

Sharon Buccino (*pro hac vice* pending)
NATURAL RESOURCES DEFENSE COUNCIL
1152 15th Street NW, Suite 300
Washington, D.C. 20005
Tel: (202) 289-6868
sbuccino@nrdc.org

Attorney for Plaintiff
Natural Resources Defense Council

Stephen H.M. Bloch (# 7813)
Laura Peterson (#16135)
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111
Tel: (801) 486-3161
steve@suwa.org
laura@suwa.org

Attorneys for Plaintiffs
*Southern Utah Wilderness Alliance and
The Wilderness Society*

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, SOUTHERN REGION OF THE CENTRAL DIVISION

NATURAL RESOURCES DEFENSE
COUNCIL, SOUTHERN UTAH
WILDERNESS ALLIANCE, and THE
WILDERNESS SOCIETY,

Plaintiffs,

v.

JOELLE MCCARTHY, in her official
capacity as the Richfield field office manager,
UNITED STATES BUREAU OF LAND
MANAGEMENT, and UNITED STATES
DEPARTMENT OF THE INTERIOR,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Case No. 4:19-cv-00055-DN

Honorable David Nuffer

INTRODUCTION

1. This lawsuit challenges the United States Bureau of Land Management’s (“BLM”) decision to lift its twelve-year-old closure order on cross-country off-highway vehicle (“OHV”) travel across 5,400 acres in the Factory Butte area of Wayne County, Utah. The Factory Butte area is renowned as one of the most extensive and spectacular Mancos Shale badlands in the world and is located on federal public lands managed by the BLM east of the entrance to Capitol Reef National Park.

2. In September 2006, BLM closed the public lands ringing Factory Butte to cross-country OHV use, limiting travel to designated motorized vehicle routes. BLM deemed the closure necessary to protect threatened and endangered plant species that were being adversely impacted by OHV use; specifically, the Wright fishhook cactus and Winkler’s pincushion cactus.

3. On May 20, 2019—despite continued declines in the endangered Wright fishhook cactus in the Factory Butte area—BLM abruptly lifted its travel closure order, allowing cross-country OHV use on 5,400 acres of BLM-managed land in the Factory Butte area. In lifting the twelve-year-old closure order, BLM opened the door to cross-country OHV use without first performing any environmental review evaluating the impacts caused by its decision, including impacts to sensitive shale soils, riparian areas, air quality, climate change, or the endangered Wright fishhook cactus. By doing so, BLM violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*

4. BLM made its decision to lift the travel closure order without any advance notice to the public. The agency issued a press release on Wednesday May 22, 2019—just before the busy Memorial Day weekend—announcing that it was immediately lifting the travel closure order and opening the area to cross-country OHV use that same day. BLM neither provided a

contemporaneous rationale nor prepared a NEPA analysis for this decision. Instead, the agency concocted its rationale a few days later when BLM Richfield field officer manager Joelle McCarthy wrote a brief “Memo to File” on May 24, 2019. This memo was not made available to the public until May 28, 2019.

5. BLM’s decision to lift the OHV travel closure order will significantly impact the Mancos Shale badlands of the Factory Butte area—an area with important geologic, scientific and scenic values. These impacts include accelerated erosion of Mancos Shale soils, decreased air quality, increased greenhouse gas emissions from OHV use, destruction and deterioration of the endangered Wright fishhook cactus, degradation of scenic resources and increased conflict between public land users. BLM has not performed NEPA analysis on the impacts from renewed OHV activity after the twelve-year reprieve.

6. To prevent significant and unanalyzed impacts from occurring, Plaintiffs Natural Resources Defense Council, Southern Utah Wilderness Alliance and The Wilderness Society request that this Court find that the Defendants violated NEPA by lifting the travel closure order without first completing the requisite environmental analysis, vacate that decision and enjoin cross-country OHV use in Factory Butte until BLM complies with NEPA.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief); and the Administrative Procedure Act (“APA”) 5 U.S.C. §§ 701-706.

8. Venue is proper in the United States District Court for the District of Utah, Southern Region of the Central Division, pursuant to 28 U.S.C. § 1391(e)(1).

9. BLM’s decision to lift the travel closure order for the 5,400 acres at issue—memorialized in the agency’s May 22, 2019 Press Release announcing the lifting of the travel closure order and later in its May 24, 2019 “Memo to file”—constitutes final agency action.

