for an incidental take permit would be futile because the HCP expressly prohibits incidental takes on reserve lands, which plaintiffs' property was classified as. *See* HCP Section 6.6 ("Reserve Lands are those State and private parcels located within the proposed reserve boundary presented in this HCP. No incidental take of desert tortoises will be allowed on reserve lands.").

In the instant case, the plaintiffs cannot show that applying for a section 10 incidental take permit would be futile. Although the HCP clearly contemplates disallowing development on reserve lands, it also states, as discussed above, that for those landowners who chose not to participate, "the HCP will have no legal effect on their property and the HCP will place no restrictions on land use within the reserve." HCP Section 3.2. In such circumstance, the court cannot assume that the FWS will foreclose all development of plaintiffs' land. The FWS has preserved its discretion with regard to development, by agreeing in the HCP that some development will be allowed under Section 10. Because Section 10 gives the FWS discretion to allow for development in areas designated as critical habitat under the ESA, the court cannot say that the permissible uses of the plaintiffs' property are known to a reasonable degree of certainty as contemplated by Palazzolo. The purpose of the Section 10 permitting process is to give the FWS the opportunity to review and balance the competing concerns of critical habitat protection and development. Reconciling these competing goals is precisely why a party is required to seek an administrative decision before a takings claim can ripen. *Cf. Boise Cascade Corp*., 296 F.3d at 1351.

Accordingly, because plaintiffs have failed to seek an incidental take permit and have never been denied such a permit by FWS, the court concludes that plaintiffs' claim for a regulatory taking is not ripe and must be dismissed without prejudice for lack of jurisdiction.

C. Any Concerns Related to the Statute of Limitations are Moot.

The final issue before the court on defendant's motion is whether plaintiffs' claims are barred by the statute of limitations. "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. Plaintiffs contend that that their Fifth Amendment takings claim and breach of contract claim did not accrue until 2010 or 2011 at the latest, which is when the government allegedly cut off negotiations to purchase plaintiffs' land and thus denied just compensation for the land. Defendant argues that any takings claim would have accrued no later than 1996, when the HCP and Implementation Agreement were signed, and thus any claim for a regulatory taking would be untimely as to the statute of limitations. Defendant further argues that with regard to any breach of contract claim, the statute of limitations would not reset with every failed negotiation and that, at most, plaintiffs would only be able to argue breach of contract with regard to the most recent negotiations for the sale of 9.02 acres, while all other acreage would be barred.

A claim against the United States first accrues when all the events have occurred that are necessary

to fix the liability of the government and entitle the claimant to demand payment and sue for money. *L.S.S. Leasing Corp. v. United States*, 695 F.2d 1359, 1365 (Fed. Cir. 1982); *Lins v. United States*, 688 F.2d 784, 786–88 (Ct. Cl. 1982). A cause of action accrues and the statute of limitations begins to run when a plaintiff is armed with the facts about the harm done to him. *United States v. Kubrick*, 444 U.S. 111, 123, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979); *Applegate v. United States*, 25 F.3d 1579, 1581–84 (Fed. Cir. 1994).

The Federal Circuit has held that in a regulatory takings case, the statute of limitations does not begin to accrue until the claim is ripe. *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1038 (Fed. Cir. 1997) (determining that the inquiry for the court to decide is when did a parties' "takings claim become ripe for adjudication" because that signifies "starting the statute of limitations clock."). This precedent has been consistently followed in this court. *See Barlow & Haun, Inc. v. United States*, 87 Fed. Cl. 428 (Fed. Cl. 2009) (noting that "[a] regulatory taking claim is ripe (and thus accrues) when the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.")(internal quotations and citations omitted); *Royal Manor, Ltd. V. United States*, 69 Fed. Cl. 58, 62 (Fed. Cl. 2005) ("It is well established that an as applied regulatory takings claim for economic damages does not ripen until there is a definitive position regarding how the statute will apply to the particular property in question."); *Id*. at 61 ("[A] regulatory takings claim accrues at the same time that it ripens ….").

Benchmark Res. Corp. v. United States is analogous to the instant case. In Benchmark, the plaintiff mining companies filed suit after the government, acting through the Office of Surface Mining Reclamation and Enforcement ("OSM"), designated certain portions of plaintiffs' property as unsuitable for surface mining. *See* 74 Fed. Cl. 458 (Fed. Cl. 2006). The government moved to dismiss, arguing that plaintiffs' takings claim was unripe because it had never petitioned OSM for a permit application. *Id*. at 464. The court agreed with the government in dismissing plaintiffs' takings claim as unripe, noting that it was uncontested that plaintiffs' had not sought a permit from OSM and holding that "[b]ecause plaintiffs' takings claim does not come within the futility exception to the administrative exhaustion doctrine, the claim is not ripe for adjudication." *Id*. at 469. In dismissing the plaintiffs' amended complaint without prejudice, the court noted that, should plaintiffs' apply and be denied a permit by OSM in the future, they would be free to challenge that administrative decision in the Court of Federal Claims. *Id*. at 475.

Having already determined that plaintiffs' takings claim is unripe, the court holds that plaintiffs' have not run afoul of the statute of limitations with regard to the property they own. Precedent is clear that in a regulatory takings case, the statute of limitations does not start to accrue until the matter is ripe. The matter will become ripe in the instant case when plaintiffs' file for a Section 10 permit and receive a decision. It is axiomatic then that a regulatory takings case which is unripe cannot be barred by the six year statute of limitations. Plaintiffs' remain free to seek an inci-

dental take permit to develop their land or continue negotiations with the government for the purchase or exchange of their property. Plaintiffs' takings claim cannot be barred by the statute of limitations because the claim is not ripe.

To the extent the government argues that the statute of limitations also bars plaintiffs' claim for breach of contract, the court believes it does not require a substantive discussion. It is clear from the analysis supra in Section A that plaintiffs are not parties to a contract with the government nor are they third party beneficiaries by the plain language of the Implementation Agreement. The court has also determined that the government did not have an enforceable duty to purchase their property in any case. Accordingly, any argument regarding the statute of limitations on this issue is moot because plaintiffs' have failed to state a claim upon which relief can be granted. *See Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1350 (Fed. Cir. 2015) (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp*., 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L.Ed.2d 15 (2007) for the proposition that "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.").

IV. CONCLUSION

For the reasons above, the government's motion to dismiss is granted in part and denied in part. The court holds that plaintiffs' claim for a regulatory taking is not ripe and thus the government's motion to dismiss Count I of the complaint is **GRANTED**. Plaintiffs' takings claim in Count I shall be dismissed without prejudice. Additionally, the court holds that

plaintiffs' claim for breach of contract fails to state a claim against the United States. Accordingly, the government's motion to dismiss Count III of the complaint for failure to state a claim is **GRANTED**. The government's motion to dismiss based on the statute of limitations is **DENIED** as moot. The clerk is directed to enter judgment accordingly. No costs.

IT IS SO ORDERED.

/s/ Senior Judge Firestone