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<b>IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH, CENTRAL DIVISION</b>	
<p>FRIENDS OF ALTA, a non-profit organization, CRAIG HEIMARK, an individual, INTERNATIONAL OUTDOOR RECREATION ASSET ALLIANCE, a non-profit organization, DR. JEFF SCHMIDT, an individual, VICTORIA SCHMIDT, an individual, MARGARET BOURKE, an individual, KIRK NICHOLS, an individual, ALLEN SANDERSON, an individual,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>UTAH DEPARTMENT OF TRANSPORTATION,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;"><b>COMPLAINT</b></p> <p>Case No. 2:23-cv-00876-JCB</p> <p>Judge Jared C. Bennett</p>

## INTRODUCTION

1. Long recognized as an environmental and recreational treasure, Little Cottonwood Canyon (and State Route 210 that runs through it) lies within the Uinta-Wasatch-Cache National Forest, one of the most heavily visited forests in the United States.

2. During the summer months, Little Cottonwood Canyon blossoms with a spectacular display of over 120 species of wildflowers, including the rare and beautiful *dodecatheon dentatum*, better known as the “Utah Shooting Star.”

3. Little Cottonwood Canyon also hosts numerous species of wildlife. Moose and mule deer grace the Canyon’s forests. Mountain goats scale the surrounding cliffs. Squirrels, marmots, pikas, and other small mammals likewise call the Canyon home.

4. The skies of Little Cottonwood Canyon also teem with life. A birdwatching paradise, watchful visitors can expect to see golden eagles, owls, woodpeckers, hummingbirds, and more.

5. Visitors from all over the world flock to Little Cottonwood Canyon to witness its beauty and to be one with nature.

6. Indeed, Little Cottonwood Canyon is home to two Congressionally designated Wilderness Areas: the Lone Peak Wilderness, established in 1978, and the Twin Peaks Wilderness, established in 1984. The outstanding terrain and natural resources of the Canyon inspire and foster numerous winter activities including resort skiing, backcountry skiing, snowshoeing, and ice climbing, and numerous summer activities including hiking, biking, picnicking, photography, climbing, fishing, and camping.

7. But the importance of Little Cottonwood Canyon is not limited to its outstanding scenic and recreational qualities. For example, as water becomes increasingly scarce in Utah's arid climate, a watershed located in the Canyon has long served as a critical source of drinking water to residents in Salt Lake County. A diversion structure in the Canyon sends water to the Little Cottonwood Water Treatment Plant with the capacity, as of 2007, to treat approximately 143 million gallons per day.

8. Little Cottonwood Canyon also holds deep historical significance to the people of Utah. Some of Utah's earliest mining towns settled in or near the Canyon, and the iconic Salt Lake Temple of the Church of Jesus Christ of Latter-day Saints was constructed from blocks of granite quarried from the mouth of the Canyon.

9. Plaintiffs and countless others have long enjoyed the environmental, scenic, recreational, and historical richness that Little Cottonwood Canyon has to offer.

10. To preserve Little Cottonwood Canyon for future generations, it must be protected from expansive development that would permanently scar its natural beauty and harm its irreplaceable resources.

11. Despite all this, and against the public's wishes, the Utah Department of Transportation ("UDOT") has, purportedly under authority delegated by the Federal Highway Association ("FHWA"), chosen to pursue a gondola transportation system that will cause irreversible harm to Little Cottonwood Canyon and its unique resources.

12. As part of the delegated responsibilities for the transportation project, UDOT was required to comply with the National Environmental Policy Act requirements of issuing an Environmental Impact Statement ("EIS"), allowing for public comment, and then issuing a Record

of Decision (“ROD”). During the process relevant to the Little Cottonwood Canyon Project, UDOT issued a Draft EIS and Final EIS before issuing the ROD on July 12, 2023.

13. UDOT selected Gondola Alternative B, “with phased implementation of Enhanced Bus Service Alternative components pending funding and construction of Gondola Alternative B,” hereinafter collectively referred to as “Gondola Alternative B.” (LCC\_FEIS\_Volume 1, Chapter 2, at 2-136.) In selecting Gondola Alternative B as its preferred alternative in the Final EIS and ROD, UDOT exceeded the authority delegated to it by the FHWA and failed to comply with NEPA. Indeed, UDOT ignored the vast majority of public comments in selecting an alternative in which it will construct the world’s longest gondola, no matter the cost and numerous adverse impacts, and in spite of questionable and minute real-world benefits of such a massive and consequential project.

14. UDOT has selected Gondola Alternative B notwithstanding colossal costs, which it concedes it cannot pay absent significant federal or other funding that may or may not become available. Nonetheless, UDOT is currently continuing to plan for the construction of the Gondola and, because it has inseparably tied Phases 1, 2, and 3 of the selected Gondola alternative, UDOT is already beginning the process of expending taxpayer dollars to do so.

15. UDOT has selected this option with little to show in the way of solving winter traffic congestion problems, even under UDOT’s own flawed cost and traffic modeling. Carrying an estimated price tag of more than \$728 million, including an addition \$4.4 million per year in operations, involving 22 gondola towers and two angle stations each ranging from 120 to 262 feet tall, and 40 large-capacity gondola cars, UDOT’s selection not only will permanently scar Little Cottonwood Canyon’s natural landscape, but will result in, at best, a savings of a few minutes of

transport time for the average winter visitor to the Canyon. In the warmer months—for nearly six months of the year—the gondola system will serve little purpose but will nonetheless mar the landscape and viewshed (UDOT has stated that the gondola “might” run in the summer, and if it does, it will only have stops at Snowbird and Alta, as will be the case in the winter months).

16. Gondola Alternative B will bring a host of environmental problems associated with the construction of 22 gondola towers, two angle stations, the mobility hubs, and any permanent or temporary access roads necessary to access the towers for maintenance. It will affect the natural habitats of golden eagles and other fauna; contaminate and endanger a critical watershed; disrupt recreation areas unrelated to resort skiing such as climbing, hiking, and backcountry skiing; and permanently alter the breathtaking views of the canyon.

17. The costs per rider to use the Gondola will likely be out of reach for middle-class Utahns and may exceed the costs of the tolling per-car, with or without carpooling, and the costs of a round-trip bus ticket.

18. Gondola Alternative B will include stops only at two private ski areas. Canyon visitors seeking to engage in recreational activities other than resort skiing will not be able to use the Gondola, thereby creating a greater cost per ticket per rider for the skiers who choose the Gondola as their mode of transportation up the Canyon.

19. Ultimately, the only real benefactors of UDOT’s selection appear to be the numerous contractors and vendors who will construct, operate, and maintain the Gondola and related infrastructure, the two private ski areas (Snowbird and Alta) which will significantly increase the number of wintertime resort-goers once the Gondola is operating, and perhaps UDOT itself.

20. UDOT has vastly understated the costs of Gondola Alternative B to the citizens of Utah, to the potential riders of the Gondola, and to the environment while exceedingly overstating who will benefit from the Gondola and what those benefits entail.

21. Gondola Alternative B's purported value to the public at large is marginal at best, and at worst, a permanent blight on an otherwise invaluable treasure that could realistically *worsen* canyon (and surrounding) traffic congestion and *increase* the time associated with travel to and in the Canyon. What cannot be disputed, however, is that UDOT's arbitrary and capricious selection will forever mar Little Cottonwood Canyon's natural beauty.

22. Plaintiffs bring this lawsuit seeking judicial review of UDOT's arbitrary and capricious analysis and decision, including its failure to comply with the procedural and substantive requirements of NEPA. Plaintiffs seek a declaration that UDOT's EIS and ROD fail to comply with NEPA, revocation of and setting aside the Final EIS and ROD, barring UDOT from taking any actions on the Gondola Project that would require an EIS and ROD until it has fully complied with NEPA, and a declaration that UDOT has violated Section 4(f) of the Department of Transportation Act of 1966 to avoid and forestall irreparable harm to the Canyon's irreplaceable resources and to Plaintiffs' interests.

23. Additionally, Plaintiffs seek an order declaring that in considering Gondola alternatives and by selecting Gondola Alternative B, UDOT has acted outside the scope of its delegated authority under the Memorandum of Understanding ("MOU") with the FHWA, as well as 23 U.S.C. § 327. Under the MOU and 23 U.S.C. § 327, UDOT's delegated authority from FHWA was limited to NEPA analysis and construction of "highway projects" as defined in Title 23 of the U.S. Code. UDOT's environmental analysis and proposed construction of a Gondola

serving two private ski areas is *ultra vires* and falls outside the scope of this contractually and statutorily defined term. *See* 23 U.S.C. § 101(a)(11) (defining “highway”); 23 U.S.C. § 101(d) (explaining how federal funds for highway projects are to be expended).

### **JURISDICTION AND VENUE**

24. This Court has jurisdiction of this action under 28 U.S.C. § 1331 and 5 U.S.C. §§ 702, 706. The Court may issue a declaratory judgment and further relief under 28 U.S.C. §§ 2201 and 2202.

25. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because UDOT is headquartered in Salt Lake County, Utah, and a substantial number of the events at issue in this lawsuit occurred within Salt Lake County, Utah.

26. UDOT, by authorization from the FHWA, issued the Record of Decision for the Little Cottonwood Canyon Project on July 12, 2023. Thus, an actual, justiciable controversy exists between the parties in which Plaintiffs are entitled to the relief sought herein to redress the harm Plaintiffs are suffering and will continue to suffer if such relief were not granted.

27. UDOT has waived sovereign immunity under 5 U.S.C. § 702.

### **PARTIES**

28. Plaintiff Friends of Alta is a non-profit organization that was established in 1981 by then-Mayor Bill Levitt and his wife, and Patrick Shea, a private attorney and retired research professor of biology at the University of Utah. Alta is a town at the top of Little Cottonwood Canyon, near where the proposed Gondola will end. Friends of Alta’s mission is to protect and preserve Alta’s (and its surrounding) unique environment, heritage, and character. Friends of Alta recognizes that Alta is a critical ecosystem and has devoted tactical and strategic resources to

protect the watershed and Albion Basin. While changes are inevitable as Utah's population changes and grows, Friends of Alta's members believe that such changes can occur with transparency in decision making, respect for the recreation base of the local economy, and the preservation of the unique place on earth that is Little Cottonwood Canyon. The town of Alta continues to attract thousands of visitors annually who revel in its spectacular scenery.

29. Friends of Alta's members are concerned that UDOT did not adequately comply with the NEPA process and did not consider more reasonable alternatives that could actually address the purpose and need of the Little Cottonwood Canyon Project. Friends of Alta and its members will be harmed by UDOT's selection of an irreversible alternative in which it will construct more than 20 towers scaling as high as 262 feet that will move 40 large Gondola cars snaking up the canyon for over eight miles, forever obstructing the pristine viewshed of Little Cottonwood Canyon. If constructed, the Gondola would be the longest gondola in the world. The construction of the towers will detrimentally harm the watershed, flora and fauna, wildlife, and the views that Friends of Alta has worked to protect since 1981. Further, rather than reducing the traffic problem, the Gondola will serve to increase the number of tourists choosing to access the two private ski areas that the Gondola will serve. And the benefit will go to only recreational users of the two private ski resorts at the cost of detrimentally and irrevocably harming the popular climbing, bike riding, backcountry skiing, and hiking areas, including the famous Alpenboch Loop Trail, that many of Friend of Alta's members enjoy. Friends of Alta and its members submitted numerous critical comments against the Gondola.

30. Kody Fox is the executive director of Friends of Alta and has been a member of Friends of Alta since 2021. Mr. Fox submitted comments during the EIS process on behalf of



himself and on behalf of Friends of Alta. Mr. Fox first discovered the wonders of Alta when a family member purchased a home near the mouth of Little Cottonwood Canyon and spent much of his free time exploring the unique outdoor recreation experiences that the Canyon has to offer. He has spent a great deal of time over the last several years exploring Little Cottonwood Canyon's hiking and mountain biking trails. He fell in love with the beauty of the canyon and the wildlife he frequently encounters. He has passed his adoration for the Canyon to his children who enjoy taking in the wildlife and native canyon flowers, and simply spending their days exploring while immersed in the unique nature that Little Cottonwood Canyon has to offer. The love Mr. Fox has for nature fostered a passion for promoting sustainable, responsible stewardship of the environment for future generations and is what drew him to work at Friends of Alta. UDOT's arbitrary and capricious analysis and selection of Gondola Alternative B as the preferred alternative to address the traffic congestion leading to and along S.R. 210 is detrimental to the purpose and goals of Friends of Alta and harms each of its members, including Mr. Fox. The Gondola will cause significant direct and indirect impacts to the unique environment of Little Cottonwood Canyon that will cause harm to the very things that draw Mr. Fox, members of Friends of Alta, and people all over the world to visit. And it will cause harm to Friends of Alta members, including Mr. Fox, who have dedicated their time and resources to helping preserve the pristine Canyon, including its wildlife, plant life, water resources, and spectacular settings and views, all of which will be impacted by the construction and operation of a Gondola and the increased visitation that will result.

31. Plaintiff International Outdoor Recreation Asset Alliance ("IORAA") is a non-profit organization that was established for the purpose of protecting the beauty, ecologies, and

accessibility of awe-inspiring places like Little Cottonwood Canyon. Under IORAA's general mission, multiple programs focus on protecting recreation areas from development projects and land management practices that primarily serve private interests at the expense of recreationists, conservationists, and the overall public interest in the threatened impact sites. Little Cottonwood Canyon is such a site and IORAA has been running a program to protect the Canyon from the irreparable harm that would be unquestionably caused by the proposed Gondola. IORAA is concerned that UDOT did not adequately comply with the NEPA process and did not adequately or thoroughly consider the more reasonable alternatives that could actually address the purpose and need of the Little Cottonwood Canyon Project. IORAA's and its members' work to protect Little Cottonwood Canyon's ecology will be harmed by the construction of the Gondola because it will disturb, displace, and destroy local wildlife species and the Canyon's flora and fauna, in direct contravention of IORAA's mission of protection and conservation of such resources for purposes of protecting recreation areas.

32. Sydney Stephens is a member and the Director of Conservation Ecology at IORAA. Ms. Stephens has spent a majority of her life interacting with the canyon, by living at the mouth of the Canyon in the city of Cottonwood Heights and recreating as an avid rock climber, hiker, and resort and backcountry skier. Ms. Stephens has been visiting, working, and recreating in Little Cottonwood Canyon multiple times per week for years. As a wildlife biologist and avid conservationist, Ms. Stephens is particularly concerned with the ecology of the Canyon. She has observed, studied, and developed a close connection with the wildlife and plants in the Canyon, and noted inaccuracies in species presence listings in the EIS, specifically noting discrepancies related to federally protected golden eagles. Several aspects of the proposed Gondola affect

wildlife habitat and species. Her concern extends to the potential degradation of clean water sources within the Canyon through sediment deposit during construction, noise pollution and visual impacts, impacting not only her personal experiences as a resident and outdoor enthusiast but also her sense of public duty to preserve the natural resources found in Little Cottonwood Canyon. Ms. Stephens emphasizes the need for public trust in local governmental agencies to help protect and conserve local public land and Forest Service land in Little Cottonwood Canyon rather than serving as a site for construction projects driven by private interests. In her capacity as a member of IORAA who brings to the organization her expertise as a wildlife biologist and conservationist, Ms. Stephens will be harmed by the construction of the Gondola as it will disturb, displace, and destroy local wildlife species that she has spent her private and professional life protecting, including on behalf of IORAA and its members.

33. Plaintiff Craig Heimark is a resident of Alta, Utah who volunteers as the town's treasurer. As a non-Utah native, Mr. Heimark was drawn to and chose to build a home at the top of Little Cottonwood Canyon specifically for its pristine views, recreational activities, and native flora, fauna, and wildlife. To Mr. Heimark, Little Cottonwood Canyon is an escape from the metal and concrete of large cities and the ever-sprawling suburban neighborhoods packed with houses and cars. UDOT's selection of the Gondola will directly harm Mr. Heimark's enjoyment of his home, use of his property, and experiences in Little Cottonwood Canyon. Mr. Heimark is greatly concerned that UDOT did not comply with its NEPA obligations with respect to the Gondola and that UDOT's decision to select the Gondola as the preferred alternative lacked transparency. Mr. Heimark is concerned that the Draft and Final EISs do not provide any meaningful insight into the process and evaluations conducted by UDOT and its cooperating agencies (including the United

States Forest Service) in reaching its preferred alternative. Throughout the NEPA process, UDOT never disclosed to the public the costs per-rider of the Gondola or whether a Gondola ticket to Alta will cost more than a ticket to Snowbird. And based on the alleged purpose and need of the Little Cottonwood Canyon Project—to reduce traffic congestion—UDOT has provided no meaningful discussion on the lack of solution that Phase I or a combination of Phase I and Phase II of the preferred alternative would address the purpose and need of the project. Mr. Heimark is concerned about the lack of justification provided to the public in the DEIS, FEIS, or ROD for the costs to the taxpayer for the Gondola allegedly to solve the problem traffic congestion that UDOT implicitly believes would not otherwise have been solved by a more cost-effective and more broadly useful means. Mr. Heimark commented during the NEPA process regarding these procedural and substantive concerns. Mr. Heimark will suffer harm by the increased traffic leading to the Canyon that will inevitably result from the planned parking garage's location just inside the mouth of the canyon, and the increased tourist traffic that is drawn to the Gondola. Mr. Heimark has one way of reaching his residence, which is by driving up Little Cottonwood Canyon on S.R. 210. The pristine views of his daily commute through the Canyon will be tarnished by the monstrous Gondola towers, cables, and Gondola cars that cross over S.R. 210 at least eleven times.