PARTIES

10. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL (“NRDC”) is a non-profit environmental membership organization that uses law, science, and the support of more than two million members and activists throughout the United States to protect wildlife and wild places and to ensure a safe and healthy environment for all living things. NRDC is headquartered in New York. Over 2,600 of NRDC’s members reside in Utah. NRDC has a long-established history of working to protect public lands in Utah including the Factory Butte area. NRDC members use and enjoy the public lands affected by BLM’s decision to open the previously closed area around Factory Butte to OHV use. Such use and enjoyment will be adversely affected by BLM’s decision. NRDC brings this action on its own behalf and on behalf of its members.

11. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE (“SUWA”) is a nonprofit environmental membership organization dedicated to the preservation of outstanding wilderness found throughout Utah, including the federal public lands surrounding Factory Butte, and the management of wilderness-quality lands in their natural state for the benefit of all Americans. SUWA is headquartered in Utah, and has members in all fifty states and several foreign countries. SUWA’s members use and enjoy public lands in the Factory Butte area for a variety of purposes including scientific study, recreation, aesthetic appreciation and financial livelihood. SUWA promotes local and national recognition of the region’s unique character through research and public education, and supports administrative and legislative initiatives to

permanently protect Utah's wild places. SUWA brings this action on its own behalf and on behalf of its members.

12. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national leadership organization founded in 1935. TWS is headquartered in Washington, D.C. TWS works to protect America's wilderness and to develop a network of wild lands through public education, scientific analysis and advocacy. TWS's goal is to ensure that future generations will enjoy the clean air, water, wildlife, beauty, and opportunities for recreation and renewal that pristine deserts, mountains, forests, and rivers provide. TWS views protecting wilderness quality and other sensitive Utah BLM-managed lands as vital to achieving its mission. TWS has worked for years to protect BLM wilderness quality and other sensitive lands in Utah including the BLM-managed lands in the Richfield field office and the Factory Butte area in particular.

13. NRDC, SUWA, TWS (referred to collectively hereafter as "NRDC") and their members' interests have been directly affected and irreparably harmed, and continue to be affected and harmed, by BLM's lifting of its closure order prohibiting off-highway vehicle travel in the Factory Butte area in violation of NEPA and the APA. NRDC's members frequently visit the Factory Butte area and recreate throughout the lands that surround it, including the North and South Caineville Mesas, Mount Pennell Wilderness Study Area, Muddy Creek wilderness character area and Capitol Reef National Park.

14. Mr. Ray Bloxham, an employee and member of SUWA, and a member of NRDC and TWS, has traveled throughout the Factory Butte area and recreated on the surrounding lands on numerous occasions over the past twenty years, including most recently in May 2019. Mr. Bloxham has plans to return to this area again in 2019, and intends to continue to visit the area for years to come. Mr. Bloxham particularly enjoys the incredible scenic views as well as the

remote and largely untrammeled nature of the area, viewing and photographing the unique landscape—especially when spring rains produce wild flowers—as well as hiking and camping.

15. As a consequence of BLM’s failure to comply with NEPA, the agency has acted before first considering the impacts of that decision and as a result, unanalyzed cross-country OHV use will significantly damage the character of the Factory Butte area. This will impair Plaintiffs’ staff and members’ use and enjoyment of the public lands within the area, as well as adjacent public lands. Plaintiffs were neither provided notice nor an opportunity to comment on BLM’s decision before it was made. Plaintiffs members also have a substantial interest in seeing that BLM complies with its obligations under federal laws including NEPA, its implementing regulations, and BLM’s own policies. The relief sought herein, including an order to reinstate the 2006 closure order until BLM has complied with the law, will redress these harms.

16. Defendant JOELLE MCCARTHY is sued in her official capacity as the BLM Richfield Field Office Manager. In that capacity Manager McCarthy is charged with overseeing BLM’s activities in that office. Manager McCarthy signed the post-hoc “Memo to File” justifying BLM’s decision.

17. Defendant BUREAU OF LAND MANAGEMENT is the agency within the United States Department of the Interior that is responsible for the management of approximately twenty-three million acres of federal public land in Utah, including the land at issue in this litigation. BLM is directly responsible for carrying out the Department of the Interior’s obligations under statutes and regulations governing land use management and for complying with the Federal Land Policy and Management Act (“FLPMA”), which requires the agency to manage public land resources for both present and future generations, and NEPA, which requires

the agency to carefully consider the environmental impacts of its actions and allow public involvement in decision-making.

18. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is the federal agency responsible for managing approximately five hundred million acres of federal public land across the United States for a variety of competing resources, including the protection of the natural and human environment.

LEGAL FRAMEWORK

A. Administrative Procedures Act

19. Judicial review of agency actions under NEPA is governed by the Administrative Procedures Act, which provides judicial review for “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. Review is limited to “final agency action for which there is no other remedy in a court.” *Id.* § 704.

20. Under the APA, a reviewing court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Agency actions may also be set aside where the action is “without observance of procedure required by law.” *Id.* § 706(2)(D).

B. National Environmental Policy Act

21. NEPA “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA has two fundamental purposes: (1) to guarantee that agencies take a “hard look” at the consequences of their actions before the actions occur by ensuring that “the agency, in reaching its decision, will have available, and will carefully consider detailed information concerning significant environmental impacts,” *Robertson v. Methow Valley Citizens Council*,

490 U.S. 332, 349-50 (1989); and (2) to ensure “the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision,” *id.* at 349.

22. NEPA achieves its purpose through action-forcing procedures that require agencies to take a hard look at the environmental consequences of their actions and authorizations.

23. The Council on Environmental Quality (“CEQ”) regulations implementing NEPA require agencies to “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. § 1501.2. *See also* 43 C.F.R. § 46.200 (Interior Department NEPA regulations, “Applying NEPA early”); *id.* § 46.100 (“A bureau proposed action is subject to the procedural requirements of NEPA if it would cause effects on the human environment (40 CFR § 1508.14), and is subject to bureau control and responsibility (40 C.F.R. § 1508.18)”). *See generally* BLM Handbook H-1790-1 National Environmental Policy Act (2008).

24. To accomplish these purposes, NEPA requires that all federal agencies prepare a “detailed statement” regarding all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement, known as an Environmental Impact Statement (“EIS”) must rigorously explore and objectively evaluate all reasonable alternatives, analyze all direct, indirect, and cumulative environmental impacts, and include a discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. §§ 1502.14, 1502.16. *See also* 43 C.F.R. Part 46, Subpart E.

25. An agency may also prepare an Environmental Assessment (“EA”) to determine whether an EIS is necessary. *Id.* §§ 1501.3, 1508.9. An EA must include a discussion of alternatives and the environmental impacts of the action. *Id.* § 1508.9. *See also* 43 C.F.R. Part 46, Subpart D.

26. If an agency decides not to prepare an EIS, an EA must “provide sufficient evidence” to support a Finding of No Significant Impact. *Id.* § 1508.9(a)(1). *See also* 43 C.F.R. § 46.325. Such evidence must demonstrate that the action “will not have a significant effect on the human environment.” 40 C.F.R. § 1508.13.

27. NEPA requires agencies to take a hard look at the direct, indirect, and cumulative impacts of a proposed action to inform its decision about whether the agency must prepare an EIS because a proposed action may significantly impact the environment. *Id.* §§ 1502.16(a), (b), 1508.7, 1508.8. *Cf.* 43 C.F.R. § 46.115.

28. In certain narrow circumstances—when a proposed action falls within a Categorical Exclusion—an agency is not required to prepare an EIS or EA. 40 C.F.R. § 1508.4; *Utah Envtl. Congress v. Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006). A categorical exclusion only applies to those “actions which do not individually or cumulatively have a significant effect on the human environment” 40 C.F.R. § 1508.4. If a categorical exclusion does apply to a certain action, an agency must determine whether “extraordinary circumstances” apply such that “a normally excluded action may have a significant environmental effect.” *Id.*

29. Before initiating actions that potentially affect the environment, federal agencies must prepare an EIS, an EA or a categorical exclusion. *Utah Envtl. Congress*, 443 F.3d at 735-36. *See also* 40 C.F.R. § 1501.4.

30. NEPA also requires an agency to supplement a past EIS when there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed

action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). When “there remains ‘major Federal action[n] to occur, and if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) (quoting 42 U.S.C. § 4332(2)(C)).

C. Regulation of OHVs

31. Under FLPMA, 43 U.S.C. § 1701 *et seq.*, BLM must manage public lands for multiple uses in a manner that “will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values . . .” *Id.* § 1701(a)(7), (8). OHV use and recreation are included amongst those multiple uses.

