IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-1945-REB (AP Case)

OREGON-CALIFORNIA TRAILS ASSOCIATION, a nonprofit corporation;
WESTERN NEBRASKA RESOURCES COUNCIL, a nonprofit corporation;
HANGING H EAST, L.L.C., a limited liability corporation;
WHITETAIL FARMS EAST, L.L.C., a limited liability corporation,

Petitioners,

v.

NOREEN WALSH, in her official capacity as the Regional Director, U.S. Fish and Wildlife Service, Department of Interior Unified Regions 5 and 7; DAVID BERNHARDT, in his official capacity as the Secretary of the U.S. Department of the Interior; and AURELIA SKIPWITH, Director of the U.S. Fish and Wildlife Service[1],

Respondents.

ANSWERING BRIEF OF FEDERAL RESPONDENTS

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[1] The Senate confirmed Ms. Skipwith on December 12, 2019. Pursuant to Fed.R.Civ.P. 25(d), she is automatically substituted for Ms. Everson.

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TABLE OF AUTHORITIES

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APE	Area of Potential Effects
EIS	environmental impact statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FWS or the Service	U.S. Fish & Wildlife Service
HCP	habitat conservation plan
ITP	incidental take permit
NEPA	National Environmental Policy Act
NERC	North American Electric Reliability Corporation
NHPA	National Historic Preservation Act
NMFS	National Marine Fisheries Service
NPPD	Nebraska Public Power District
ROD	Record of Decision
SHPO	State Historic Preservation Office
SPP	Southwest Power Pool

ADMINISTRATIVE RECORD CITATION

On the thumb drive provided to the Court and the parties, the administrative record documents are divided into subject-matter folders, with a matching Bates number prefix. In this brief, we cite to administrative record documents by identifying the prefix and the Bates number. For example, the first document in the first folder (Emails) would be cited as EMAIL_000001.

INTRODUCTION

After years of analysis and public participation, in 2019 the United States Fish and Wildlife Service ("the Service") issued a permit to the Nebraska Public Power District ("NPPD") under Section 10 of the Endangered Species Act ("ESA"). The permit allows NPPD to incidentally "take" endangered American burying beetles in connection with the construction and operation of a new east-west 225-mile transmission line in Nebraska ("the R-Project"). The Service's action is limited to authorizing the incidental take associated with an otherwise lawful private activity. The Service lacks authority over the permitting or siting for the transmission line or for future wind development that may occur. Nonetheless, many of Petitioners' arguments seek to hold the Service accountable for alternatives or decisions outside of the agency's ESA Section 10 authority. For example, NPPD decided not to apply for an ESA Section 10 exemption for possible impacts to whooping cranes. While the Service was obligated to evaluate NPPD's determination that take of the crane is not reasonably certain to occur, once it independently confirmed this conclusion, the Service could not require NPPD to include cranes in the permit.

The administrative record demonstrates that the Service reasonably evaluated NPPD's application for the ESA Section 10 permit through an in-depth environmental impact statement ("EIS") conducted under the National Environmental Policy Act ("NEPA") and a biological opinion conducted under ESA Section 7. These analyses investigated all aspects of the permitting decision, including areas impacted by the National Historic Preservation Act ("NHPA"), and supported the Service's issuance of the permit. With respect to the ESA, the Service reasonably determined that NPPD

minimized and mitigated the take of the beetle, fully offsetting the impacts of the project by NPPD's commitment to acquire 600 acres of mitigation habitat. The record also supports the Service's assessment that the project is unlikely to result in "take" of the interior least tern, the piping plover, and the whooping crane. While the crane assessment involved multiple competing analyses, the Service ultimately addressed the strengths and weaknesses of each, fully explaining its final determination. Petitioners disparage the agency's expert resolution of these highly technical issues, but their arguments amount to little more than disagreement with the final determination reached by the Service. Finally, the Service properly evaluated the impacts of any future wind development as a cumulative effect, considered together with the R-Project; the Court should reject Petitioners' arguments that the ESA requires different consideration of such generalized future developments.