34. Plaintiff Dr. Jefferson Schmidt and his wife, Plaintiff Victoria Schmidt, have lived in the mouth of Little Cottonwood Canyon for 38 years. The Schmidts chose this location because it was a beautiful, quiet, residential and agricultural place to raise their eight children. Their home at the mouth of Little Cottonwood Canyon continues to be an enjoyable source for hiking, skiing, and appreciating nature up close with an abundance of wildlife, clean air, and water. Their home has an inspiring view up into the majestic Canyon. Little Cottonwood Canyon is a steep, dead

ended, rugged, avalanche prone, creation and, by that very nature, the Schmidts have seen first-hand that it is limited in what can be developed there. The proposed construction of the Gondola will destroy the Canyon and the Schmidts' experience of living there. The Gondola will not solve the traffic problem but will literally bring the problem to their front door, as Dr. Schmidts' property sits just a few hundred feet from the proposed site of the Gondola and parking structure. The construction noise, dust, and vibration will last for years, and once completed the constant noise from the Gondola, as well as the traffic to it, will be endless and relentless. The clear air and drinking water will obviously be affected. The Schmidts' gorgeous view of the magnificent glacier created canyon will be marred by 200-plus foot towers as they march up the canyon. The surroundings associated development of commercial entities will change the Schmidts' quiet residential neighborhood forever. The Schmidts believes that UDOT's vision should be modified, not that of the canyon. They are concerned that UDOT overlooked and was disinterested in common sense solutions to the traffic issues and will instead spend more than \$1 billion to build a Gondola that will benefit only a few corporate entities while destroying the nature of the Canyon. The Schmidts' are especially concerned and commented to UDOT during the NEPA process that the best approach, which had not yet been tried and studied, was increased bus services with incentives for people to use public transit. The Schmidts believe that solution would have better resolved the traffic problem, and instead they will experience greater traffic congestion at their front door with the Gondola. The Schmidts are also concerned that UDOT overlooked and was disinterested in common sense solutions to the traffic issues and will instead spend more than \$1 billion to build a Gondola that will benefit only a few corporate entities while destroying the nature

of the Canyon. The Schmidts expressed their concerns about the Gondola alternatives in public comments throughout the EIS process.

35. Plaintiff Margaret Bourke is a resident of Alta, Utah, who has hiked and skied extensively in Little Cottonwood Canyon since 1981. Ms. Bourke enjoys the aesthetic majesty of the Canyon's mountains, high alpine lakes, and trails that she frequently hikes to observe and photograph the flora, fauna, wildlife, and unobstructed views of the Milky Way and other celestial bodies. The construction of the Gondola, along with the necessary mobility hubs, towers, and cables will dominate the viewshed that Ms. Bourke currently enjoys from her property of the scenic beauty of Little Cottonwood Canyon. Ms. Bourke is greatly concerned that UDOT did not comply with its NEPA obligations with respect to the Gondola. The Draft EIS and Final EIS did not adequately address the environmental impacts of the necessary ancillary construction projects that will be required to implement the Gondola. Nor did the Draft EIS or Final EIS adequately consider the environmental impacts that the construction of the mobility hubs and the towers will have on the Canyon, lack of winter-long traction law enforcement, lack of improved merging between Snowbird and Alta, nor a snow plow station at the top of the Canyon. Significantly, the Gondola will disturb and damage biological, wildlife, recreation, scenic, natural, and cultural and historical resources that Little Cottonwood Canyon offers, which Ms. Bourke continues to rely on in her use and enjoyment of the Canyon. Ms. Bourke's use and enjoyment of the Canyon will be further injured by excavating and/or constructing a resort bus stop and/or mobility hub in the immediate proximity of the Alta City archeological townsite as well as historic structures in Alta. Further, Ms. Bourke will be injured in her enjoyment of the Canyon as adverse impacts occur with ever

more users channeled into the Canyon. Ms. Bourke expressed her concerns in public comments throughout the EIS process.

36. Plaintiff Kirk Nichols is a resident of Utah and professor at the University of Utah teaching courses related to parks, recreation, and tourism. Mr. Nichols has memories of his use and enjoyment of Little Cottonwood Canyon that go back nearly 65 years. For 40 years, Mr. Nichols has rock climbed and ice climbed on both sides of lower Little Cottonwood Canyon. He has also ridge walked Little Cottonwood Canyon from top to bottom and hiked the length of each of the canyons on the south side of Little Cottonwood Creek countless times. In addition to teaching his own children to ski at Alta, Mr. Nichols taught telemark skiing at Alta and backcountry avalanche courses and rock-climbing courses in Little Cottonwood Canyon for many decades. Mr. Nichols and his siblings own a cabin in Big Cottonwood Canyon. To get to the property, Mr. Nichols and his family must pass through S.R. 210 and the congestion sprawling out into the valley from the bottom of both Big and Little Cottonwood Canyon. Mr. Nichols is aware of and greatly concerned by UDOT's failures to conduct an adequate and thorough NEPA process. UDOT's decision to build a parking garage with at least 1,500 parking stalls as part of the "Gravel Pit" "mobility hub" for the Gondola is detrimental to Mr. Nichols' current use and enjoyment of the Canyon. Mr. Nichols is concerned that UDOT ignored all requests to start with a programmatic-EIS and suddenly stopped its separate regional plan that they called the Cottonwood Canyons-Transportation Action Plan (CC-TAP) because UDOT intended to choose the Gondola as a preferred alternative (regardless of the outcome of any NEPA analysis) and that UDOT overlooked entirely the basis for the Little Cottonwood Canyon Project: to reduce traffic congestion. Mr. Nichols is concerned that UDOT intends to build parking garages at or near the

base of Big and Little Cottonwood Canyon, without conducting meaningful traffic surveys, which will significantly contribute to the traffic congestion on S.R. 190, S.R. 209, and S.R. 210, as well as the feeder roads to and from those highways. Further, Mr. Nichols' enjoyment of rock and ice-climbing and hiking will be diminished by looking straight across, eye-to-eye, with Gondola towers and cables (that will be in violation of the Forest Service Landscape Integrity Attributes) and will never blend in with the surrounding natural scenery he has enjoyed in the Canyon for decades. Mr. Nichols expressed these and other concerns in public comments during the EIS process.

37. Plaintiff Allen Sanderson, a resident of Salt Lake City, first started climbing in Little Cottonwood Canyon in the fall of 1987 and has climbed in the Canyon almost every year since then. Over the past 35 years, he has spent 5–10 days each year climbing (both rock and ice), hiking, skiing, and on occasion biking in Little Cottonwood Canyon. One of his first climbs was the 5.10 Mexican Crack that is in the lower portion of the canyon on U.S. Forest Service land. Since then he has climbed extensively on both the U.S. Forest Service-managed lands in the lower Canyon as well as the land owned by the LDS Church (aka the Gate Butte) repeating nearly all of the climbs in both areas. In addition to climbing extensively in the lower canyon, Mr. Sanderson has climbed in the upper canyon in Tanner's Gulch as well as at Hellgate. All of these areas will be negatively impacted by the building of the Gondola and will result in harm to Mr. Sanderson's experiences climbing and using resources in the Canyon. Mr. Sanderson believes one of the pleasures of climbing in the lower canyon is the ease of access and the ability to escape the city quickly and the great views afforded. With the exception of the privately owned Wasatch Resort, much of which is hidden by native trees, there is no visual development other than the roadway,



S.R. 210. Such views would be irreparably lost with the building of a Gondola and would have severe negative impacts on Mr. Sanderson's use and enjoyment of the Canyon. In addition to the views, animals such as Mountain Goats frequent the climbing areas. Once while climbing a route, Mr. Sanderson stopped mid-route to watch goats scramble among the adjacent rocks. The tranquility of such interaction will be irreparably lost with the continuous noise of the Gondola. Mr. Sanderson commented throughout the EIS process on the Little Cottonwood Canyon Project and, as reflected in his comments, has significant concerns regarding the purpose, needs, and analysis identified in the EIS documents leading to UDOT's selection of Gondola Alternative B. Mr. Sanderson has been harmed by UDOT's procedural failures relating to NEPA and by UDOT's substantive and procedural failures regarding Section 4(f) resources because UDOT has dismissed and failed to analyze and consider concerns and impacts that relate directly to Mr. Sanderson's uses of the Canyon identified above.

38. Defendant UDOT is a Utah state agency and its decisions and actions on transportation and highway projects are administered, funded, or constructed subject to State transportation laws and regulations. UDOT is responsible for issuing the Draft EIS, Final EIS, and ROD challenged here. Under a January 2017 Memorandum of Understanding between UDOT and FHWA, and FHWA's delegation of responsibilities under federal laws to UDOT for the Little Cottonwood Canyon Project, UDOT's Little Cottonwood Canyon Project is subject to state and federal transportation laws and regulations including NEPA and its implementing regulations, as well as the federal Administrative Procedure Act ("APA").

## LEGAL FRAMEWORK

### **I. Administrative Procedure Act**

39. Because NEPA does not include a private right of action, this case is brought pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. 551–559, 701–706. The APA allows persons and organizations to challenge final agency action in the federal courts.

40. Judicial review of agency actions under the Little Cottonwood Canyon Project, and the relevant statutes’ implementing regulations, is governed by the APA, 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. “[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.” *Id.* § 704.

41. 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).

### **II. National Environmental Policy Act**

42. The United States Congress enacted NEPA “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321.

43. NEPA has two primary objectives: (1) to foster informed decision-making by requiring agencies to consider the environmental impacts of their proposed actions, and (2) to ensure that agencies inform the public that they have considered environmental concerns in their decision-making process. 40 C.F.R. § 1500.1(c).

44. Agencies must “integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. § 1501.2(a).

45. To this end, the Council on Environmental Quality (“CEQ”) has promulgated regulations implementing NEPA. Among other things, the rules are intended to “tell federal agencies what they must do to comply with the procedures and achieve the goal of [NEPA],” to “insure that environmental information is made available to public officials and decisions are made before actions are taken,” and to ensure “better decisions” and “foster excellent action.” 40 C.F.R. § 1500.1(a)–(c)(1987).<sup>1</sup>

46. All federal agencies are required to prepare an EIS on “proposals for ... major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). The EIS must include:

- (i) reasonably foreseeable environmental effects of the proposed agency action;

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<sup>1</sup> Since the CEQ amended its NEPA regulations in 2020, those regulations “apply to any NEPA process begun after September 14, 2020. An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020.” 40 C.F.R. § 1506.13 (2020). Because the Little Cottonwood Canyon Project began in 2019, and because UDOT throughout the NEPA process relied on CEQ’s 1978 NEPA regulations, those regulations apply to UDOT’s decision and analysis.

(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

42 U.S.C. § 4332(C).

47. NEPA requires that agencies “succinctly describe the environment of the area(s) to be affected or created by the alternative under consideration.” 40 C.F.R. § 1502.15. NEPA also requires the action agency to set an appropriate baseline detailing the nature and extent of the resources in that area. “The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process.” Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* 41 (January 1997). “Without establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

48. The agency must, among other things, rigorously explore and objectively evaluate all reasonable alternatives to the actions considered in the EIS, including a baseline alternative of taking “no action.” 40 C.F.R. § 1502.14. The environmental effect of taking no action, including

the predictable private actions by others, must be analyzed and compared with the effects of approving the proposed action. 46 Fed. Reg. 18,026, 18,027 (March 23, 1981).

49. NEPA also requires that the agency take a “hard look” at all direct, indirect, and cumulative environmental effects of the proposed action and its alternatives. 40 C.F.R. §§ 1502.14, 1502.16; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Direct effects are those that are “caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect effects are those that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(b). A cumulative effect is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7. “Effects” are synonymous with “impacts.” *Id.* § 1508.8.

50. The agency proposing the action must also analyze connected actions, cumulative actions, and similar actions, together with the proposed action, in a single EIS. Actions are connected if each action would not take place without the other and thus have no independent utility. *See id.* § 1508.25(a)(1). Cumulative actions are those that “when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” *Id.* § 1508.8(a)(2). Similar actions are those that, “when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” *Id.* § 1508.8(a)(3).

51. The agency responsible for preparing the EIS for a proposed project must issue a public ROD stating the agency's decision concerning the project, identifying the alternatives considered environmentally preferable, and "discuss all such factors, including any essential considerations of national policy, that the agency balances in making its decision and state how those considerations entered into its decision." 40 C.F.R. § 1505.2(a)(1)–(2). The agency must also state in the ROD whether it has "adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not." *Id.* § 1505.2(a)(2). Further, the agency "shall adopt and summarize, where applicable, a monitoring and enforcement program for any enforceable mitigation requirements or commitments." *Id.* § 1505.2(a)(3).

52. In reviewing a challenge to the NEPA process, the United States Court of Appeals for the Tenth Circuit has explained that it will "will not 'supply a reasoned basis for the agency's action that the agency itself has not given.'" *High Country Conservation Advocates v. United States Forest Service*, 951 F.3d 1217, 1223 (10th Cir. 2020) (emphasis added) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

53. In the ROD, "the decision maker shall certify ... that the agency has considered all of the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement." 40 C.F.R. § 1505.2(b).

## **FACTUAL BACKGROUND**

### **I. Little Cottonwood Canyon**

54. Little Cottonwood Canyon lies in the Uinta-Wasatch-Cache National Forest (managed by the United States Forest Service) along the eastern edge of Salt Lake City in Salt Lake County, Utah.

55. The Canyon is home to two Congressionally designated Wilderness Areas: the Lone Peak Wilderness, established in 1978, and the Twin Peaks Wilderness, established in 1984. The outstanding terrain and natural resources of the Canyon inspire and foster numerous winter activities including resort skiing, backcountry skiing, snowshoeing, and ice climbing, and numerous summer activities including hiking, biking, picnicking, photography, climbing, fishing, and camping.

56. According to UDOT, the two privately owned ski areas, Snowbird and Alta, “offer” these “abundant recreation opportunities.” (LLC\_FEIS\_Volume 1, Chapter 1, at 1-5.)

57. Residents of Utah and those who travel from out of state can engage in these recreation opportunities in Little Cottonwood Canyon without the “offer” from Snowbird or Alta, save the opportunity to ski at the two private ski areas.

58. Little Cottonwood Canyon is also a critical watershed area, as defined by the Salt Lake Valley Board of Health, and a source of drinking water for many residents of Salt Lake County.

59. The purpose of a watershed is to protect and promote health and promote conditions that contribute to preserving and protecting drinking water quality.

60. There are sixteen sensitive wildlife species that occur in the Salt Lake Ranger District, which includes Little Cottonwood Canyon. (LCC\_FEIS\_Volume 4, Chapter 13, 13-10–13-20.)

61. Also located in the Canyon are golden eagles, which are expressly protected by the Bald and Golden Eagle Protection Act. 16 U.S.C. 668 *et seq.* The Final EIS asserts that there are no golden eagles in the Canyon (LCC\_FEIS\_Volume 4, Chapter 13, T. 13.3-6), even though UDOT was notified through public comment of the presence of a pair of golden eagles that nest at the base of the Canyon, and that visitors of the Canyon have seen golden eagles since the 1980s.

62. Little Cottonwood Canyon is accessed using one of two state roads: via S.R. 210 on the north or S.R. 209 on the south side of the canyon. These two roads are connected by Wasatch Boulevard to the west, which continues north (merging with S.R. 210) and south of the canyon. To the north, S.R. 210/Wasatch Boulevard connects to Big Cottonwood Canyon Road (S.R. 190) and Fort Union Boulevard, which runs east to west through the city of Cottonwood Heights. (*See* LCC\_FEIS\_Volume 1, Chapter 1, Fig. 1.1-1.) During high-congestion winter traffic days, delays and congestion extend well beyond S.R. 190 on the north and S.R. 209 and Wasatch Boulevard on the south and west.