32. In the early 1970s, as OHV recreation became more prevalent and the impacts therefrom more apparent, President Nixon signed Executive Order 11644, 37 Fed. Reg. 2877 (1972), directing BLM and other agencies to develop and issue regulations limiting the destructive impacts from OHV use. That Executive Order, amended and expanded by President Carter in 1977 through Executive Order 11989, 42 Fed. Reg. 26959 (1977), is implemented through regulations codified at 43 C.F.R. Part 8340. Those regulations require BLM to “designate all public lands as either open, limited, or closed to off-road vehicles.” 43 C.F.R. § 8342.1. The designation of land “shall be based on the protection of the resources of the public lands, the promotion of the safety of all the users of public lands, and the minimization of conflicts among various uses of the public lands.” *Id.*

33. Specifically, BLM’s regulations require that any OHV areas or trails must be “located to minimize damage to soil, watershed, air, or other resources of the public lands, and to prevent impairment of wilderness suitability.” *Id.*

34. Those regulations also direct that BLM shall close areas to OHV use

where the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects upon soil vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources . . . until the adverse effects are eliminated and measures implemented to prevent recurrence.

Id. § 8341.2. *See id.* (stating that lands subject to closures “shall not be opened to the type(s) of off-road vehicle to which it was closed unless the authorized officer determines that the adverse effects have been eliminated and measures implemented to prevent recurrence.”). *See generally* BLM Instruction Memorandum 2016-128, Requirements for Processing and Approving Temporary Public Land Closure and Restriction Orders (July 26, 2016).

FACTS GIVING RISE TO NRDC’S CAUSE OF ACTION

I. Factory Butte

35. Factory Butte is a nationally-recognized landmark dominating the Mancos Shale badlands in Wayne County, Utah.

36. The unique natural features of Factory Butte itself and the surrounding area draw artists, photographers, guidebook authors and documentary filmmakers from all over the world. Visitors are drawn to the Mancos Shale badlands and multicolored bentonite hills. In the spring, the desolate badlands surrounding Factory Butte explode with color as yellow and purple flowers blanket the landscape. It is a popular place for hiking and dispersed camping opportunities as well.

37. The Factory Butte area also provides habitat for the Wright fishhook cactus (*Sclerocactus wrightiae*), a plant that has been listed as endangered under the Endangered Species Act since 1979. The Wright fishhook cactus is a small barrel like cactus with four central spines. In the spring, adults produce cream-colored flowers with magenta filaments. The species has a tenuous

grip on survival in this harsh environment and the number of flowering cacti in an area is vital for its reproductive success. OHV use is a significant threat to the Wright fishhook cactus causing habitat fragmentation, habitat disturbance from increases in erosion and increased access for illegal collectors.



The Factory Butte area in bloom. © Tom Till

38. Factory Butte's badlands are delicate. The combination of thin soils, steep slopes, and lack of vegetation combine to make the badlands highly susceptible to erosion. The primary protection against that erosion is a thin layer of permeable soil crust that generally withstands high winds and heavy rainfall. That surface layer, though strong, is also extremely fragile. Any kind of extensive surface disturbances leads to accelerated erosion and landscape degradation.

II. OHV Use and Impacts

39. OHVs¹ are vehicles equipped for travel off of improved or maintained roads. Such vehicles include motorcycles, all-terrain vehicles, and many kinds of four-wheel drive trucks or jeeps. OHV use has exploded in Utah over the past twenty years. In 2018, there were over 202,000 OHVs registered in Utah, a nearly four-fold increase from twenty years ago. As OHV use on federal public lands has proliferated, so have their environmental impacts.

40. OHV use results in significant environmental impacts, causing damage to soils, vegetation and wildlife, degrading air and water quality, harming cultural resources and causing conflicts with other land uses. OHVs compress and compact desert soils thereby increasing soil erosion and runoff while also decreasing its ability to support vegetation. OHV use can trample vegetation and reduce vegetative cover as well as introduce non-native plant species. Further, OHV use can result in habitat fragmentation that changes the distribution of species across a landscape and affects behaviors like breeding and migration. OHV use can also adversely affect riparian areas, water quality and air quality.

41. These OHV-caused impacts are exacerbated as the impacts from global climate change become more prevalent. According to the Intergovernmental Panel on Climate Change, the American southwest, including Utah, will see significant impacts from climate change, including increased temperatures, aridification, lower soil moisture and major vegetation shifts. OHV use can accelerate such changes.