The administrative record further demonstrates that the Service complied with NEPA. The Service explained its reasons for dismissing a Central Route alternative in the final EIS. The Service also took a hard look at the cumulative effects of future wind projects and, where data was lacking, adequately explained what data was missing and why the Service could not complete a more specific analysis. The Service likewise complied with the NHPA. The Service has entered into a Programmatic Agreement with all relevant parties that establishes a process for addressing potential adverse effects to cultural resources and, under NHPA regulations, this agreement satisfies the Service's Section 106 consultations obligations.

For these reasons, as set forth more fully below, this Court should deny the Petition for Review and uphold the Service's challenged actions here.

STATUTORY AND REGULATORY BACKGROUND

I. Endangered Species Act

Congress enacted the ESA to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). To accomplish this goal, Congress directed the Secretary[2] in Section 4 of the ESA to list endangered and threatened species and to designate critical habitat for those species. 16 U.S.C. § 1533. ESA Section 9 prohibits the taking of any endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B) and (G).[3] This prohibition applies to any person, including the United States and its agencies.

A. ESA Section 10 - Habitat Conservation Plans and Incidental Take Permits

In 1982, Congress amended ESA Section 10 to address the concerns of private entities that wish to pursue lawful activities on private property without risking criminal and civil penalties under ESA Section 9 for take. *See* H.R. Rep. No. 97-567 at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2831. Section 10(a) provides an exception from the take prohibition of ESA Section 9 if the "take" is incidental to otherwise legal conduct and if the take "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B). Private entities are not required to obtain an ESA Section 10(a)(1)(B) permit and such a permit does not

[2] Administration of the ESA is divided between the Secretary of the Interior (terrestrial species) and the Secretary of Commerce (marine species). 16 U.S.C. §§ 1532(15), 1533(a)(2). The Secretary of the Interior has jurisdiction over the species at issue here and this responsibility has been delegated to the Service. *See* 50 C.F.R. § 402.01(b).

[3] The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

directly authorize development; rather it authorizes the incidental take of listed species that may accompany development. Whether to apply for a Section 10 permit "is a decision of the applicant." ADD_00982. If an applicant chooses not to, and incidental take should occur from the project, "the project proponent is liable for violation" of ESA Section 9. ADD_02580.

An applicant seeking an ITP must submit an HCP that specifies:

> (i) the impact that will likely result from the incidental take;
> (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding available to implement [minimization and mitigation];
> (iii) what alternative actions the applicant considered and the reasons these alternatives are not being utilized; and
> (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

16 U.S.C. § 1539(a)(2)(A); 50 C.F.R. §§ 17.22(b)(1), 17.32(b)(1). Upon receipt of a complete application package, the Service publishes notice in the Federal Register and provides the public with 30 days to comment on whether the permit should issue. 16 U.S.C. § 1539(a)(2)(B); 50 C.F.R. §§ 17.22, 17.32(b)(1)(ii).

After evaluation of all of this information, if the Secretary finds that:

> (i) the taking will be incidental;
> (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
> (iii) the applicant will ensure that adequate funding for the plan will be provided;
> (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
> (v) any additional measures imposed by the Secretary will be met;

then "the Secretary shall issue the permit." 16 U.S.C. § 1539(a)(2)(B).

B. ESA Section 7 Consultation

Section 7(a)(2) of the ESA prohibits federal agencies from taking any action that is likely to "jeopardize the continued existence of any endangered species or threatened

species . . ." 16 U.S.C. § 1536(a)(2). To achieve this objective, the ESA requires the agency ("the action agency") to consult with the relevant federal wildlife agency whenever a federal action "may affect" an endangered or threatened species. 50 C.F.R. § 402.14(a). In this case, because the action at issue is the Service's issuance of the ESA Section 10(a) permit, the Service was both action agency and consulting agency. Accordingly, the Service consulted with itself on the potential effects of that action.