## **II. Little Cottonwood Canyon Project**

63. In 2017, the Utah legislature passed Senate Bill 277 to fund transportation improvement projects associated with recreation and tourism within the state. S.R. 210 was identified as a top priority transportation improvement project by the Utah Transportation Committee.



64. In March 2018, the FHWA published in the Federal Register on behalf of UDOT a Notice of Intent to prepare the Little Cottonwood Canyon EIS for certain proposed improvements to S.R. 210.

65. In general, the Secretary of Transportation has the responsibility to carry out transportation projects. 23 U.S.C. § 327. But the Secretary of Transportation may assign to the State “the responsibilities of the Secretary with respect to one or more highway projects within the State under [NEPA].” *Id.* § 327(1)(2). The FHWA assigned its responsibilities under NEPA and other federal environmental laws to UDOT for highway projects pursuant to 23 U.S.C. § 327 and in a memorandum of understanding (“MOU”). The MOU defines “highway project” consistent with the definition found at 23 C.F.R. § 773.103.

66. The MOU required UDOT to carry out the environmental review process for the Little Cottonwood Canyon Project and prepare an EIS.

67. The Notice of Intent filed on behalf of UDOT “stated UDOT’s proposal to make operations improvements, introduce demand-management measures, and facility implementation of improved public transit service on S.R. 210.” (LLC\_FEIS\_Volume 1, Chapter 1, at 1-6.)

68. After reviewing the comments submitted during the scoping period between March 9 and May 14, 2018, UDOT “revised the scope of th[e] EIS to focus on enhancing safety and improving wintertime mobility through avalanche mitigation, improving parking at existing USDA Forest Service trailheads, and making roadway improvements to Wasatch Boulevard from S.R. 190/Fort Union Boulevard to North Little Cottonwood Road.” (LCC\_FEIS\_Volume 1, Chapter1, at 1-6.)

69. The “transportation needs assessment study area, or study area, used for the Little Cottonwood Canyon EIS extends along S.R. 210 from its intersection with S.R. 190/Fort Union Boulevard in Cottonwood Heights, Utah, to its terminus in the town of Alta, Utah, and includes the Alta Bypass Road.” (LCC\_FEIS\_Volume 1, Chapter 1, at 1-3.) “UDOT developed the study area to include an area that is influenced by the transportation operations on S.R. 210 and to provide logical termini for the project.” (*Id.*)

70. UDOT selected the intersection of S.R. 190/Fort Union Boulevard “as the western terminus [of the study area] because it is the point where traffic splits between Big Cottonwood Canyon and Little Cottonwood Canyon” and the traffic “south of this intersection is mostly related to trips into and out of Little Cottonwood Canyon and commuter traffic on Wasatch Boulevard.” (LCC\_FEIS\_Volume 1, Chapter 1, at 1-3.) According to the FEIS, UDOT ignored the traffic that developed prior to the intersection of S.R. 190/Fort Union Boulevard when determining whether the alternatives—as explained in greater detail below—would help resolve any traffic congestion or safety.

71. According to UDOT, it “intends to improve the transportation-related commuter, recreation, and tourism experiences for all users of S.R. 210 through transportation improvements that improve roadway safety, reliability, and mobility on S.R. 210.” The purpose of the Little Cottonwood Canyon Project “is reflected in one primary objective for S.R. 210: to substantially improve roadway safety, reliability, and mobility on S.R. 210 from Fort Union Boulevard through the town of Alta for all users on S.R. 210.” (LCC\_FEIS\_Volume 1, Chapter 1, at 1-7.)

72. UDOT also “considered goals put forward by Cottonwood Heights City in its adopted *Wasatch Boulevard Master Plan* (Cottonwood Heights City 2019),” such as “a connected

network of paths and trails for transportation and recreation and a balance of livability, roadway capacity, and sustainable canyon access.” (LCC\_FEIS\_Volume 1, Chapter 1, at 1-7.)

73. “In addition, UDOT considered the goals in the Town of Alta’s *Alta Commercial Core: Active Transportation Implementation Plan* (Town of Alta 2019),” which included “accommodating bicycle and pedestrian use along S.R. 210, socially activating the commercial core, managing vehicle speeds and increasing safety, preserving or optimizing on-street parking, and planning for snow removal.” (LCC\_FEIS\_Volume 1, Chapter 1, at 1-7.)

74. Further, UDOT claimed that “another secondary objective” was to “mitigate short-term impacts and minimize potential long-term transportation system impacts to water quality.” (LLC\_FEIS\_Volume 1, Chapter 1, at 1-7.)

75. UDOT identified that the process “will include coordinating with the USDA Forest Service, the Salt Lake City Department of Public Utilities, the Metropolitan Water District of Salt Lake and Sandy, and Sandy City to consider alternatives and develop management practices that maintain the quality of the Little Cottonwood Canyon watershed.” (LCC\_FEIS, \_Volume 1, Chapter 1, at 1-7.)

76. As the lead agency taking on the responsibility of the NEPA process, UDOT identified the following agencies as “[c]ooperating and participating” agencies: U.S. Army Corps of Engineers, U.S. Department of Agriculture (USDA) Forest Service, and U.S. Environmental Protection Agency. (LLC\_FEIS\_Volume 1, Chapter 1, at T. 1.1-1).

77. The deficiencies UDOT claimed to be seeking to address through the project were:
- a. Decreased mobility in winter during the morning (AM) and afternoon (PM) peak travel periods related to visits to ski areas, with the greatest traffic volumes on weekends and holidays and during and after snowstorms.

- b. Decreased mobility on Wasatch Boulevard resulting from weekday commuter traffic.
- c. Safety concerns associated with avalanche hazard and traffic delays caused by the current avalanche-mitigation program.
- d. Limited parking at trailhead and ski areas that leads to roadside parking.

(LCC\_FEIS\_Volume 1, Chapter S, at S-3.)

78. To comply with NEPA, UDOT was required to develop an EIS that includes reasonable alternatives for the project development.

### **III. Environmental Impact Statements and the Preferred Alternative**

#### **A. The Five Alternatives**

79. As part of the NEPA process, UDOT presented five alternatives: (1) Enhanced Bus Service Alternative; (2) Enhanced Bus Service in Peak-period Shoulder Lane Alternative; (3) Gondola Alternative A (Starting at the entrance of Little Cottonwood Canyon); (4) Gondola Alternative B (Starting at La Caille); (5) Cog Rail Alternative (Starting at La Caille).

(LCC\_FEIS\_Volume 1, Chapter S, at S-5.)

80. Under NEPA, UDOT is required to establish, as a baseline, a “no action” alternative to the Little Cottonwood Canyon Project. As with all alternatives, NEPA requires that the EIS for the “no action” alternative should be “in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§1502.16).” 42 C.F.R. § 1502.14.

81. UDOT provided only the following information in the Final EIS regarding the No-Action Alternative:

NEPA requires an analysis of the No-Action Alternative. This alternative serves as the baseline so that decision-makers can compare the environmental effects of the action alternatives.

If no action is taken on S.R. 210, UDOT would continue to make minor maintenance improvements to parking and access. Overall, with the No-Action Alternative, the basic layout and operation of S.R. 210 would not change.

(LCC\_FEIS\_Volume 1, Chapter 2, at 2-53.)

82. Nothing in UDOT's No-Action Alternative statements meaningfully provides for what the current traffic congestion is, the impacts the current traffic congestion has on the environment, the extent to which traffic will increase with a no-action alternative, or a prediction of what the environmental impacts would be if no action was taken.

83. UDOT also proposed five "sub-alternatives [to] help the primary alternatives achieve the project goals." These include: (1) S.R. 210–Wasatch Boulevard Alternatives (Imbalanced-lane Alternative and Five-lane Alternatives); (2) Mobility Hubs Alternative (Gravel Pit, and 9400 South and Highland Drive); (3) Avalanche Mitigation Alternatives (Snow Sheds with Berms Alternative and Snow Sheds with Realigned Road Alternative); (4) Trailhead Parking Alternatives (Trailhead Parking Improvements and No S.R. 210 Roadside Parking within ¼ Mile of Trailheads Alternative; Trailhead Parking Improvements and No Roadside Parking from S.R. 209/S.R. 210 Intersection to Snowbird Entry 1 Alternative; No Trailhead Parking from S.R. 209/S.R. 210 Intersection to Snowbird Entry 1 Alternative); (5) No Winter Parking Alternative. (LCC\_FEIS\_Volume 1, Chapter S, at S-15.)

84. On August 31, 2022, UDOT issued its Final EIS, which identified Gondola Alternative B as its preferred alternative. (LCC\_FEIS\_Volume 1, Chapter S, at S-24.) On June 29, 2023, UDOT issued the ROD. 88 FR 45268.

85. The Little Cottonwood Canyon Project described in the Final EIS involves three phases ultimately resulting in UDOT's selection of the construction of the Gondola—regardless of the success of the first two phases in addressing the alleged purpose and need of the Project.

86. “Phase 1 will consist of Improved and Increased Bus Service (similar to the bus service described under the Enhanced Bus Service Alternative but in a smaller scale to meet demands meet the demands associated with earlier years of operation), a mobility hub at the gravel pit (as described under the Enhanced Bus Service Alternative), and bus stops at the Snowbird and Alta ski resorts (as described under the Enhanced Bus Service Alternative),” as well as tolling and “No Winter Parking Alternative.” (LCC\_ROD\_at 2–3.)

87. “Phase 2 will involve constructing the Snow Sheds with Realigned Road Alternative, the Wasatch Boulevard Sub-alternative, and the Trailhead Improvements and No S.R. 210 Roadside Parking within ¼ Mile of Trailheads Alternative. Phase 2 implementation will depend on available funding.” (LCC\_ROD\_at 3.)

88. “Phase 3 will involve constructing Gondola Alternative B and its supporting infrastructure (base station parking and its access roads). Phase 3 implementation will depend on available funding.” (LCC\_ROD\_at 3.)

89. The Enhanced Bus Service Alternative would cease when the Gondola is operational. (LCC\_FEIS\_Volume 4, Chapter 19, 19-3; LCC\_FEIS\_Volume 1, Chapter 2I, at 2; LCC\_ROD, at 2–3.)

90. UDOT also identified elements of the sub-alternatives that it would incorporate in the Project: (1) the Five-lane Alternative (Wasatch Boulevard alternative), (2) Snow Sheds with Realigned Road Alternative (avalanche mitigation alternative), (3) Trailhead Improvements and

no Roadside Parking within ¼ Mile Alternative (trailhead parking alternative), and (4) No Winter Parking Alternative. These sub-alternatives will be implemented during the first and second phases of the Project. (LCC\_ROD, at 2.)

91. According to UDOT’s Final EIS, “UDOT prefers Gondola Alternative B primarily because it would provide the best overall reliability.” It further stated that “[b]ased on public input, and recognizing that safety, mobility, and reliability are issues on S.R. 210 today, and that it could take years to obtain funding to complete construction of Gondola Alternative B, UDOT has also determined that the preferred alternative should include implementing components of the Enhanced Bus Service Alternative, pending completion of Gondola Alternative B.” (LCC\_FEIS\_Volume 1, Chapters S, at S-9.)

**B. The Impacts**

92. UDOT has failed to comply with NEPA’s obligation to take a “hard look” at the environmental impacts of the Alternatives, including the preferred Gondola Alternative B.

1. Failure to consider adequately the impacts of the Gondola on Little Cottonwood Canyon’s watershed and drinking water.

93. According to the Salt Lake County Health Department and the U.S. Forest Service, “all of Little Cottonwood Canyon” is a protected watershed area. *Watersheds in the Salt Lake Valley*, U.S. Forest Service, available at [https://www.fs.usda.gov/detailfull/uwcnf/landmanagement/resourcemanagement/?cid=fsem\\_035491&width=full](https://www.fs.usda.gov/detailfull/uwcnf/landmanagement/resourcemanagement/?cid=fsem_035491&width=full); *Watersheds*, Salt Lake County Health Department, available at <https://slco.org/health/water-quality/watersheds/>.

94. The Little Cottonwood Canyon watershed contributes to “more than half of the drinking water that 360,000 people depend on every day.” *Watershed Management Plant*, Salt

Lake City Public Utilities, available at <https://www.slc.gov/utilities/watershed/watershedmanagementplan/>. (See also LCC\_FEIS\_Volume 4, Chapter 12, at 12-4.)

95. In the Final EIS, UDOT recognized that Gondola Alternative B would “add a total of about 13.5 acres of new impervious surface (improvements to North Little Cottonwood Road, parking structures, gondola base station, bus stations, and roadways west of the parking structure)” solely “at the Gondola Alternative B base station.” (LCC\_FEIS\_Volume 4, Chapter 12, at 12-35.)

96. But UDOT also stated, without addressing the Superfund sites that the Gondola structures, parking garage, and towers would be built on or near (or the construction thereof would be on or near), that the “gondola stations, towers, and cabins would not discharge pollutants to the groundwater, and no groundwater quality impacts are anticipated.” (LCC\_FEIS\_Volume 4, Chapter 12, at 12-36.) This contradicts the statements made with respect to Superfund sites addressed in Chapter 16 of the Final EIS, as addressed below.

97. This statement also contradicts UDOT’s explanations in Chapter 3 of the Final EIS, which provides that, with respect to Gondola Alternative B: “The USDA Forest Service has stated that ... the *Forest Plan* would need to be amended if the gondola system would be inconsistent with the plan’s management prescriptions.” “The applicable management prescriptions are the watershed emphasis (MP 3.1W) and developed recreation areas (MP 4.5) management prescriptions.” (LCC\_FEIS\_Volume 1, Chapter 3, at 3-34.)

98. But because UDOT arbitrarily decided the Gondola system is “not considered a motor vehicle travelway,” (and thus beyond UDOT’s delegated responsibility from the Secretary of Transportation to study and construct “highway projects”) the “gondola system ... would be consistent with the watershed emphasis management prescription, and a *Forest Plan* amendment



would not likely be required.” (LCC\_FEIS\_Volume 1, Chapter 3, at 3-34.) Thus, UDOT does not yet even know if it will have to work with the Forest Service to revise the Forest Plan to ensure that Gondola Alternative B would be consistent with the current management prescriptions on the Little Cottonwood Canyon watershed.

99. Further, in addressing the watershed, UDOT refers only to the base station as being located near the watershed, but does not address the locations of each of the 22 towers and their proximity to the ground and surface level water sources of the watershed. (LCC\_FEIS\_Volume 4, Chapter 12, at 12-34, 12-36; LCC\_FEIS\_Volume 1, Chapter 3, at 3-28; LCC\_FEIS\_Volume 4, Chapter 16, at 16-12.)

2. Failure to consider adequately the impacts of the Gondola on wildlife.

100. Chapter 13 of the Final EIS discusses “Ecosystem Resources,” and in that chapter UDOT has identified what actions are required under Section 7 of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, “before taking any action that could affect a federally listed threatened or endangered species or designated critical habitat for an endangered species.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-2.)

101. The MOU between the FHWA and UDOT defers to UDOT the “responsibilities for compliance with Section 7 requirements as part of the environmental review process for highway projects in Utah.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-2.)

102. UDOT identified the “Ecosystem Resources Impact Analysis Area” as “extend[ing] along State Route (S.R.) 210 from its intersection with S.R. 190/Fort Union Boulevard in Cottonwood Heights to its terminus in the town of Alta, including the Alta Bypass Road” and it “also includes the area around the gravel pit adjacent to Wasatch Boulevard north of Fort Union

Boulevard and the existing park-and-ride lot at 9400 South and Highland Drive.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-1.)

103. UDOT identified “the entirety of Little Cottonwood Canyon” as the impact analysis area for “wildlife habitat.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-1.)

104. UDOT received “a list of 16 Forest Service sensitive species that are known or suspected to occur in the Salt Lake Ranger District” from representatives from the Uinta-Wasatch-Cache National Forest. “These sensitive species are listed in Table 13.3-2 along with information about potentially suitable habitat or documented occurrences in the ecosystem resources impact analysis area.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-10.)

105. But according to UDOT, “[g]eneral field surveys conducted prior to the release of the Draft EIS did not identify any of the species listed in Table 13.2-2.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-10). UDOT did not identify which agency conducted the field surveys.

106. UDOT also states that “UDOT’s database research and consultation with agencies indicates that no federally listed plant species are known to occur in Salt Lake County.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-10.) UDOT did not identify which “database” it used to make this determination, nor did it identify which “agencies” it consulted.

107. Without knowing which “database” UDOT used to make the determination that there were no federally listed plants known to occur in Salt Lake County, the public is prevented from confirming that UDOT complied with its Section 7 and NEPA requirements.