42. As recent studies make clear, the erosion of desert soils from wind threatens both the environment and human health. Activities that exacerbate erosion have broad implications for

¹ OHVs are synonymous with Off-Road Vehicles (“ORVs”), defined as “any motorized vehicle capable of, or designed for travel on or immediately over land, water, or other natural terrain.” 43 C.F.R. § 8340.0-5(a); *see also* Bureau of Land Mgmt., *Richfield Field Office Record of Decision & Approved Resource Management Plan* 175 (Oct. 2018).

the functioning of lands with dry soils like those in the Factory Butte area. While soil crusts are generally resistant to erosion by even high speed winds, when those crusts are disturbed that soil becomes susceptible to erosion by wind. OHV use is one cause of soil crust disturbance and dust emissions from OHV recreation areas can be substantial. In a changing climate, aridification combined with land uses that increase dust emissions have synergistic and significant consequences.

III. Land Management in the Factory Butte Area

A. BLM decisions and inaction allow OHV use and damage to proliferate at Factory Butte

43. Motorized vehicle use in the Factory Butte area has a long and controversial history.

44. In 1980, Brigham Young University geologists released a survey of Natural Landmark Areas of the Colorado Plateau with threats to their integrity. Factory Butte and its distinctive badlands were identified in this report.

45. In 1982, BLM's Richfield field office approved a Management Framework Plan ("MFP") to guide the management of the roughly 1.9 million acres of land within the Henry Mountains Planning Area. BLM resource specialists noted in the MFP that the Factory Butte area was receiving intensive OHV use resulting in "unsightly scars" along Highway 24. The Plan also stated: "Use has reached the point where 'undue and unnecessary degradation' (prohibited by FLPMA) may now be occurring. Complaints from Caineville residents have been received and critical newspaper articles have been published." BLM, Henry Mountain Planning Unit, *Management Framework Plan R-3.1* (Nov. 1982) ("Henry Mountains MFP").

46. The Henry Mountains MFP also recommended that much of the Factory Butte area be protected as an Area of Critical Environmental Concern to preserve scenic, recreational,

scientific, biological, watershed, historical and botanical values.² Henry Mountains MFP, R-1.1. According to the MFP, the Factory Butte area's remarkable relevant and important values include scenic and natural processes: the area provides outstanding views of Factory Butte, the Water Pocket Fold, and the San Rafael Swell and the Mancos Shale is unique and well preserved, containing five different types of Mancos Shale, including one type that contains marine vertebrate fossils. The area also has a long history of scientific research value dating back to 1875. *Id.*

47. According to BLM's resource specialists, the Factory Butte area required special management protection because OHV damage was causing long-lasting visible scars and impacting the Factory Butte area. *Id.* That damage was expected to increase. Further, portions of the proposed Area of Critical Environmental Concern were determined to be "highly susceptible to natural erosion which would be increased by OHV activity." *Id.* R-3.5. Soils data BLM analyzed similarly showed that BLM should minimize surface disturbance in areas with Mancos Shale outcrops. *Id.*

48. Disregarding the recommendation of its specialists, BLM decided not to close the Factory Butte area to cross-country OHV use, and instead expressly allowed such use to continue and committed to conduct a study to determine whether a closure was warranted. Henry Mountains MFP at R-3.5.

49. Between 1982 and 1999 BLM staff did not perform the monitoring of OHV use and damage that it committed to in the MFP. Nor did BLM conduct a study to determine if closing the Factory Butte area to cross-country OHV use was warranted. Meanwhile, significantly increased OHV use resulted in dramatic visual scars and expanded into habitat for two federally-

² The MFP's proposed Factory Butte Area of Critical Environmental Concern encompassed 66,000 acres in the area around Factory Butte, including much of the 5,400 acres at issue here.

protected cactus. A 2004 report on erosion in the Factory Butte area concluded that OHVs were accelerating erosion by four times the natural rate. *See* John C. Dohrenwend, *Accelerated erosion in areas disturbed by OHV activity in the Mancos Shale badlands of the Factory Butte – North Caineville Mesa area, Wayne County, Utah* 11 (2004).