The procedure for "formal consultation" is described at length at 50 C.F.R. § 402.14. Formal consultation culminates in the Service's issuance of a "biological opinion" which advises whether the proposed action is likely to jeopardize any listed species and, if so, whether "reasonable and prudent alternatives" exist to avoid such a result. 16 U.S.C. § 1536(b)(4). There are no reasonable and prudent alternatives at issue in this case, as the Service concluded that issuance of the Section 10 permit is not likely to jeopardize the American burying beetle.

II. The National Environmental Policy Act

NEPA "prescribes the necessary process" by which agencies must take a "hard look at the environmental consequences of proposed actions," but it "does not mandate particular results." *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1171–72 (10th Cir. 1999) (citations omitted); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1034 (10th Cir. 2001); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1521–22 (10th Cir. 1992). NEPA simply establishes certain procedures agencies must follow before taking any action that could significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C) (listing requirements and components of an EIS). *See also* 40 C.F.R. §§ 1500-1508 (NEPA implementing regulations). These "action-forcing procedures" are

intended to prohibit "uninformed—rather than unwise—agency action.'" *Colo. Envtl. Coal.*, 185 F.3d at 1171-72 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)). A court's role is not to "'fly speck' the environmental impact statement, but rather, to make a 'pragmatic judgment whether the [EIS]'s form, content and preparation foster both informed decision-making and informed public participation.'" *Custer Cty.*, 256 F.3d at 1035 (citations omitted).

III. The National Historic Preservation Act

The NHPA, 54 U.S.C. § 302101; 306108, "requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic Preservation . . . to administer the Act." *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270, 1280 (D.N.M. 2008) (quoting *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003). "NHPA, like NEPA, is a procedural statute requiring government agencies to stop, look, and listen before proceeding when their action will affect national historical assets." *Coal. of Concerned Citizens To Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transportation*, 843 F.3d 886, 905–06 (10th Cir. 2016) (quoting *Presidio Historical Ass'n v. Presidio Trust*, 811 F.3d 1154, 1169 (9th Cir. 2016)).

Section 106 of the NHPA requires that federal agencies consider the effects of a proposed undertaking on any historic properties within the Project's Area of Potential Effects ("APE") and that agencies follow regulations issued by the Advisory Council on Historic Preservation ("the Council"). 36 C.F.R. Pt. 800; 54 U.S.C. § 306108. Section 106 authorizes an agency to enter into a "programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain

complex project situations or multiple undertakings." 36 C.F.R. § 800.14(b). "When a governing programmatic agreement is in place, compliance with the procedures in that agreement satisfies the agency's NHPA Section 106 responsibilities for all covered undertakings." *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 846 (10th Cir. 2019) (citing 36 C.F.R. § 800.14(b)(2)(iii)). *See also* 36 C.F.R. § 800.6(b).

FACTUAL BACKGROUND

In response to the widespread 2003 blackout impacting more than 50 million people, the Energy Policy Act of 2005 called for the creation of an Electric Reliability Organization to develop and enforce compliance with mandatory reliability standards in the United States. Pub. L. 109-58, 119 Stat. 594. The Federal Energy Regulatory Commission designated the North American Electric Reliability Corporation ("NERC") as this organization in 2006. The Southwest Power Pool ("SPP"), to which NPPD belongs, is one of the regional electric reliability councils under NERC's authority. The SPP conducts 10- and 20-year planning studies to ensure the electrical grid will continue to meet the NERC standards. LIT_CITED_018626-27. When SPP identifies a need for new transmission infrastructure, it issues a "Notice to Construct" directive to the relevant power company, which undertakes the planning and construction of the project. LIT_CITED_018627. In April 2012, NPPD received a Notice to Construct a new east-west 345-kilovolt ("kv") transmission line and a new substation. *Id.* NPPD received another Notice to Construct in 2014 requiring a new 345-kv transformer near the existing substation. *Id.* Together, these new infrastructure components are referred to as "the R-Project."