108. Without knowing which “agencies” UDOT consulted to make the determination that there were no federally listed plants known to occur in the Canyon, the public is prevented

from verifying with those agencies that UDOT complied with its Section 7 and NEPA requirements.

109. In “Pertinent Correspondence,” The U.S. Fish and Wildlife Service informed UDOT: “Please be aware that bald and golden eagles are protected under the Bald and Golden Eagle Protection Act (16 U.S.C. 668 *et seq.*), and projects affecting these species may require development of an eagle conservation plan[.]” (LCC\_FEIS\_Volume 4, Chapter 13A, at 2.)

110. UDOT has not adequately considered the effects of the Gondola on golden eagles that are located within Little Cottonwood Canyon.

111. Golden eagles have been frequent inhabitants of Little Cottonwood Canyon with several historical, alternative, and currently in-use nests found throughout the Canyon today.

112. Golden eagles often switch nests between breeding seasons, occupying several nests over their lifetime, underscoring the importance of protecting all intact nests within their habitat.

113. Many citizens and visitors of Little Cottonwood Canyon effortlessly observe golden eagles in the Canyon, and occasionally document these sightings in and around Little Cottonwood Canyon on publicly available citizen science platforms such as eBird and iNaturalist.

114. HawkWatch International is a renowned expert entity in raptor biology and is often contracted by the Utah Division of Wildlife Resources to share data on various species’ nesting and overall fitness, including golden eagles.

115. HawkWatch International has been monitoring nesting areas from ground surveys in and around the mouth of Little Cottonwood Canyon and has available data on the golden eagle presence in this location.

116. Recent field surveys from HawkWatch International confirmed the presence of two adult golden eagles and active use of a nest in Little Cottonwood Canyon in April 2023.

117. In a helicopter survey, HawkWatch International also confirmed the presence of three nests currently associated with golden eagle use, with an additional five nests identified as older or potential golden eagle nests. Further, six different eagle sightings were documented where two adults and one juvenile golden eagle were identified.

118. UDOT has determined that “[p]otentially suitable breeding habitat exists in the cliffs in the ecosystem resources impact analysis area” for golden eagles but “[i]ndividuals have **not** been observed in the area.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-19.)

119. UDOT did not discuss, consider, or identify any golden eagle nests in the impact analysis area.

120. UDOT did not disclose or identify any agency or entity with which it worked to determine that there were no golden eagles present in the Canyon or why it did not need to consider the presence of golden eagle nests in the Canyon.

121. Any construction of the Gondola that affects the habitat, nests, and presence of the golden eagles currently present in Little Cottonwood Canyon will be a violation of the Bald and Golden Eagle Protection Act, which makes it unlawful to “knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter,” 16 U.S.C.

§ 668(a). And “take” means “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” *Id.* § 668c.

122. The U.S. Fish and Wildlife Service also informed UDOT in the “Pertinent Correspondence” to consider “[g]uidance for minimizing impacts to migratory birds for projects including communications towers (e.g., cellular, digital television, radio, and emergency broadcast).” (LCC\_FEIS\_Volume 4, Chapter 13A, at 2.)

123. UDOT stated that “[i]mpacts to migratory birds and raptors would include a minor loss of disturbed roadside habitat and increased noise and visual disturbance,” and that “[c]onstruction activities could take migratory birds and displace birds from habitat near construction areas.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-30.)

124. UDOT states that, to the extent migratory birds and raptors are affected by the construction, it will coordinate with the Forest Service “to determine any known raptor nests in the helicopter flight path or in areas that could be disturbed by construction activities and to determine when and where preconstruction raptor nest surveys should occur.” Further, “[i]f active nests are found, UDOT will coordinate with the USDA Forest Service and [U.S. Fish and Wildlife Service] regarding protocols to protect the active nests.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-58–13-59.)

125. UDOT also provides that “[i]mpacts to migratory birds and raptors would include a loss of 12 acres of habitat, displacements during construction, increased habitat fragmentation, and potential destruction of nests during summer construction.” Further, “[d]isturbance by construction workers and equipment might be substantial enough to cause stress to nesting birds

and cause birds to abandon their nests and their young to be killed by predators.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-30, 13-34, 13-37, 13-41, 13-45, 13-49, 13-53.)

126. UDOT indicates that these impacts would occur with respect to all Alternatives proposed in the EIS, but does not adequately explain how the impacts would be more or less significant for the Gondola Alternatives. (LCC\_FEIS\_Volume 4, Chapter 13, at 13-45.)

127. Based on UDOT’s “mitigation” statements, it appears that UDOT has not actually conducted any legitimate survey to determine whether any migratory birds, or golden eagles and their nests, are present in the Canyon and will be disturbed by the construction and presence of the Gondola.

128. UDOT also provides that “[t]o the extent practicable, gondola towers and lighting design should consider recommendation from the *Recommended Best Practices for Communication Tower Design, Siting, Construction, Operation, Maintenance, and Decommissioning* (USFWS 2021)” and that “[t]ower lighting should be implemented only if required by FAA, and flashing red lights and an aircraft detection lighting system should be used if allowed.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-59.)

129. According to these statements, UDOT is aware that the Gondola towers and necessary lighting on those towers is required by FAA regulations for towers taller than 200 feet, but UDOT does not address the impacts of such lighting based on the false contingency that lighting will be used only “if required by FAA.” (*See id.*)

130. UDOT states that “Little Cottonwood Canyon is not considered a wildlife migration corridor,” but acknowledges that “the presence of gondola towers and the increase in activity from

gondola cabins moving overhead could slightly increase the barrier effect for terrestrial mammals that use the canyon.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-45.)

131. UDOT boldly states, without citation to any support or survey that “[t]errestrial mammals would eventually acclimate to the presence of the gondola.” (LCC\_FEIS\_Volume 4, Chapter 13, at 13-45.)

3. Failure to consider adequately the impacts of the Gondola on roadless areas.

132. In the Final EIS, UDOT failed to consider the impacts of the Gondola on roadless areas, and after the Final EIS was published, the U.S. Forest Service “requested that UDOT provide supplemental information and analysis regarding the impacts of the S.R. 210 Project to Inventoried Roadless Areas under the 2001 Roadless Area Conservation Rule (RACR; 66 Federal Register 3243 [January 12, 2002]) and the Forest Plan.” (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 1.) A supplemental information report is issued after a Final EIS is issued and includes information that was not but should have been included in the Final EIS for the public to comment on.

133. “The 2001 Roadless Rule establishes prohibitions on road construction, road reconstruction, and timber harvesting on 58.5 million acres of inventoried roadless areas on National Forest System lands. The intent of the 2001 Roadless Rule is to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management.” *2001 Roadless Rule*, USDA Forest Service, last visited 11/15/2023, available at <https://www.fs.usda.gov/main/roadless/2001rule/#:~:text=The%202001%20Roadless%20Rule%20establishes,on%20National%20Forest%20System%20lands>.

134. According to UDOT, “RACR required the USDA Forest Service to conduct an inventory of roadless areas for their potential to be designated as wilderness based on size (at least 5,000 acres) or location (contiguous to an existing Wilderness Area).” (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 1.) And if “an area meets these criteria, it becomes an ‘Inventoried Roadless Area’ (IRA) for the purpose of the RACR.” *Id.*

135. In the Supplemental Information Report, UDOT recognized that “the RACR prohibits road construction, road reconstruction, and timber harvesting (timber cutting, sale, or removal) in IRAs unless certain exceptions or circumstances exist.” (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 1.)

136. Again, UDOT did not consider this prior to publishing the Final EIS.

137. “Little Cottonwood Canyon contains the White Pine IRA and portions of the Twin Peaks and Lone Peak IRAs. These three IRAs are adjacent to the two Wilderness Areas, Twin Peaks and Lone Peak, in Little Cottonwood Canyon.” (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 2.)

138. “The Little Cottonwood Canyon Final EIS proposes alternatives and sub-alternatives, which would require activities in IRAs that are not considered roads, but may have associated ground disturbance including timber cutting and removal.” And the “Little Cottonwood Canyon Final EIS also proposes alternatives that would have activities that would be considered construction or reconstruction of the existing S.R. 210 roadway.” (LCC\_Supplemental



Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 4.)

139. Although UDOT made these statements, UDOT has not adequately considered the extent of the construction required for the Gondola Alternatives.

140. For example, UDOT provides that Gondola Alternative B would require 20 towers, 8 of which would be located within the IRAs, as well as the Tanner Flats angle station. (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 52, 33.)

141. “A total of about 2 to 3 acres of vegetation would be removed depending on final design,” and the “gondola alignment (not including towers and angles stations) would be located over about 13.3 acres of the IRAs total—about 6.6 acres in the Twin Peaks IRA (0.10%), 5.9 acres in the Lone Peak IRA (0.67%), and 0.8 acre in the White Pine IRA (0.04%).” (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 33–35, 55.)

142. UDOT attempts to explain that it would be able to use National Forest System lands “in the form of a nonexclusive right-of-way for highway purposes by FHWA or through a special-use authorization,” while at the same time establishing that “a gondola system is not considered a motor vehicle travelway, ... therefore, Gondola Alternative A [and Gondola Alternative B] would be an activity not otherwise prohibited by the RACR.” This assertion is contrary to UDOT’s authority, delegated by FHWA, to analyze and construct “highway projects,” as set forth in UDOT’s and FHWA’s 2017 MOU and as defined in Title 23 of the U.S. Code. Further, UDOT boldly states that “[t]he removal of timber around the base and angle station would, therefore, be

considered incident to the construction of the gondola.” (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 35, 55.)

143. UDOT’s decision to construct and operate a Gondola system in Little Cottonwood Canyon has a significant effect on the IRAs located within the Canyon, even though UDOT minimizes the significance by simply concluding that a suspended Gondola over roadless areas is not a road inviting “private vehicle use,” and therefore will not impact roadless characteristics. (E.g., LCC\_Supplemental Information Report– Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 37 (explaining that Gondola Alternative A [and B] would be consistent with a desired future condition in the Forest Plan, which states that the USDA Forest Service will work actively with other parties to explore options for reducing private vehicle use in Little Cottonwood Canyon.”).)

144. The U.S. Forest Service’s concern that UDOT did not adequately consider the Roadless Areas and requirement that UDOT conduct and submit a Supplemental Information Report suggests that UDOT has not adequately considered many of the impacts that the Gondola will have on the watershed, drinking water, wildlife, and other resources, as set forth above.

145. Moreover, UDOT’s repeated reference to actions the U.S. Forest Service *may* take or *could* take to work around IRA—and its acknowledgement that its own analysis of the Gondola’s consistency with RACR is “subject to the USDA Forest Service’s review and decision” (LCC\_Supplemental Information Report– Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at T. 5)—highlights the fact that UDOT has selected an alternative on which it has not adequately consulted with the U.S. Forest Service—the primary land manager in

the Canyon—and has improperly relied on speculative approvals and amendments by the U.S. Forest Service in selecting Gondola Alternative B.

4. Failure to consider adequately the impacts of construction for the Gondola on or near Superfund sites.

146. There are at least two Superfund sites located within Little Cottonwood Canyon: the Davenport and Flagstaff Smelters Superfund Site and Jones and Pardee Smelter Superfund Site.

147. “Thousands of contaminated sites exist nationally due to hazardous waste being dumped, left out in the open, or otherwise improperly managed. These sites include manufacturing facilities, processing plants, landfills and mining sites.” *What is Superfund?*, United States Environmental Protection Agency, available at <https://www.epa.gov/superfund/what-superfund>. “In response, Congress established the Comprehensive Environmental Response, Compensation, and Liability Act (‘CERCLA’) in 1980.” *Id.* CERCLA is informally called “Superfund” and it allows the Environmental Protection Agency to clean contaminated sites, referred to as Superfund sites. *Id.*

148. The Davenport and Flagstaff Smelters Superfund Site is in the La Caille area near the bottom of the Canyon. (*See* LCC\_FEIS\_Volume 4, Chapter 16, at 16-4, fig. 16.3-2.) The figure also shows that near the Flagstaff Smelter segment of the site there is a CERCLA “Voluntary Cleanup Site.” (*Id.*)

149. The Davenport and Flagstaff Smelters Superfund Site was placed on EPA’s National Priorities List (NPL) in April 2003. (LCC\_FEIS\_Volume 4, Chapter 16, at 16-6.) According to the Final EIS, a portion of this site, prior to NPL listing, “had been” in the state’s

Voluntary Cleanup Program. (*Id.*) The Final EIS figure indicates a still-existent “Voluntary Cleanup Site.” (*Id.*)

150. According to the Final EIS, the “main driver” for listing the Davenport and Flagstaff Smelters site on the NPL was lead and arsenic contamination. (LCC\_FEIS\_Volume 4, Chapter 16, at 16-6.) In August 2012, this site “reached the Superfund milestone ‘construction complete’” as the result of “cleanup activities” that “included excavation and treatment of soils to a depth of 18 inches, off-site disposal, and site restoration with a cap of clean fill,” and “[w]ith the completion of all response actions” it was deleted from the NPL in July 2018. (*Id.*) However, the FEIS admits that “[w]aste remains in place at depth,” although subject to “institutional controls” pursuant to Salt Lake County Soil Ordinance 9.50.060, and that “it could contain contaminated materials or hazardous substances.” (*Id.*; *see also* LCC\_FEIS\_Volume 4, Chapter 24, at 24-7 (noting institutional control imposed by ordinance).) Later in the Final EIS, UDOT states that there is “a high probability of existing soil or groundwater degradation” at “[c]losed and/or inactive Superfund (CERCLA) sites” (LCC\_FEIS\_Volume 4, Chapter 16, at 16-8), which would include the Davenport and Flagstaff site, and specifically characterizes the Davenport and Flagstaff site as having “a high probability of contamination” (*id.* at 16-13).

151. The base station for Gondola Alternative B will “be located on” the Davenport and Flagstaff site. (LCC\_FEIS\_Volume 4, Chapter 16, at 16-3.) It is unclear from the FEIS whether the associated 2,500-vehicle parking structure and new access roads would also be “on” the Davenport and Flagstaff site. However, nothing in the ROD or Final EIS suggests that these facilities would be constructed outside the site.

152. The Final EIS provides little detail on how UDOT would manage the impact of constructing or operating base station facilities on the Davenport and Flagstaff site. It states only that

[p]rior to construction, UDOT would coordinate with DERR and EPA and conduct an environmental site investigation to determine the extent of potential contamination, if any. If contamination is found, an avoidance or remediation plan would be developed. If remediation of the former Flagstaff Smelter and Davenport Smelter site is required, it is possible that remediation could delay the project at the location of the remediation and increase this alternative's construction cost.

(LCC\_FEIS\_Volume 4, Chapter 16, at 16-14.)

153. Chapter 24 of the FEIS provides limited additional information and states that if a Superfund (CERCLA) site is impacted, "UDOT would submit a remediation work plan to the regulatory agency (either the [UDEQ] or EPA)" that "would define clean-up levels and protective measures for construction workers." (LCC\_FEIS\_Volume 4, Chapter 24, at 24-7.)

154. For the Davenport and Flagstaff site specifically, "any construction activities and remediation would have to be coordinated with Salt Lake County, the Utah Division of Environmental Response and Remediation (DERR), and EPA to ensure that the requirements of the institutional control [imposed by the county ordinance] are appropriately considered and incorporated." (LCC\_FEIS\_Volume 4, Chapter 24, at 24-7.) And UDOT states that "[e]nvironmental site assessments might be conducted at the sites of concern to further evaluate the nature and extent of contamination to better identify potential risks of encountering hazardous materials when constructing the selected alternative." (LCC\_FEIS\_Volume 4, Chapter 25, at 25-15.)

155. Thus, UDOT does not know what the impacts of construction will have on the Davenport and Flagstaff Superfund sites or whether it will lead to arsenic or lead contamination of the environment, including the watershed. UDOT simply has not studied the issue, as is its duty under NEPA; UDOT instead simply kicks the proverbial can down the road and defers to other agencies who will aid in protective and “clean-up” measures.

156. A second Superfund site is the Jones and Pardee Smelter, which is across S.R. 210 from the Tanners Flat Campground and within the Tanners avalanche path. (FEIS 16-6, 16-4.) Neither the Final EIS nor the ROD present any information about the boundaries or size of the Jones and Pardee site. Gondola tower 9 and the Tanner’s Flat angle station “would both be adjacent” to the Jones and Pardee site. (LCC\_FEIS\_Volume 4, Chapter 16, at 16-12.)