OHV impacts in the Factory Butte area © Ray Bloxham

B. SUWA petitions BLM to close the Factory Butte area and BLM agrees to do so

50. Because of the widespread impacts from cross-country OHV use in the Factory Butte area, on April 1, 2005 SUWA and Friends of Factory Butte submitted to BLM a Petition seeking immediate closure of the Factory Butte area to cross-country OHV use. SUWA argued that BLM was required to close the Factory Butte area to cross-country OHV travel because such use was causing considerable adverse effects to natural resources. Specifically, SUWA contended that OHV use was causing adverse effects to Mancos Shale soil resources, riparian resources, scenic resources and threatened and endangered species (the endangered Wright fishhook cactus and the

threatened Winkler pincushion cactus). SUWA also argued that continued cross-country OHV use was a health hazard, resulting in selenium-laden soil becoming airborne thereby polluting air, water and crops, and also violated the Clean Water Act. Further, the extensive cross-country OHV use occurring at Factory Butte was causing well-documented conflicts among public land users.

51. In the summer of 2005 BLM requested that its Resource Advisory Committee study OHV use in the Factory Butte area. The Resource Advisory Committee formed a subcommittee dedicated to that issue. The subcommittee was composed of a diverse group of individuals who undertook numerous meetings and field tours, and met with a variety of scientists and experts. The subcommittee confirmed that unacceptable resource impacts were occurring from cross-country OHV use though deadlocked on whether to recommend that BLM take any specific action to address the issue.

52. By 2006, BLM completed a number of cacti inventories in the Factory Butte area. Those inventories showed that cross-country motorized use was impacting threatened and endangered cactus populations.

53. On April 7, 2006, BLM formally responded to SUWA's closure petition. BLM conceded that there was sufficient justification to close the Factory Butte area to cross-country OHV use to protect the federally listed Wright fishhook cactus and Winkler pincushion cactus. To that end, BLM officially closed 142,023 acres of the Factory Butte area to cross-country OHV use, limiting motorized vehicles to designated vehicle routes. According to BLM, the purpose of the closure was to protect those threatened and endangered species that had been or were at risk of being adversely impacted by OHV use. 71 Fed. Reg. 55009, *Notice of Off-Highway Vehicle (OHV) Travel Restriction for Factory Butte Area, UT* (Sept. 20, 2006). The closure order was to

remain in effect until the conditions giving rise to the order were sufficiently addressed, or BLM's Richfield field office completed its Resource Management Plan. The closure did not affect 2,602 acres within Factory Butte, known as Swing Arm City, which remained open to cross-country OHV use.

C. BLM's Richfield resource management plan is finalized; Factory Butte closure remains in place

54. In October 2007, BLM's Richfield field office released its draft Resource Management Plan ("RMP") and draft EIS for the management of over 2 million acres of public lands in south-central Utah. Bureau of Land Mgmt., *Richfield Field Office Resource Management Plan & Environmental Impact Statement (Draft)* (Oct. 2007). In that document, BLM's preferred alternative limited cross-country OHV use in the Factory Butte area to Swing Arm City to accommodate existing use and future growth. *Id.* at 2-47, 2-65. BLM also acknowledged that allowing cross-country vehicle use across the larger Factory Butte area would have major impacts to water resources, vegetation resources and special status species by causing extensive vegetation removal, soil compaction, changing surface hydrology and increasing runoff as well as altering plant communities. *Id.* at 4-31, 4-50, 4-136.

55. In August 2008, BLM's Richfield field office released its Proposed Resource Management Plan and Final EIS. For the first time—and after the opportunity for public comment had closed—the agency proposed establishing a 24,400 acre Factory Butte Special Recreation Management Area (referred to herein as "the Factory Butte SRMA"). Inside that area BLM proposed creating three cross-country OHV "play areas" where cross-country OHV travel would be allowed: 5,800 acres around Factory Butte, 2,600 acres in Swing Arm City and 100 acres in Caineville Cove Inn. Bureau of Land Mgmt., *Richfield Field Office Proposed Resource Management Plan and Final Environmental Impact Statement* 2-51 to 2-52 (Aug. 2008). The

Final EIS noted that OHVs in the Factory Butte area “are causing or will cause adverse effects on [threatened and endangered] plant species in the area.” *Id.* at 3-99. It also explained that the 2006 Factory Butte closure order would remain in effect until BLM signed the Record of Decision. *Id.*

56. BLM’s Record of Decision and Approved Resource Management Plan—despite designating the Factory Butte and Caineville Cove Inn OHV play areas to cross-country OHV use—explained that the 2006 OHV closure order would remain in effect because BLM had not yet implemented the measures required by that order. Bureau of Land Mgmt., *Richfield Field Office Record of Decision & Approved Resource Management Plan* 53 (Oct. 2008). According to the Record of Decision, before the agency could lift the travel closure order, BLM was required to ensure there was appropriate infrastructure in place to protect the threatened and endangered cacti, that a monitoring plan was completed and enacted, and that the authorized officer “formally rescinded” the Factory Butte OHV closure order. *Id.* at 114.