157. The Final EIS states that, based on “Preliminary Assessments,” it was determined at some earlier point (the Final EIS does not specify when) that the threat to human health and/or environment was not sufficient for inclusion of the Jones and Pardee Smelter Superfund site on the NPL. (LCC\_FEIS\_Volume 4, Chapter 16, at 16-6.) Nonetheless, the Final EIS acknowledges that, “[d]espite this determination, there could still be mining wastes at these sites that, if disturbed, would need to be managed in a protective manner.” (*Id.*) And, the Final EIS specifically characterizes the Jones and Pardee site as having a “high probability of contamination.” (*Id.* at 16-12.)

158. The Final EIS does not provide any further information regarding the proximity of Gondola tower 9 and the Tanner’s Flat angle station to the Jones and Pardee Smelter Superfund site, and it provides only little discussion of the impact of the facilities on the site. It states only, “[p]rior to construction, UDOT would conduct an environmental site investigation to determine

the extent of potential contamination, if any. If contamination is found, an avoidance or remediation plan would be developed. If remediation of the Pardee Smelter site is required, it is possible that remediation could delay the project at the location of the remediation and increase” the Gondola’s construction cost. (LCC\_FEIS\_Volume 4, Chapter 16, at 16-12–16-3.)

159. At least six people commented on the Gondola’s impact to the two Superfund sites as described in the Draft EIS. (See LCC\_FEIS\_Volume 1: Final EIS Comments Database, at 322, 345; LCC\_FEIS\_Volume 2: Longer Comments, at 106, 133, 269, 282.)

160. Commenters pointed out that mitigation for Gondola construction would be “costly,” the costs would not be “inconsequential,” and the public needed to better understand the time and money necessary for remediation. (LCC\_FEIS\_Volume 1: Final EIS Comments Database, at 345; LCC\_FEIS\_Volume 2: Longer Comments, at 106, 133, 383.) Specifically with regard to construction of the base station parking structure on the Davenport and Flagstaff site, one commenter noted that construction would require excavation into the contaminated soil below the 18 inches treated to stabilize the site (and that some areas underneath vegetation had not been stabilized), and that excavation would cause contaminated soil to disperse in the air posing a grave risk to the area’s residents. (See LCC\_FEIS\_Volume 1: Final EIS Comments Database, at 345; see also LCC\_FEIS\_Volume 2: Longer Comments, at 106, 269.)

161. In Chapter 32 of the Final EIS, UDOT acknowledged these comments under the heading “Commenters were concerned about impacts to old mining sites from construction of the primary alternatives.” (LCC\_FEIS\_Volume 6, Chapter 32, at 32-187.) UDOT’s response, however, did not acknowledge the commenters’ concerns that remediation costs may be high, or their concerns regarding the direct impacts to public health by disturbing contaminated soils.

Rather, UDOT persisted in downplaying the potential impacts, repeating the same language quoted above to the effect that, “if any” contamination is found, UDOT would prepare a remediation plan that “could delay the project . . . and increase construction cost” (LCC\_FEIS\_Volume 6, Chapter 32, at 32-187), and simply declared, “The Final EIS describes the expected impacts to the site and mitigation to avoid impacts to public health and safety.” (LCC\_FEIS\_Volume 6, Chapter 32, at 32-188.)

162. At least 11 people, Sandy City, and the Salt Lake Mayor’s Office commented on the Gondola’s impact to the two Superfund sites as described in the Final EIS. (*See* LCC\_ROD at A1-209, A1-311 to -314, A1-317, A1-683, A1-747, A1-764, A1-766, A1-772, A1-812, A1-835, A1-976, A1-1118, A2-755, A3-283, A3-394.)

163. One commenter provided significant detail regarding not only the impacts of constructing the parking structure on the Davenport and Flagstaff Superfund site but also a newly proposed second access road to the structure:

The new Gondola B Alternative introduces a new entrance (a second entrance) to the gondola parking structure off Wasatch near the entrance to La Caille. This will require a new road to be cut through the EPA [Superfund] Sites OU3 and OU1 penetrating areas that have not been remediated because they were tree-covered or too steeply sloped per the EPA 1<sup>st</sup> and 2<sup>nd</sup> 5-year reports. It passes close by the site of the Flagstaff Smelter, the primary source of lead and arsenic contamination. The new Gondola B Alternative, therefore, has a much bigger cost impact than the old alternative. It also has a much bigger safety risk to public health, at a minimum during remediation of the site – a cost not included in the gondola B alternative as stated by the EIS. The impact on the public safety of residents and vehicle passengers during construction could be considerable . . . . Even though the risk and cost of this new penetration of the Superfund Site are identified in the EIS, its impact on the environment was explicitly excluded from consideration and assessment.



(LCC\_ROD at A1-313.)

164. Sandy City also commented that the base station and related facilities “will expose elevated heavy metal deposits in the vicinity” of the Davenport and Flagstaff Superfund site.

(LCC\_ROD at A3-328.)

165. A commenter also expressed detailed concerns about the Jones and Pardee Smelters Superfund site. This commenter stated that because the Jones and Pardee site “was not anticipated to be involved in any future development, EPA never previously tested the site nor designated it as a Superfund Site and therefore never remediated the site.” (LCC\_ROD at A1-317.) He further pointed out that, “[b]efore the public can effectively comment on the EIS, the site needs to be tested, analyzed, incorporated into engineering plans and cost estimates, and provided as a risk assessment.” (LCC\_ROD at A1-317.)

166. The Salt Lake City Mayor also expressed her concerns related to her understanding that EPA did only a preliminary assessment of the Jones and Pardee site in the past and questioned whether UDOT appropriately concluded that the site would not be disturbed by the angle station given its location within an Inventoried Roadless Area. (*See* LCC\_ROD at A3-394.) She recommended that EPA and the Forest Service conduct additional environmental assessments to determine if there is a need for remediation and reconsideration of Superfund site designation. (LCC\_ROD at A3-394.)

167. UDOT did not respond to the comments summarized above in the ROD, other than to cite to previous inadequate and non-substantive responses to comments on the DEIS.

5. Failure to consider adequately impacts of developing Gondola structures on National Forest Service land.

168. At the outset of the NEPA process, UDOT and the Forest Service entered into a Memorandum of Understanding (“FS MOU”). The purpose of the FS MOU was to “[p]rovide for the overall framework for a mutually beneficial, cooperative working relationship between [UDOT] and the [Forest Service] in carrying out the [NEPA] process for the Little Cottonwood Canyon Project.” *See* FS MOU, § 1. The purpose was also to “[e]stablish coordination procedures to be followed during the NEPA process,” such as UDOT’s consideration of “the view of the Forest Service in making project decisions,” and to “[e]nsure that the EIS prepared by UDOT for the Project can satisfy the NEPA obligations *of the Forest Service*, if any, . . . in a manner consistent with Executive Order 13807.” *Id.* (emphasis added).

169. In the FS MOU, UDOT and the Forest Service recognized that “UDOT currently holds a highway easement for approximately 3.6 miles of” S.R. 210 and that the Forest Service owns the remaining 2.17 miles of the highway. Under the FS MOU, “UDOT has proposed acquiring an easement for the 2.17-mile section to facilitate UDOT’s ongoing maintenance and operation of the existing SR-210 roadway.” FS MOU, § 2, Current Ownership of Right-of-Way.

170. UDOT and the Forest Service also recognized that the Little Cottonwood Canyon Project “may require easements for additional rights-of-way on National Forest System land along, or in the vicinity of, SR-210 in Little Cottonwood Canyon. Such easements, if needed would be executed as federal land transfers approved by FHWA in coordination with the Forest Service . . . .” FS MOU, § 2, Potential Approval of Federal Land Transfer.

171. Further, UDOT and the Forest Service acknowledged that “the Project may require one or more new or modified Special Use Permits to be issued by the Forest Service (e.g., for

construction staging areas, access roads, waste or borrow areas, or other impacts to National Forest System lands that are not otherwise proposed for appropriate by FHWA, etc.).” Significantly, the “[i]ssuance of a Special Use Permit would be considered a federal action requiring NEPA compliance by the Forest Service.” FS MOU, § 2, Potential Approval of Special Use Permits.

172. In the FS MOU, UDOT and the Forest Service purport to “anticipate that areas required for implementation of the preferred alternative, including temporary staging, access roads, waste, or borrow areas, etc., will be included in the EIS analysis and resulting decision.” FS MOU, § 2, Potential Approval of Special Use Permits.

173. UDOT and the Forest Service agreed to certain mutual and separate responsibilities with respect to the NEPA obligations for the Little Cottonwood Canyon Project.

174. For example, UDOT and the Forest Service mutually agreed to “coordinate to identify action *early on in the process* that may be considered federal action and *require NEPA compliance by the Forest Service*, and if such actions are identified, work cooperatively together to ensure that each agency’s legal requirements are adequately and appropriately met, including the requirements of Executive Order 13807.” FS MOU, § 3(A)(6).

175. UDOT and the Forest Service identified a UDOT specific responsibility of “[i]dentifying a full range of approvals and reviews needed for the Project and seeking to ensure that all such requirements are met as part of a single, integrated process.” FS MOU, § 3(B) UDOT Responsibilities.

176. UDOT was also responsible for ensuring that the “EIS developed for the Project may be adopted, tiered, or otherwise used by the Forest Service to satisfy its agency-specific NEPA responsibilities, if any, with regard to the Project.” FS MOU, § 3(B), UDOT Responsibilities.

177. The Forest Service was responsible for, among other things, “mak[ing] a good faith effort to raise concerns about the Project and offer solutions relative to its area of special expertise in a timely and specific manner,” along with “[o]ther responsibilities as appropriate for a cooperating agency in the NEPA process.” FS MOU, § 3(B), Forest Service Responsibilities.

178. According to UDOT, as stated in the Final EIS, “[s]ome of the proposed improvements on NFS land not already part of the UDOT perfected easement or appropriated by FHWA could be subject to 23 USC Section 317” thorough which process “the U.S. Secretary of Agriculture can certify that the appropriation of NFS land for transportation use is contrary to the public interest or inconsistent with the purposes for which the NFS land was originally reserved, or agree to the appropriation and transfer of an interest in the land to UDOT, potentially with stipulated conditions to protect NFS land.” (LCC\_FEIS\_Volume 4, Chapter 24, at 24-4.)

179. But UDOT has not yet sought appropriation of NFS land, and the Final EIS provides only speculation and conjecture as to what UDOT can do if the U.S. Forest Service agrees to the appropriation.

180. Indeed, UDOT has not identified the types of “potentially ... stipulated conditions” UDOT and the Forest Service would agree to as part of the appropriation.

181. UDOT recognizes that “the USDA Forest Service might potentially have to amend the *Forest Plan*” if the land is appropriated. (LCC\_FEIS\_Volume 4, Chapter 24, at 24-4.) But UDOT has not explained what parts of the Forest Plan would need to be amended and the impacts that would have on the watershed, wildlife, and other resources. Further, the Final EIS and ROD have conflicting language as to whether an amendment to the Forest Plan will actually be necessary. (*See, e.g.*, LCC\_ROD at A-38 (“After the UDOT ROD is issued, FHWA will determine

components of the selected alternative under its statutory purview. ... If FHWA determines that it will appropriate NFS lands ... for the gondola, the appropriation would be considered ‘in the public interest’ and the gondola would qualify for an exception in the [Roadless Area Conservation Rule].”); LCC\_FEIS\_Volume 4, Chapter 28, 28-9, T. 28.3-1 n.b (indicating that whether a revision to the U.S. Forest Service land use plan is necessary for the gondola is “[p]ending FHWA’s determination of proposed actions eligible for appropriation”); LCC\_FEIS\_Volume 1, Chapter 3, at 3-27 (stating that for the Gondola, “UDOT would obtain either an easement through the Section 317 appropriation process or a special-use authorization” for the U.S. Forest Service); LCC\_FEIS\_Volume 6, 32-243 (“The Forest Plan amendment process does not take into account transportation rights of way. ... The gondola system is a transportation system.”).)

182. Regardless, to construct the Gondola’s necessary components, UDOT will be required to clear timber and vegetation for fenced-off tower pads (eight of which are in roadless areas) and an angle station, (*see* Supplemental Information Report, *Assessment of the Roadless Area rule for the Final EIS Alternatives*, at 34), and construct immense towers strung together by cables within an 80-foot-wide right-of-way.

183. “The proposed gondola lines ..., towers, and stations would overlap about 55 acres under the USDA Forest Service watershed emphasis management prescription (MP 3.1W) and 15 acres under the USDA Forest Service developed recreation areas management prescription (MP 4.5).” (LCC\_FEIS\_Volume 1, Chapter 3, at 3-28, 3-34.)

184. “The USDA Forest Service has stated that ... the *Forest Plan* would need to be amended if the gondola system would be inconsistent with the plan’s management prescriptions.”

“The applicable management prescriptions are the watershed emphasis (MP 3.1W) and developed recreation areas (MP 4.5) management prescriptions.” (LCC\_FEIS\_Volume 1, Chapter 3, at 3-34.)

185. Gondola Alternative B will significantly degrade inventoried roadless areas in Little Cottonwood Canyon, which impacts UDOT largely dismisses on the shaky premise that the Gondola “travelway” is not a “road” for purposes of the Roadless Area Conservation Rule and 2003 Uinta-Wasatch-Cache National Forest Plan. (LCC\_FEIS\_Volume 1, Chapter 3, at 3-27; LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 4, 35.); *see also supra* ¶¶ 132–145.

186. Notwithstanding these critical outstanding concerns related to the U.S. Forest Service and the Forest Plan, UDOT simply assumes the needed amendments will occur and conditions will be stipulated to with the U.S. Forest Service. In the absence of final action by the U.S. Forest Service, concerned parties such as Plaintiffs are forced to challenge UDOT’s EIS and ROD without knowing the contours of those important amendments and conditions.

187. This conduct—in which UDOT relies on contingent agency action by the U.S. Forest Service—is not only a violation of NEPA, but also violates the FS MOU.

188. UDOT never explicitly stated in the Final EIS or ROD which “Special Use Permits” would be necessary for construction of the Gondola and instead vaguely stated that it would at some point in the future work with the Forest Service if necessary to obtain a Special Use Permit. (*See, e.g.*, LCC\_FEIS\_Volume 1, Chapter S, at S-32 (“Based on the analysis documented in this EIS, ... the Forest [Service] Supervisor ... will issue a separate Record of Decision to document its decision on the selected alternative” and “whether to issue a special-use authorization and Forest Plan amendment ....”); LCC\_FEIS\_Volume 4, Chapter 24, at 24-5 (“If a commercial vendor is

selected to operate the bus or gondola service, a special-use authorization from the USDA Forest Service might be required and would be based on the analysis in this EIS.”); LCC\_ROD at A-36 (stating that the FEIS and roadless area Supplemental Information Report “will be considered by the Forest Service Responsible Official in making a decision” without suggestion of further environmental analysis).)

189. UDOT has not satisfied the U.S. Forest Service’s NEPA obligations. Nor can it. UDOT is a transportation agency with statutory mandates focused on traffic and road safety. UDOT is not itself concerned with or focused on the management and preservation of Forest Service land.

190. Unlike UDOT, the Forest Service is focused on the multiple uses of federal land as outlined in the Multiple-Use Sustained-Yield Act of 1960, which provides that “the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528.

191. The Forest Service has not issued an EIS to show the public the environmental considerations it has reviewed with respect to potential Special Use Permits, Current Ownership of Right-of-Way and UDOT’s potential easement, or a Potential Approval of Federal Land Transfer.

192. The public therefore has not had the required ability to comment on the potential and still speculative Special Use Permits, Current Ownership of Right-of-Way and UDOT’s potential easement, or Potential Approval of Federal Land Transfer.

193. UDOT’s issuance of a ROD without the public’s ability to review and comment on the U.S. Forest Service’s obligations to consider environmental impacts to the Special Use Permits,

Current Ownership of Right-of-Way and UDOT's potential easement, or Potential Approval of Federal Land Transfer, is a violation of NEPA and the FS MOU.

6. Failure to consider adequately the impacts of the Gondola on Big Cottonwood Canyon and feeder roads.

194. In Chapter 1, Purpose and Need, the Final EIS indicates that UDOT limited its "transportation needs assessment study area" along S.R. 210 from the intersection of S.R. 210 and S.R. 190/Fort Union Boulevard at the mouth of Big Cottonwood Canyon "to the Town of Alta, and the Alta Bypass Road." (*See* LCC\_FEIS\_Volume 1, Chapter 1 at 1-3-1-4, fig. at 1.1-1.)

195. UDOT selected the intersection of S.R. 210 and S.R. 190/Fort Union as the northern and western terminus of the needs study area "because it is at the point where traffic splits between Big Cottonwood Canyon and Little Cottonwood Canyon. Traffic south of this intersection is mostly related to trips into and out of Little Cottonwood Canyon and commuter traffic on Wasatch Boulevard." (LCC\_FEIS\_Volume 1, Chapter 1, at 1-3; *see also* LCC\_ROD at 8.)

196. Although Chapter 1 of the Final EIS presents maps showing Big Cottonwood Canyon Road and discusses Big Cottonwood Canyon very generally, the chapter avoids any specific discussion of the road or its uses consistent with UDOT's decision to excise Big Cottonwood Canyon from the needs study area. (*See generally* LCC\_FEIS\_Volume 1, Chapter 1, at 1-3, 1-16.)

197. The Final EIS only briefly recognizes the relationship between traffic in Little Cottonwood Canyon and traffic in Big Cottonwood Canyon, merely stating that "S.R. 210 is part of a major north-south corridor at the base of the Wasatch Mountains providing access to both Big and Little Cottonwood Canyons," "[t]he traffic issues in Big and Little Cottonwood Canyons have implications beyond inconvenience to travelers, impacts such as potential economic impacts to the



ski industry,” and that road closures in Little Cottonwood Canyon for avalanche control can cause “backups” that “limit the mobility of residents and commuters along Wasatch Boulevard, Big Cottonwood Canyon Road, I-215, the 6200 South interchange on I-215, North Little Cottonwood Road, and S.R. 209 and can substantially interfere with emergency vehicles’ access in these areas.” (LCC\_FEIS\_Volume 1, Chapter 1, at 1-16–1-17, 1-26.)

198. Although Big Cottonwood Canyon is hardly recognized as part of the Little Cottonwood Canyon Project, UDOT very briefly addressed the “indirect impacts” to Big Cottonwood Canyon in Chapter 20 of the Final EIS. In that Chapter, UDOT states that it intends to implement a similar tolling policy in Big Cottonwood Canyon to reduce the potential for causing greater traffic congestion. UDOT decided not to include Big Cottonwood Canyon in its “Indirect Effects Impacts Analysis Area,” except as it relates to tolling. (LCC\_FEIS\_Volume 4, Chapter 20, at 20-1.)

199. With respect to tolling, UDOT noted that “Some commenters stated that a toll or ban on single-occupant vehicles in Little Cottonwood Canyon could cause users to shift to Big Cottonwood Canyon or potentially another resort, thereby impacting other roads or creating additional crowds.” (LCC\_FEIS\_Volume 4, Chapter 20, at 20-20.)

200. UDOT also explains that “for tolling to be effective in reducing congestion on S.R. 210 and to get about 30% of personal vehicle users onto transit, the toll could be between \$20 and \$30 per vehicle (the final cost has not been determined and would be based on travel demand). At that toll rate, about 550 vehicles or about 1,200 skiers (assuming an average vehicle occupancy of 2.17 people) per day might no longer visit the ski resorts in Little Cottonwood Canyon, instead going to other ski resorts.” (LCC\_FEIS\_Volume 4, Chapter 20, at 20-20.)

201. To offset this impact, UDOT states: “If tolling . . . were implemented in Little Cottonwood Canyon, UDOT would likely implement a similar tolling policy in Big Cottonwood Canyon to reduce the potential for causing greater traffic congestion. Therefore, it is unlikely that tolling would cause indirect effects from increased use if tolling were implemented. Additionally, with improved travel times from the project alternatives on S.R. 210 in Little Cottonwood Canyon, it is not likely that users would shift use to Big Cottonwood Canyon.” (LCC\_FEIS\_Volume 4, Chapter 20, at 20-20; *see also* LCC\_FEIS\_Volume 1, Chapter 2, at 2-50 (“[I]f a toll were implemented for S.R. 210, UDOT likely would need to implement a toll for S.R. 190 in Big Cottonwood Canyon at the same time. If only Little Cottonwood Canyon were tolled, use of Big Cottonwood Canyon could increase as users act to avoid the toll.”); LCC\_ROD at 92 (“Implementing tolling” in Little Cottonwood Canyon “requires the same traffic demand strategies” in Big Cottonwood Canyon.))

202. The Final EIS indicates that the Big Cottonwood Canyon toll would be about the same as the Little Cottonwood Canyon toll—\$20–\$30 per vehicle—and the toll station or gantry would be immediately below the Solitude ski area. (LCC\_FEIS\_Volume 4, Chapter 20, at 20-20–20-21.)

203. UDOT recognizes that there is an impact on “Environmental Justice Populations,” and that a Big Cottonwood Canyon toll might have a disparate impact on low-income populations visiting and trying to recreate in Big Cottonwood Canyon, so the Final EIS indicates that “UDOT would also likely implement an improved bus service along S.R. 190, for those users who do not want to pay a toll.” (LCC\_FEIS\_Volume 4, Chapter 20, at 20-21.)

204. UDOT does not address or recognize the challenges of a single parent attempting to take their multiple children skiing, with each set of skis and other relevant gear, at a resort past where tolling has been implemented, or whether this “cheaper” alternative is a further barrier to low-income populations accessing the resorts or other recreation up-canyon.

205. In recognizing that low-income populations may want to recreate at Guardsman Pass in upper Big Cottonwood Canyon, above the Solitude and Brighton resorts, the Final EIS first opines that “it is unlikely that members of low-income populations would partake in snowmobiling due to the investment required for trucks, trailers, and snow machines, but some low-income snowshoers or skiers might want to use the area and be discouraged by the toll.” (LCC\_FEIS\_Volume 4, Chapter 20, at 20-22.) But UDOT purports that to alleviate some financial barriers to low-income populations: “[t]he toll could be in effect during the morning peak period only (7 AM to 10 AM), which would allow low-income populations to recreate in this area without paying a toll by passing through the toll gantry before 7 AM or after 10 AM.” (*Id.*)

206. With respect to the “cumulative impacts,” UDOT “identifies “Cottonwood Canyons Developed Site Reconstruction Phase 3” as another project, describing it as “[r]econstruction of restrooms, waste/water systems, bridging, trailheads in both Big and Little Cottonwood Canyons.” (LCC\_FEIS\_Volume 4, Chapter 20, at T. 21.2-1.) But UDOT states that “[n]o environmental impact information is available” and “[t]he projects will be managed by the USDA Forest Service.” (*Id.*)

207. Even though UDOT recognized that there could be a shift in traffic to Big Cottonwood Canyon due to the tolling in Little Cottonwood Canyon, UDOT explained that it did not evaluate Big Cottonwood Canyon because “improvements” in Big Cottonwood Canyon “are

not necessary to address the transportation issues on S.R. 210.” (LCC\_FEIS\_Volume 5, Chapter 32, at 32-8.) Thus, “[t]ransportation improvements” in Big Cottonwood Canyon “are outside” the needs study area and “would require a separate environmental document.” (*Id.*; see also LCC\_ROD at A-6 (same); LCC\_FEIS\_Volume 6, Chapter 32, at 32-203 (stating that before a Big Cottonwood Canyon toll is implemented, “separate environmental documentation” will be required).)

### **C. Public Comments**

208. The Draft EIS was released on June 25, 2021, followed by a 70-day public comment period ending on September 3, 2021. A revised Draft EIS was released on December 10, 2021, followed by a 30-day public comment period that ended on January 10, 2022.

209. More than 50,000 public comments were submitted on the Draft EIS and Final EIS. The public comments overwhelmingly disfavored and raised serious concerns about adverse environmental impacts of the Gondola alternatives.

210. Plaintiff Friends of Alta commented on the Final EIS and explained its position against the Gondola, including that it “disagrees strongly with this decision.” Friends of Alta referenced that “only 2-3% of Utah residents ski Snowbird and Alta on weekends,” but “every Utah citizen” will be responsible for its costs, and that “Gondola Alternative B places our vital watershed at risk” by “contaminating the watershed which is responsible for providing swaths of vital culinary water for the Salt Lake Valley.” Friends of Alta also referenced the “viewscape of Little Cottonwood Canyon [that] would be irreversibly scarred by the more than 20 towers scaling as high as 262 feet into the sky moving 40 large gondolas” and that the Gondola will not solve traffic congestion problems in the canyon and only “allow[] more users to access the [ski areas].”

Friends of Alta further commented that “[t]he steps taken in the phased approach must matter,” and that “if UDOT's goal is to reduce traffic and a phased approach can achieve that goal at a fraction of the cost of Gondola Alternative B, no gondola should be built.” (LCC\_FEIS\_Volume 2: Longer Comments, at 239–40.)

211. Sydney Stephens commented on the Final EIS as the Director of Conservation Ecology at IORAA and raised concerns about the harm the construction of the Gondola and the operation of the Gondola will cause on Little Cottonwood Canyon’s ecology. Ms. Stephens notified UDOT that “[h]abitat fragmentation by the presence of anthropogenic structures (i.e., large towers), noise disturbance from construction and high-decibel machinery (i.e., gears on a gondola which will easily disturb airborne creatures – UDOT’s analysis of the peak-to-peak gondola’s dB heard from the ground is inadequate in assessing wildlife hearing ranges and proximity to source) are shown in many studies to affect health, reproduction, and survival of many species.” Ms. Stephens explained that the effects of habitat fragmentation will affect surrounding areas as wildlife disperses and seeks new territory, which also leads to increased human-wildlife conflict. Ms. Stephens also commented that the “aim of having people be added to the canyon (aka the resorts) via gondola, in lieu of reducing vehicles [and] their footprint” shows that there is a misrepresentation between the need to reduce traffic congestion and the decision to construct a Gondola. (LCC\_FEIS\_Volume 2: Longer Comments, at 330–33.)

212. Plaintiff Craig Heimark commented on the disconnect between the needs of Utah’s citizens with respect to traffic control in and around Little Cottonwood Canyon (where he resides) and the political aspirations of Utah’s representatives when it comes to the selection of Gondola Alternative B as the preferred alternative. (LCC\_FEIS\_Volume 2: Longer Comments, at 90–91.)

213. Plaintiff Kirk Nichols commented throughout the EIS process, addressing concerns regarding UDOT's purported Purpose and Need of Little Cottonwood Canyon Project. Mr. Nichols is concerned that "[t]his EIS never took a look, as required by NEPA, at the latent demand. ... Never studied was whether the people already crowding the canyon and would come more frequently if they perceived that there would be no waiting on the roadway before getting to their destination. A small straw poll found most canyon users would come almost twice as often if they thought there would be a low risk of congestion...." (LCC\_FEIS\_Volume 1: Final EIS Comments Database, at 415.) Mr. Nichols commented, for example, that the "Draft Environmental Statement (LCC-DEIS) does not address 'all users on S.R. 210,' only those going to the commercial resorts" and that "[a]ll other road travelers are treated as incidental rather than being studied in the EIS. Mr. Nichols also commented regarding the unduly narrow scope of the EIS and its inability "to solve or even study the purported purposes as stated in the LCC DEIS ... [t]o increase mobility and reliability in LCC...." Mr. Nichols continued that "[t]he citizens of Cottonwood Heights will still be stuck in their driveways and in congested traffic due to the sub-rational choice of the small area of study where all the same cars as presently cause the congestion will continue to arrive in Cottonwood Heights in only increased numbers." Mr. Nichols also commented extensively regarding UDOT's failures to adequately consider impacts in traffic (and otherwise) in Big Cottonwood Canyon, where he has a residence, and regarding environmental justice concerns. (See LCC\_FEIS\_Volume 6, Chapter 32B DEIS Comments 1-3086, at 32B-2527-32B-2528; LCC\_FEIS\_Volume 6, Chapter 32B DEIS Comments 8835-11677, at 32B-10777; LCC\_FEIS\_Volume 6, Chapter 32B DEIS Comments 11678-13307, at 12601; LCC\_FEIS\_Volume 1: Final EIS Comments Database, at 487.)

214. Plaintiff Allen Sanderson commented on the Draft EIS with respect to the too-narrow Purpose and Need and the failure of the proposed Gondola alternatives to address the stated purpose and need, especially as it relates to traffic congestion and traffic modeling. As Mr. Sanderson points out, there is a disconnect between the EIS's stated purpose of improving transportation-related experiences for "*all users* of S.R. 210," but the need and selected alternative only addresses one particular set of users (resort users during peak periods in the winter)—and fails even to address that need. (*See* LCC\_FEIS\_Volume 6, Chapter 32B Comments to DEIS 11678-13307, at 32B-13815-32B-13816; LCC\_FEIS\_Volume 6, Chapter 32B Comments to DEIS 11678-13307, at 32B-13815-32B-13816.)

215. Plaintiff Sanderson also commented on how the Gondola Alternatives do not meet the purpose for the project:

- a. "Gondola Alternative. This alternative does not meet the purpose and fails to consider the cumulative impacts of all recreational users. The purpose is *to improve the transportation-related commuter, recreation, and tourism experiences for all users of S.R. 210 through transportation improvements that improve roadway safety, reliability, and mobility on S.R. 210.*"
- b. "The gondola by its very nature serves one select user group, resort visitors at the expense of all other users. It does not meet any current or forecasted needs along the full extent of S.R. 210, only at the terminus for approximately 50 winter days a year during the winter season. There are current and future needs outside of these 50 winter days that must be addressed, for example parking at White Pine trailhead which is used year-round."

- c. “The DEIS fails to analyze the cumulative impacts of the gondola to the recreation experience of users in the lower portion of the canyon. The addition of access roads, supporting structures, and continuous noise from the gondola cars and cables traversing towers will impact the experience of users. As proposed, supporting structures will be directly in front of and above prominent climbing areas creating both a visual and noise impact where none currently exists. These cumulative impacts will impact and displace users and ha[ve] not been analyzed.”
- d. “At a minimum, the DEIS must include a less impactful alternative that fully analyzes a bus only alternative with no road widening along S.R. 210.”

(LCC\_FEIS\_Volume 6, Chapter 32B Comments to DEIS 11678-13307, at 32B-13817.)

216. Plaintiff Margaret Bourke commented, *inter alia*, that the “format of the phasing process” only makes sense “if the tolling and busing options [do not] provide adequately for transportation needs,” and it was inappropriate and arbitrary for UDOT to select Gondola Alternative B without any opportunity to avoid the expense and harm of a Gondola via earlier phases. (LCC\_FEIS\_Volume 2: Longer Comments, at 33–34.)

217. Plaintiff Victoria Schmidt commented that the stated goal of the Little Cottonwood Canyon Project “is not to feed private resorts” and instead is aimed at reducing traffic in and around Little Cottonwood Canyon. “The gondola adds an additional tourist attraction to the canyon that surely increases traffic instead of reducing it in these key feeder routes,” and UDOT will “permanently” ruin “a significant part of the canyon’s appeal on a gamble that existing drivers will be persuaded to leave their cars and switch to the gondola. Aside from that gamble[,], which has multiple challenges, it is a for sure fact that it will be well advertised and that [UDOT] will now



attract more people to this congested canyon. That was not the original assignment.” (LCC\_FEIS\_Volume 6, Chapter 32B DEIS Comments 5891-8834, at 32B-6892).

218. Plaintiff Dr. Jefferson Schmidt commented that the traffic-related problems at the mouth of Little Cottonwood Canyon have “grown significantly” over the last 20 years, but that “bussing transportation related solutions to said traffic problems have not been thoroughly attempted.” Therefore, it is illogical and unnecessary to pursue solutions beyond those relating to increased bus services—“such as gondolas or widening the road”—and UDOT should instead be putting “more effort into encouraging people to use the public transportation options that are already in place.” (LCC\_FEIS\_Volume 6, Chapter 32B DEIS Comments 11678-13307, at 32B-13558.)

219. The public comments put UDOT on notice that analyses in the EIS, *inter alia*:
- a. Failed to consider a reasonable range of alternatives to the Little Cottonwood Canyon Project;
  - b. Failed to analyze adequately the alternatives it purported to consider in favor of the Gondola alternatives;
  - c. Failed to disclose adequately the environmental impacts of each of the alternatives;
  - d. Failed to study adequately the potential impacts of the Gondola alternatives;
  - e. Failed to identify and discuss adequately measures that could be taken to avoid, minimize, or compensate for the Gondola alternatives’ impacts;
  - f. Failed to assess adequately the cumulative impacts of the Gondola alternatives;
  - g. Failed to address and disclose the environmental impacts of the Gondola alternatives on the golden eagles currently nesting in Little Cottonwood Canyon;

- h. Failed to adequately address and disclose adequately the environmental impacts of building on former Superfund sites that could have still-present contamination concerns because construction activities could also release air-borne toxics;
- i. Failed to address and disclose adequately the environmental impacts on roadless areas;
- j. Failed to address and disclose adequately the environmental impacts on access roads to the Gondola towers for maintenance and repairs;
- k. Failed to disclose adequately the costs of the Gondola, including per-rider tickets;
- l. Failed to study or address adequately the foreseeable and required connected actions in Big Cottonwood Canyon and S.R. 190;
- m. Failed to study or address adequately the effects on lower or middle-income families and their ability to afford and use either of the Gondola alternatives; and
- n. Failed to respond adequately to comments submitted on the Draft EIS;

**D. The Preferred Alternative**

220. UDOT selected Gondola Alternative B as its preferred alternative without providing accurate information about how Gondola Alternative B will actually address the purpose and need of improved transportation along S.R. 210.