57. In 2010, the U.S. Fish and Wildlife Service issued a biological opinion for the Factory Butte SRMA. According to that opinion, the Factory Butte SRMA is centrally located within the Wright fishhook cactus’s range.³ It also identified OHV use as a threat to the species causing both direct mortality and habitat disturbance from the increase in erosion and sedimentation. The biological opinion predicted that the most likely impacts to opening the Factory Butte play area are indirect impacts from OHVs: increased airborne dust and particulates, changes in pollinator-plant interactions, and increased illegal OHV use leading to habitat fragmentation and degradation.

³ Based on further studies, the Fish and Wildlife Service determined that the Factory Butte area did not contain suitable habitat for the threatened Winkler pincushion cactus. Accordingly, the biological opinion focused solely on the Wright fishhook cactus.

58. Between 2009 and 2017, BLM conducted annual monitoring of the Wright fishhook cactus within the Factory Butte SRMA. The purpose of the monitoring was to determine whether OHVs were illegally entering occupied cacti habitat and whether the cacti at selected sites were increasing, stable or decreasing. BLM's monitoring found that although OHV violations of the travel closure order decreased between 2006 and 2016, violations spiked in 2017. BLM's monitoring also demonstrated a decrease in cacti population in all monitored locations within the Factory Butte SRMA, including "dramatic mortality" since 2014.

59. BLM's 2018 monitoring similarly found an increase in violations of the travel closure order and declines in cactus populations. Violations increased from seven each in 2015 and 2016 to twenty in 2017 and then up to thirty-two in 2018. Wright fishhook cactus populations continued to decline in each of the monitored sites.

60. In 2018, shortly after Brian Steed became Acting Director of BLM, Wayne and Piute Counties sent separate letters to Acting Director Steed requesting that BLM lift the Factory Butte travel closure order. Based on information and belief, Wayne County commissioners also engaged Senator Mitt Romney's staff to pressure BLM to lift the travel closure order.

61. In April 2019, BLM submitted a memorandum to the Fish and Wildlife Service asserting that BLM had complied with the requirements of the 2010 biological opinion and additional conservation measures. BLM requested the Fish and Wildlife Service's concurrence that BLM had in fact complied with the 2010 biological opinion and with BLM's intent to move forward with opening the Factory Butte area to cross-country OHV use.

62. On May 17, 2019, BLM sent a follow-up memorandum to the Fish and Wildlife Service referencing communications between BLM and the Fish and Wildlife Service, and requesting changes to the 2010 biological opinion and associated monitoring plan. BLM requested new

thresholds for OHV disturbance within Wright fishhook cactus habitat, also changing the point at which BLM is required to reinitiate consultation with the Fish and Wildlife Service based on impacts to the endangered cactus. BLM also requested modifications to its Wright fishhook cactus monitoring obligations.

63. On May 20, 2019, the Fish and Wildlife Services accepted the BLM-proposed changes to its 2010 Biological Opinion and concluded that opening the Factory Butte and Caineville Cove play areas to cross-country OHV use was not likely to jeopardize the Wright fishhook cactus.

D. BLM lifts the closure order and cross-country OHV use and damage resumes at Factory Butte

64. BLM issued a press release on May 22, 2019, just before the popular Memorial Day weekend, announcing that it was opening 5,400 acres in the Factory Butte area to cross-country OHV use. Though BLM's press release asserted that it had been installing "infrastructure" to support this decision (e.g. signs and fences) for years, in fact those steps had not yet been completed by the time BLM opened the area to cross-country OHV use. BLM did not provide any documentation or justification for opening the areas to cross-country OHV use.

65. Two days later, after SUWA requested a copy of BLM's decision and bases for opening the area, BLM's Richfield field office prepared a three-page, post-hoc "Memo to File" on its decision to open the Factory Butte area.