221. First, the Final EIS does not adequately account for the costs of Gondola Alternative B, and the funding required to complete construction of it far exceeds the amount identified by UDOT.

222. The Final EIS provides incorrect and inaccurate cost comparisons for the five alternatives.

223. The Final EIS provides incorrect and inaccurate timing models for comparing the parking and travel times for each of the five alternatives.

224. UDOT's traveling and queuing modeling creates biases in favor of the Gondola alternatives by inaccurately understating total travel time estimates in comparison with other alternatives and fails to make proper comparisons with the No-Action Alternative.

225. These biases in favor of the Gondola alternatives based on purported time savings are subsequently compounded by flawed modeling related to costs of the Gondola project that, again, creates biases in favor of the Gondola alternatives.

226. For example, UDOT's traffic modeling is based on steady-state traffic flows, which is contrary to the real-world traffic flow during peak periods into Little Cottonwood Canyon. In a real-world traffic flow model, Gondola Alternative B will result in, at best, a mere couple of minutes in time saved over less invasive alternatives, such as increased busing and no action.

227. Moreover, UDOT artificially inflates costs for less invasive alternatives, such as increased busing, by, for example, assuming an entirely new fleet of buses will need to be purchased in year one of the project rather than adding buses in response to increased demand, and that the entire fleet will need replacement in 15 years when such replacement data are based on year-round full-fleet bus usage (rather than only during the winter months and as buses are added to meet demand).

228. When these modeling biases are properly accounted for, Gondola Alternative B's monetary costs and its effects on the environment far outweigh the stated purpose and need in the Final EIS.

229. The Final EIS does not account for the time it would take for a person or persons using the Gondola to access Alta Ski Area where the person or persons might be required to exit the Gondola at Snowbird that the person or persons accessed from the base.

230. Taken together, these miscalculations and inaccuracies are significant. UDOT's inadequate EIS analyses has resulted in biases in favor of the Gondola alternatives, both in terms of costs to Utah taxpayers and in terms of traffic congestion problems and the time it will take wintertime Canyon users to reach the two ski areas.

231. At any cost, including UDOT's deflated cost measures, the best outcome under Gondola Alternative B is a marginal time savings for Little Cottonwood Canyon travelers. If all costs are properly accounted for, those marginal time savings become not only completely outsized by the project's price tag, but also are an entirely frivolous use of public funds.

**E. Section 4(f) Resources**

232. In addition to UDOT assuming the FHWA's NEPA responsibilities through the MOU, it also has assumed the FHWA's responsibilities to comply with the requirements of Section 4(f) under the Department of Transportation Act of 1966, 49 U.S.C. § 303.

233. Section 4(f) of the Department of Transportation Act, 49 USC § 303, provides that the Secretary of Transportation may approve a transportation program or project requiring the use of public owned recreation areas and historic sites regardless whether publicly or privately owned only if there is no reasonable or prudent alternative to using that land and the program or project includes all possible planning to minimize harm to the recreation area or historic site resulting from the use. These requirements do not apply if the Secretary finds the impacts of the program or project are de minimis.

234. Under Section 4(f), for a recreation area, de minimis impact exists if the Secretary determines, after public notice and comment, that the program or project will not adversely affect the activities, features, and attributes of the recreation area and the finding of the Secretary has received concurrence from the official with jurisdiction over the area.

235. Under Section 4(f), for a historic site, de minimis impact exists if the Secretary has determined, under Section 106 of the National Historic Preservation Act (NHPA), 54 USC § 306108, that the program or project will have no adverse effect on the historic site and received concurrence from the relevant state historic preservation officer.

236. Chapter 26 of the Final EIS states that it discusses UDOT's review of "Section 4(f) resources" and "determines the impacts to those sources, identifies measures to minimize harm where necessary, analyzes the alternative with the least overall harm, and describes the coordination efforts made to address Section 4(f) issues and concerns." (LCC\_FEIS\_Volume 5, Chapter 26, at 26-1.)

237. The Section 4(f) study area "is the same as the cultural resources impact analysis area described in Chapter 15, *Cultural Resources*" and is "generally based on a 100-footwide buffer on either side of S.R. 210, from north of the intersection with Big Cottonwood Canyon Road (milepost [MP] 0.0) and extending southeast to the end of S.R. 210 in the town of Alta (MP 12.5), including the Alta Bypass Road (MP 12.5 to MP 13.6)." But the study area "shifts or widens in some locations to accommodate the topography of Little Cottonwood Canyon *and the project alternatives*." (LCC\_FEIS\_Volume 5, Chapter 26, at 26-1.)

238. Further the "study area also includes the area around the gravel pit adjacent to Wasatch Boulevard north of Fort Union Boulevard and the existing Utah Transit Authority park-

and-ride lot at 9400 South and Highland Drive. The study area includes land that could be affected through right-of-way acquisition, easement, or permit.” (LCC\_FEIS\_Volume 5, Chapter 26, at 26-1.)

239. The Forest Service determined that numerous recreation areas within Little Cottonwood Canyon qualify as Section 4(f) properties. Among these areas, the Forest Service identified an area accessed by the Alpenbock Loop Trail, Alpenbock Spur Trail, and Grit Mill Connector trail as a single Section 4(f) property. This area is called the “Alpenbock Loop and Grit Mill Climbing Opportunities” Section 4(f) resource in the Final EIS (hereafter “Alpenbock 4(f) Property”). (LCC\_FEIS\_Volume 5, Chapter 26, at 26-57.)

240. UDOT determined that several areas qualify as historic sites within the meaning of Section 4(f). One of these areas is called the “Little Cottonwood Canyon Climbing Historic District” in the Final EIS (hereafter “Climbing Historic District”). (LCC\_FEIS\_Volume 5, Chapter 26, at 26-30.)

241. UDOT determined that the Climbing Historic District is eligible for listing on the National Register of Historic Places pursuant to the NHPA based on the existence of 25 climbing areas and 79 routes associated with a significant period of development between 1960 to 1974. (LCC\_FEIS\_Volume 5, Chapter 26, at 26-30, T. 26.4-1.) The Climbing Historic District is approximately 270 acres in size and includes both Forest Service land and private land leased to Salt Lake Climbers’ Alliance.

242. UDOT does not know what type of property interest it will receive for the Gondola alignment. For purposes of conducting its Section 4(f) evaluation, UDOT assumed that it would obtain an 80-foot-wide easement centered on the gondola cables and that would encompass the

area of Gondola cabin overflight and the footprint of the Gondola towers. (LCC\_FEIS\_Volume 5, Chapter 26, at 26-54, 26-57.) UDOT also assumed that the land subject to the easement “would still be available for recreational use.” (LCC\_FEIS\_Volume 5, Chapter 26, at 26-57.)

243. For the Alpenbock 4(f) Property, UDOT concluded that the gondola would have de minimis impact. UDOT reasoned that: (1) only one boulder within the easement would have to be removed, but that it would be either relocated or UDOT would work with the U.S. Forest Service to construct trails to boulders without trail access and, in any event, UDOT would “commit[] to ensure no net loss of accessible climbing boulder opportunities”; (2) the remaining 43 boulders within the easement would not be affected and would still be accessible; (3) visual impacts from the Gondola would be minimized because “many of the bouldering areas are shielded by vegetation,” only “some” climbers would feel adversely affected, and “setting and visual qualities are not included in the features, attributes, or activities that qualify this resource for protection under Section 4(f)”; and (4) noise from the gondola would be within the existing noise conditions created by S.R. 210. (LCC\_FEIS\_Volume 5, Chapter 26, at 26-57–26-58.)

244. For the Climbing Historic District, UDOT concluded that the gondola would have de minimis impact because UDOT determined that, under Section 106 of the NHPA, the Gondola would have “no adverse effect” on the Climbing Historic District, and the Utah State Historic Preservation Officer concurred. (LCC\_FEIS\_Volume 5, Chapter 26, at 26-30, T. 26.4-1, 26-89.)

245. During the comment period on the Draft EIS and Final EIS, commenters contended that UDOT erred with respect to all of the reasons articulated for its de minimis conclusion and summarized above for both the Alpenbock 4(f) Property and the Climbing Historic District. UDOT responded to these comments in the Final EIS and ROD largely by simply restating its

reasoning. (*See, e.g.*, LCC\_FEIS\_Volume 6, Chapter 32, at 32-73, 32-131–32-133, 32-215–32-217.).

246. UDOT's reasoning for its Alpenbock 4(f) Property de minimis conclusion either is unsupported by the record or wrong. Regarding reason (1), UDOT fails to recognize that each boulder and each boulder problem is unique to the climbing community. A boulder cannot be feasibly moved in such a way to retain its existing boulder problems, nor can another boulder replace the bouldering opportunities on a destroyed boulder. Therefore, UDOT erred in concluding that the boulder that would have to be removed would not be permanently destroyed as a Section 4(f) attribute.

247. Regarding (2), UDOT has not committed to accepting an easement that will provide full and complete access to the 34 boulders that would not have to be removed within the easement. It is not sufficient under Section 4(f) to simply *assume* that an attribute of the Section 4(f) resource will still be available for public use. The statute allows for a de minimis finding only if there is a *commitment* that the attribute will not be lost or will be fully mitigated. Therefore, UDOT erred in finding de minimis impact to the 34 boulders.

248. Regarding (3), UDOT's various rationales are unsupported and contradicted by the record in multiple ways, including that the conclusion that most of the boulders would be shielded from the Gondola by vegetation is unsupported. There is no information in the record supporting this conclusion for the hundreds of known bouldering problems and routes within the Alpenbock 4(f) Property. The cables and cars will be directly or nearly directly over the boulders, and all but a few of the base areas and none of the boulders themselves are under vegetation. Further, any



trees are almost all entirely deciduous and will have no leaves during a large part of the year, eliminating a shielding effect.

249. Moreover, there is no support for UDOT's conclusion that only "some" climbers will be adversely affected by the Gondola's visual impact. UDOT did not conduct any type of appropriate study to ascertain how climbers would be affected by the presence of Gondola cables and cars. Comments received by UDOT regarding this issue from the climbing public were virtually unanimous that a natural setting and visual quality are important features of climbing and the Gondola would adversely affect their experience.

250. Further, there is no support in the Final EIS or other documents made available by UDOT for the conclusion that natural setting and visual quality are not attributes or features for which the Alpenbock 4(f) Property qualified for protection. To the extent that this was determined, it is wrong for the reasons above regarding visual impact. Therefore, UDOT arbitrarily and capriciously found that the visual impact of the Gondola would be de minimis.

251. Regarding (4), UDOT's conclusion that the sound of the Gondola will be washed out by road noise is wrong. Traffic on S.R. 210 varies substantially during the course of a day, as well as weekly and seasonally, and noise levels will fluctuate accordingly. The noise level of the Gondola will be constant when in operation. Climbing takes place in the Alpenbock 4(f) property during all hours of daylight and occasionally in the darkness of early morning or night. There is no basis to assume that for even the majority of time or for the majority of climbers the sound of the Gondola would be subsumed by road noise. UDOT admits "the noise from the gondola could be noticed when there is light vehicle activity." (LCC\_FEIS\_Volume 5, Chapter 32, at 32-164.) Defendant also fails to acknowledge that climbers on routes on the bigger cliffs will be closer to

the top of Gondola towers where the noise from the Gondola emanates and further from the road than other users of the area, and thus road noise is less likely to subsume Gondola noise. Therefore, UDOT erroneously found that the noise Gondola of the impact would be de minimis.

252. UDOT also recognized that the Tanners Flat Campground will be significantly impacted such that campers may no longer want to use tents due to the noise and sensory impacts, instead turning to recreational vehicle (RV) campers. (LCC\_FEIS\_Volume 5, Chapter 26, at 26-56.) But UDOT also states that, although the Gondola cables and therefore cabins, “would span the campground,” “the visual and privacy attributes of the campground are not features that qualify the campground for Section 4(f) protection.” (*Id.*)

253. In further violation of Section 4(f), UDOT failed to consider the Open Space across the street from the Gondola mobility hub and parking structure that has been designated a public recreation area through the city of Cottonwood Height’s purchase of the property. Removing bus services from Wasatch Boulevard will bring 30% more cars to this public recreation area, and the Gondola will increase noise, traffic, and scenic damage. The Final EIS is void of any mitigation measures related to this public recreation area.

254. For the foregoing and other reasons, Defendant’s de minimis findings under Section 4(f) of the Department of Transportation Act are arbitrary, capricious, and not in accordance with law.

**FIRST CAUSE OF ACTION**  
*Violation of –NEPA - Purpose and Need*

255. Plaintiffs incorporate by reference the allegations in Paragraph 1 through 254 above as if fully set forth in full herein.

256. The purpose and need of the Gondola, as stated in the Final EIS, is too narrow to address traffic congestion and safety concerns on S.R. 210, and Gondola Alternative B does not meet the stated Purpose and Need.

257. The Purpose of the Little Cottonwood Canyon Project is “to substantially improve roadway safety, reliability, and mobility on S.R. 210 from Fort Union Boulevard through the town of Alta for all users on S.R. 210.” (LCC\_FEIS\_Volume 1, Chapter 1, at 1-7.) The Need of the Little Cottonwood Canyon Project is “related primarily to traffic during peak periods, avalanche risk and avalanche mitigation in Little Cottonwood Canyon, multiple on-road users in constrained areas, and anticipated future increases in visitation to Little Cottonwood Canyon as a result of population growth in Utah,” including decreased mobility in the winter during “peak travel periods related to visits to ski areas,” decreased mobility for commuter traffic on Wasatch Boulevard, safety concerns related to avalanche hazards, and limited parking in the Canyon. (LCC\_FEIS\_Volume 1, Chapter 1, at 1-8.) UDOT’s decision to select Gondola Alternative B as the preferred alternative does not meet the Purpose and Needs of the Little Cottonwood Canyon Project and instead stands to serve only the private ski areas and benefit those who can afford to take the Gondola to those resorts.

258. UDOT’s Draft EIS and Final EIS do not support Gondola Alternative B as addressing the traffic and safety concerns leading to and along S.R. 210, as articulated in the Purpose and Need. Instead, UDOT’s Draft and Final EIS are drafted in such a way as to conceal what UDOT believes to be the real “Purpose and Need,” which is to construct a Gondola and serve a very narrow set of Canyon users to the detriment of virtually all others.

259. To the extent UDOT's Purpose and Need is to address traffic congestion and safety, UDOT has provided too narrow of a perspective in the Needs statement. The Need statement focuses only on peak winter traffic for resort skiers and snowboarders while arbitrarily ignoring other users, in contradiction of the stated Purposes of the project, as well as traffic congestion on the connected S.R. 190 and other feeder roads to S.R. 210. Further, UDOT's traffic and cost modeling is arbitrary and capricious and does not meet the stated Purpose and Need of the Little Cottonwood Canyon Project.

260. The failure of the Final EIS to sufficiently provide a Purpose and Need based on adequate and reliable information in support of Gondola Alternative B is a violation of NEPA, and is arbitrary, capricious, or otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2). The ROD relies on the deficient Final EIS and therefore violates NEPA and is arbitrary, capricious, and otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2).

**SECOND CAUSE OF ACTION**  
*Violations of –NEPA - Alternatives*

261. Plaintiffs incorporate by reference the allegations in Paragraph 1 through 260 above as if fully set forth in full herein.

262. The Final EIS does not adequately consider all reasonable alternatives to constructing and implementing a Gondola. There were alternatives that would have met the purposes and needs of the community for reduced traffic congestion on S.R. 210 without the same monetary costs and irreversible environmental harm.

263. The Final EIS does not adequately evaluate and consider all or a combination of the following reasonable alternatives or improvements, including their impacts under an accurate, real-world traffic and cost analysis:

- o. S.R. 210–Wasatch Boulevard Improvement (Imbalanced-lane Alternative and Five-lane Alternatives);
- p. Mobility Hubs Improvement (Gravel Pit, and 9400 South and Highland Drive);
- q. Avalanche Mitigation Improvement (Snow Sheds with Berms Alternative and Snow Sheds with Realigned Road Alternative);
- r. Trailhead Parking Alternatives/Improvements (Trailhead Parking Improvements and No S.R. 210 Roadside Parking within ¼ Mile of Trailheads Alternative; Trailhead Parking Improvements and No Roadside Parking from S.R. 209/S.R. 210 Intersection to Snowbird Entry 1 Alternative; No Trailhead Parking from S.R. 209/S.R. 210 Intersection to Snowbird Entry 1 Alternative);
- s. No Winter Parking Alternative; and
- t. No Action.