66. BLM's three-page memo briefly recounted measures BLM had undertaken to comply with the Service's biological opinion, but did not contain any environmental analysis. BLM did not conduct any NEPA analysis prior to lifting the closure order. BLM did not evaluate the impact opening the Factory Butte area to cross-country OHV use would have on Mancos Shale soils, riparian resources, air quality, or climate change.

67. BLM did not provide any advance notice to the public regarding BLM's proposed decision, nor did BLM provide an opportunity to comment on or review the decision before it took effect.

68. Based on information and belief, cross-country OHV use has occurred and continues to occur across the Factory Butte area since the closure order was lifted.

First Cause of Action
Violation of NEPA and the APA
(Failure to Prepare NEPA Analysis)

69. Plaintiffs hereby incorporate by reference all of the preceding paragraphs.

70. NEPA requires BLM to analyze environmental consequences before initiating actions that potentially affect the environment. 42 U.S.C. § 4332(2)(C). It may do so in an EIS, EA or CX, but cannot exempt itself from complying with NEPA.

71. An agency may prepare an EA to determine whether an EIS is necessary, 40 C.F.R § 1501.3, but if an agency decides not to prepare an EIS, an EA must provide "sufficient evidence" that a full EIS is not necessary. *Id.* § 1508.9. In certain limited circumstances BLM may also prepare a categorical exclusion to document its compliance with NEPA. *Id.* § 1501.4.

72. The threshold to trigger environmental analysis under NEPA is relatively low, requiring only a substantial question whether an action may cause significant environmental impacts to trigger NEPA.

73. BLM must both take a "hard look" at potential environmental consequences of its actions and make the relevant information available to the public.

74. BLM's decision, first set forth in its press release and later documented in the post-hoc Memo to File, to lift its longstanding Factory Butte closure order constituted a major federal action. That decision will result in significant environmental impacts including, but not limited to,

potential direct, indirect and cumulative impacts to soil resources, riparian resources, air quality, water quality and climate change.

75. Accordingly, BLM's decision triggered NEPA, requiring BLM to do one of three things: prepare an EIS, prepare an EA and finding of no significant impact and decision record, or prepare a categorical exclusion. Instead, BLM did nothing.

76. By lifting the closure order without first analyzing the potential significant environmental impacts—or even evaluating whether such environmental review was required—Defendants violated NEPA, 42 U.S.C. § 4332(C), and the APA's requirement for rational, rather than arbitrary, decision-making, 5 U.S.C. § 706(2)(A). BLM's decision should therefore be held unlawful and set aside.

Second Cause of Action
Violation of NEPA and the APA
(Failure to Prepare Supplemental NEPA)

77. Plaintiffs hereby incorporate by reference all of the preceding paragraphs.

78. NEPA requires that federal agencies prepare supplemental analyses where there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). Agencies may also first prepare a review that considers whether new information is of such importance as to require a supplemental analysis.

79. BLM's decision to lift the Factory Butte closure order triggered NEPA's requirement to supplement its earlier analysis, the Richfield RMP Final EIS. Because BLM issued its decision without first completing a supplemental environmental analysis—or considering whether such environmental review was required—BLM violated NEPA, 42 U.S.C. § 4332(2)(C); 40 C.F.R. §

1502.9(c)(1)(ii), and the APA's requirement for rational, rather than arbitrary, decision-making, 5 U.S.C. § 706(2)(A). BLM's decision should therefore be held unlawful and set aside.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that the Court enter judgment in their favor and against Joelle McCarthy, in her official capacity as the Richfield field office manager of the Bureau of Land Management; the Bureau of Land Management, and the United States Department of the Interior; and that the Court:

- (1) Declare that Defendants have violated NEPA as set forth above;
- (2) Declare unlawful and set aside BLM's decision to lift the Factory Butte closure order;
- (3) Award injunctive relief instructing BLM to re-impose the closure order on cross-country OHV use in the Factory Butte area until Defendants have complied with NEPA;
- (4) Retain continuing jurisdiction of this matter until Defendants fully remedy the violations of law complained of herein;
- (5) Award Plaintiffs the costs they have incurred in pursuing this action, including attorneys' fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions.
- (6) Grant such other and further relief as is proper.

DATED: August 1, 2019

Respectfully submitted,

/s/ Laura Peterson

Laura Peterson
Stephen H.M. Bloch
*Attorneys for Plaintiffs Southern Utah Wilderness
Alliance and The Wilderness Society*

Sharon Buccino
Attorney for Natural Resources Defense Council