264. UDOT also fails to present fairly or adequately the alternatives it considered and presents biased analyses in favor of the Gondola alternatives. For example, as explained above, UDOT relies on flawed traffic data and travel scenarios in a manner that favors the Gondola alternatives, and disfavors less costly and impactful alternatives.

265. Further, UDOT’s inclusion of the Gondola alternatives violated the authority delegated to them by the FHWA. Pursuant to UDOT’s MOU with FHWA, UDOT was delegated authority to undertake NEPA analyses regarding “highway projects.” The Gondola alternatives do

not meet the definition of a “highway project,” and therefore, UDOT’s inclusion and selection of Gondola alternatives went beyond the scope of its delegated authority from FHWA.

266. UDOT’s selection of Gondola Alternative B also violates the FS MOU and improperly commits resources to the selected alternative before needed rights-of-way, special use permits, and potential plan revisions by the U.S. Forest Service have been provided or made, and before the U.S. Forest Service has conducted necessary NEPA analyses regarding the same. Under its own FS MOU with the U.S. Forest Service, UDOT cannot proceed with its selected alternative before the U.S. Forest Service takes final agency action and before the public has opportunity to comment on such action given different mandates, standards, and resources that the U.S. Forest Service must consider in taking agency action.

267. UDOT’s failure adequately to consider reasonable alternatives, and to present misleading or incomplete information about the traffic modeling, or a combination thereof, to present fairly an analysis of each alternative in an unbiased manner, and to analyze and consider alternatives beyond the scope of authority delegated to UDOT is a violation of NEPA, is arbitrary, capricious, or otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2). The ROD relies on the deficient Final EIS and therefore violates NEPA and is arbitrary, capricious, and otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2).

### **THIRD CAUSE OF ACTION**

#### *Violations of NEPA – Impacts*

268. Plaintiffs incorporate by reference the allegations in Paragraph 1 through 267 above as if fully set forth in full herein.

269. NEPA requires UDOT to take a hard look at the direct, indirect, and cumulative effects of its various alternatives. 40 C.F.R. §§ 1507; 1508.8(a), (b).

270. The failure of the Final EIS to adequately identify, disclose, and study the direct, indirect, and cumulative impacts of the Gondola on the natural and human environment is a violation of NEPA.

271. Impacts not adequately identified, disclosed, studied, and/or improperly deferred until after close of the NEPA process, include but are not limited to those discussed *supra* and below:

- a. impacts of the Gondola on the Little Cottonwood Canyon viewshed;
- b. impacts of the Gondola on the canyon's watershed;
  - i. For example, UDOT asserts in conclusory fashion that no Gondola alternative will impact Waters of the United States under the Clean Water Act. UDOT fails to consider that tower construction will occur in and around, or may impact, wetland areas subject to jurisdiction under the Clean Water Act.
  - ii. UDOT also fails to consider potential impacts on critical drinking water sources, including that Gondola construction will require excavation of multiple hazardous waste sites that may result in contamination. UDOT acknowledges these risks but fails to properly analyze them and fails to identify sufficient mitigation measures.
- c. impacts of the Gondola on wildlife;
  - i. For example, UDOT asserts that raptors in Little Cottonwood Canyon will face unspecified "minor" impacts from the Gondola's construction or operation and "are expected to acclimate to the presence of the gondola

quickly.” UDOT provides no support for this statement. UDOT fails to consider the impacts of construction, noise, and other harms from the Gondola on raptors that may result in unlawful takes of protected species.

- ii. UDOT asserts that there are no golden eagles present in Little Cottonwood Canyon. The only support UDOT provides for this statement is that it conducted a “web search” on HawkWatch International’s website and did not locate any information about golden eagles in Little Cottonwood Canyon. UDOT did not otherwise consult HawkWatch International or engage in any other means to discern whether golden eagles are nesting in Little Cottonwood Canyon. Because there is at least one known nesting pair of golden eagles at the base of the Canyon, and countless sightings of golden eagles by visitors to the Canyon, UDOT has failed to consider or address the effects the currently planned Gondola system will have on such eagles or their nests, or if the towers’ placement violates the Bald & Golden Eagle Protection Act.

d. impacts of the Gondola on roadless areas:

- i. UDOT incorrectly assumes that the construction of the Gondola has no impact on roadless areas for purposes of the RACR, including the two roadless areas through which the Gondola is planned to be constructed, the Twin Peaks and Lone Peak Inventoried Roadless Areas. This determination is based on the flawed and arbitrary premise that Gondola towers and dozens of suspended Gondola cabins crossing through inventoried roadless



areas will result in no violation of the RACR because the Gondola system is not a “road” for which timber harvesting is necessary.

- ii. UDOT also arbitrarily and capriciously assumes Gondola Alternative B is consistent with other RACR values, but concedes that its conclusion is subject to U.S. Forest Service review, which has not occurred.
- e. impacts of construction on or near Superfund sites:
- i. UDOT acknowledges, but fails to take the requisite “hard look,” regarding construction on or near at least two CERCLA Superfund sites: the Davenport and Flagstaff site and the Jones and Pardee site.
  - ii. UDOT acknowledges that substantial excavation will need to occur at these sites, and even that there is a “high probability of contamination” from such excavation, but UDOT simply dismisses that risk based on future, unspecified mitigation assessments and measures. In essence, UDOT acknowledges significant contamination risks, but simply delays any analysis of the extent of such risks on human health or the environment, the costs related to the likely contamination and potential cleanup, and potential delays to the project.
- f. impacts on developing on National Forest Service land:
- i. To construct roads and gondola towers on National Forest Service land, UDOT must obtain special use permits from the National Forest Service. The EIS does not adequately consider or disclose the cost, feasibility, or requirements of obtaining such a permit. The EIS also fails to consider the

costs associated with any remediation or mitigation that the U.S. Forest Service may require to obtain or comply with a permit.

- ii. UDOT also arbitrarily assumes that it will obtain U.S. Forest Service easements, special use permits, and needed revisions to U.S. Forest Service plan documents, and relies upon such contingent actions in selecting Gondola Alternative B before the U.S. Forest Service has taken any final agency action—including necessary NEPA analyses—regarding the needed U.S. Forest Service actions. UDOT’s EIS and analyses do not suffice for proper EIS analysis by the U.S. Forest Service, which requires additional and separate public comment and input.

g. impacts on Big Cottonwood Canyon:

- i. The Final EIS explains that the “impact analysis area was selected to include locations where project-related impacts could cause changes in land use, use of recreation resources, and tolling.” (LCC\_FEIS\_Volume 4, Chapter 20, at 20-1.) But UDOT included only the indirect impacts to Big Cottonwood Canyon with respect to tolling, and it provided that it would “likely ... need to implement tolling for S.R. 190 in [Big Cottonwood Canyon] at the same time” because a toll in the Little Cottonwood Canyon could result in a greater flow of traffic to the ski resorts in Big Cottonwood Canyon. (LCC\_FEIS\_Volume 4, Chapter 20, at 20-20, 2-50; LCC\_ROD at 92, 102.) UDOT did not otherwise consider how the Gondola Alternative B will affect traffic congestion leading to Big Cottonwood Canyon.

- ii. UDOT did not consider the cumulative impacts Gondola Alternative B will have on Big Cottonwood Canyon. Chapter 21 of the FEIS, which addresses the “Cumulative Impacts,” identified separate cumulative impact analysis areas for recreation, water resources, ecosystem resources, and visual resources, but did not include traffic congestion in nearby areas including Big Cottonwood Canyon. Instead, the FEIS merely acknowledges that visitor use may shift to nearby canyons as a result of Gondola infrastructure.

272. UDOT’s failure to analyze these impacts violates NEPA and its implementing regulations, and is therefore arbitrary, capricious, and otherwise not in accordance with the law in violation of the APA. 5 U.S.C. § 706(2). The ROD relies on the deficient Final EIS and therefore violates NEPA and is arbitrary, capricious, and otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2).

**FOURTH CAUSE OF ACTION**  
*Violations of NEPA - Mitigation*

273. Plaintiffs incorporate by reference the allegations in Paragraph 1 through 272 above as if fully set forth in full herein.

274. The failure of the Final EIS adequately to identify, discuss, and determine the effectiveness of measures that could be taken to avoid, minimize, or compensate for the Gondola Alternative B’s impacts on the natural and human environment violates NEPA. This includes measures related to the adverse impacts identified above regarding adverse wildlife, watershed, roadless areas, viewsheds, wilderness areas and Superfund site impacts.

275. UDOT’s failure to mitigate the harms to the environment that will result from Gondola Alternative B violates NEPA and its implementing regulations, and is therefore

arbitrary, capricious, and otherwise not in accordance with the law in violation of the APA. 5 U.S.C. § 706(2). The ROD relies on the deficient Final EIS and therefore violates NEPA and is arbitrary, capricious, and otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2).

**FIFTH CAUSE OF ACTION**

*Violations of NEPA - Response to Comments*

276. Plaintiffs incorporate by reference the allegations in Paragraph 1 through 275 above as if fully set forth in full herein.

277. The failure of UDOT to adequately respond to substantive comments submitted on the Draft EIS and Final EIS is a violation of NEPA.

278. Throughout the NEPA process, Plaintiff and other members of the public submitted extensive comments on the environmental impacts of the Gondola alternatives to the viewshed, the watershed, traffic congestion, wildlife, and inaccuracies of the parking and queuing models.

279. Despite acknowledging that the Gondola Alternative B is incredibly costly and that it will take years to obtain sufficient funding to construct the Gondola, and despite acknowledging that the first phase of the preferred alternative action could sufficiently address the purpose and need of the Little Cottonwood Canyon Project while causing less harm to the environment, UDOT failed to analyze how the Gondola Alternative B would directly, indirectly, and cumulatively impact vegetation, wildlife, water quality, and other natural resources.

280. These failures include, but are not limited to, UDOT's failure to address direct, indirect, and cumulative impacts in Big Cottonwood Canyon, adjacent communities and nearby canyons and recreational sites that will necessarily result from construction and operation of the

Gondola project in Little Cottonwood Canyon. UDOT received comments regarding these concerns and arbitrarily refused to address them as beyond the scope of its NEPA duties.

281. UDOT's failure to analyze these impacts in response to comments violates NEPA, its implementing regulations, and is arbitrary, capricious, or not otherwise in accordance with the law in violation of the APA. 5 U.S.C. § 706(2). The ROD relies on the defective Final EIS and UDOT's response to comments and therefore violates NEPA and is arbitrary, capricious, and otherwise not in accordance with law in violation of the APA. 5 U.S.C. § 706(2).

#### **SIXTH CAUSE OF ACTION**

##### *Violations of Section 4(f) of the Department of Transportation Act of 1966*

282. Plaintiffs incorporate by reference the allegations in Paragraph 1 through 281 above as if fully set forth in full herein.

283. Section 4(f) has as its goal the preservation of publicly-owned recreation lands, parks, wildlife refuges, and historic sites.

284. Section 4(f) mandates that the Secretary of Transportation cooperate and consult with, *inter alia*, the Secretary of Agriculture "to maintain and enhance the natural beauty of lands crossed by transportation activities and facilities." 49 U.S.C. 303.

285. Section 4(f) permits approval of a transportation program or project only if there is no prudent or feasible alternative to using the land at issue, *and* the project includes all possible planning to minimize harm to the site at issue. *See id.*

286. UDOT, in conjunction with the FHWA, failed to analyze certain 4(f) resources and arbitrarily determined there would be "no adverse impact" or "de minimis impact" regarding at least the Little Cottonwood Historic Climbing District and the Alpenbock Trail/Grit Mill Climbing Opportunities, the Tanners Flat campground, and the Cottonwood Heights Open Space.

287. UDOT has failed to analyze adequately the impacts of the Gondola alternatives to these resources, and has further arbitrarily determined there are no feasible or prudent avoidance alternatives. As such, UDOT has failed in its obligations under Section 4(f).

**SEVENTH CAUSE OF ACTION**

*Ultra Vires Acts Beyond Scope of Delegated Authority*

288. Plaintiffs incorporate by reference the allegations in Paragraph 1 through 287 above as if fully set forth in full herein.

289. Pursuant to an MOU and 23 U.S.C. § 327, UDOT was granted authority by the FHWA to conduct NEPA analyses for and to construct “highway projects.” *See* MOU § 3.1.

290. UDOT exceeded its authority under the MOU and 23 U.S.C. § 327 when it considered the Gondola alternatives because a gondola does not constitute a “highway project” as that term is defined in FHWA statutes and regulations.

291. Part 3 of the MOU describes the “Assignments and Assumptions of Responsibility” undertaken by UDOT pursuant to the MOU, including a description of “highway projects” included and excluded for purposes of UDOT’s NEPA responsibilities. *Id.*

292. “Highway projects” under the MOU include those “proposed to be funded with Title 23 funds ....” MOU § 3.3.1.

293. The MOU states that “any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by UDOT under [the MOU] remains the responsibility of the USDOT Secretary.” MOU § 3.2.2.

294. Title 23 of the U.S. Code defines “Highway” to include “a road, street, and parkway,” and “a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure

including public roads on dams, sign, guardrail, and protective structure, in connection with a highway.” 23 U.S.C. § 101(a)(11).

295. Title 23’s Declaration of Policy makes clear that no federal funding pursuant to that Title “shall be expended ... unless funds for such expenditure are identified and included as a line item in an appropriation Act and are to meet obligations of the United States heretofore or hereafter incurred under this title attributable to the construction of Federal-aid *highways* or *highway* planning, research, or development ....” 23 U.S.C. § 101(d) (emphasis added).

296. The Gondola in Gondola Alternative B in UDOT’s EIS and ROD is not a “highway” or “highway project.” Indeed, UDOT concedes in its attempt to evade violations of pertinent roadless area rules that the Gondola system “is not a motor vehicle travelway.” (LCC\_Supplemental Information Report – Assessment of Roadless Area Conservation Rule for the Final EIS Alternatives, at 35, 55.)

297. Plaintiffs therefore seek a declaration that UDOT’s consideration and selection of Gondola Alternative B was *ultra vires*, beyond the authority delegated to it by FHWA, and violates federal law regarding delegation of authority to conduct NEPA analyses to UDOT.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully request that this Court enter judgment in Plaintiffs’ favor and against UDOT and provide the following relief:

1. Declare that UDOT has violated NEPA and its implementing regulations, and the APA, as follows:
  - a. The Final EIS and ROD fail to comply with NEPA and the APA and are therefore invalid, as are any approvals or permits relying on the same.

- b. UDOT's acts and omissions in preparing and issuing the Draft EIS, Final EIS, and ROD are arbitrary, capricious, and not in accordance with governing law.
    - c. UDOT's NEPA analysis regarding a gondola project exceeded its authority to perform such analyses for "highway projects."
  2. Enter an order as follows:
    - a. Revoking and setting aside the Final EIS and ROD;
    - b. Ordering UDOT to fully comply with NEPA and the APA in preparing a new NEPA analysis that includes, among other things, an appropriate statement of purpose and need, an appropriate study area, reasonable alternatives, adequate analyses of direct, indirect, and cumulative impacts of such alternatives, and in-depth responses to substantive public comment;
    - c. Enjoining UDOT from imposing deadlines and statutes of limitation related to challenges of its NEPA processes in the absence of final agency action by the U.S. Forest Service, including regarding, *inter alia*, any revision or amendment of the Forest Plan and any U.S. Forest Service permits or easements.
    - d. Enjoining UDOT from considering alternatives in any new EIS and ROD pertaining to a gondola system, or other transportation system beyond the scope of "highway projects" as defined in the FHWA's MOU with UDOT and in Title 23 of the U.S. Code.
  3. Declare that UDOT has violated Section 4(f) of the Department of Transportation Act of 1966 and enjoin UDOT from proceeding with the Gondola project until such time as it has fully complied with both NEPA and Section 4(f).



4. Retain continuing jurisdiction of this matter until UDOT fully remedies the violations of law complained of herein.
5. Award Plaintiff the costs incurred in pursuing this action, including attorneys' fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and any other applicable provisions.
6. Grant such other relief the Court deems just and proper.

DATED this 4th day of December 23.

MANNING CURTIS BRADSHAW  
& BEDNAR PLLC

/s/ Mitch M. Longson  
Mitch M. Longson  
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