I. Overview of the Permit Process

NPPD first contacted the Service in May 2012 in order to begin evaluation of whether the R-Project would result in the prohibited take of any protected species. SECTION _7_000004. When NPPD began evaluating potential routes for the R-Project in 2012, it considered many alternate routes. LIT_CITED_032225. NPPD received and evaluated more than 2,500 public comments during this state-law-driven process. *Id*. In October 2014, the Service published notice seeking comments on the scope of a proposed Environmental Impact Statement, and setting three public meetings in Nebraska for this purpose. ADD_01016–17. After receiving a number of comments, the Service issued a Scoping Summary Report. LIT_CITED_032198. In May 2015, NPPD provided to the Service a preliminary draft habitat conservation plan ("HCP") analyzing the impacts of the R-Project on numerous species and seeking an incidental take permit for impacts to the American burying beetle. SECTION _7_000004. In May 2016, the Service and NPPD discussed whether take of the whooping crane was also reasonably certain to occur and if the ITP application should be amended, with NPPD ultimately determining the issue in the negative. *Id.* As discussed in greater detail below, after independent review, the Service agreed that the take of the whooping crane was not reasonably certain to occur.

In May 2017, the Service issued for public comment a draft EIS and the draft HCP.[4] ADD_01017. During the 60-day comment period, the Service held three public meetings. *Id.* The agency received numerous requests for an extension of the comment

[4] FWS also published NPPD's draft Migratory Bird Treaty Act plan and its draft restoration management plan. ADD_01017.

period and, accordingly, re-opened the public comment period for another 60 days and an additional question/answer session. *Id.* The Service reviewed each correspondence and identified specific comments within each piece of correspondence. LIT_CITED_032198–99. Approximately 800 individual comments were derived from the correspondence received. *Id*.

In February 2019, the Service published a final EIS, the final HCP, the agency's response to public comments, and a draft record of decision ("ROD") in which it proposed to issue an incidental take permit to NPPD for take of the beetle. LIT_CITED_032166-33002 (final EIS), 018617-883 (final HCP); NEPA_002317-25 (draft ROD), 002326-2464 (analysis of public comment). In May 2019, the Service issued a supplemental response to additional comments it received on the final EIS. ADD_01021-36. The biological opinion analyzing the impact of granting the ITP was signed on June 4, 2019, and the Record of Decision and permit issued on June 12, 2019. SECTION_7_000001-34; ADD_01012-19; HCP_001927-30.

II. The Final EIS

The final EIS states that the purpose of the Service's proposed action (approving the HCP and issuing the ITP) is "to authorize take of the beetle incidental to the construction, operation, and maintenance (including emergency repairs) of the R-Project, while ensuring conservation of the species by minimizing and mitigating the impacts from the anticipated take to the maximum extent practicable." LIT_CITED_032208. The need for the proposed action is "to respond to NPPD's application for a permit and determine whether permit issuance is appropriate." LIT_CITED_032210. The final EIS also identifies the need for the R-Project itself: 1) to

increase energy reliability; 2) to reduce congestion; and 3) to provide transmission access to renewable energy resources. LIT_CITED_032210–16. Because the project's need date, January 1, 2018, has passed, NPPD is implementing mitigation plans to reduce the risk of power outages and load shedding. LIT_CITED_032215.

Given the purpose and need of both the Service's proposed action and the R-Project, the final EIS describes the development of alternatives and explains the basis for choosing the preferred alternative. Chapter 2 of the final EIS thus presents three alternatives, two action alternatives and a no-action alternative. LIT_CITED_032168. The Service's preferred alternative uses both steel lattice tower structure and tubular steel monopole structures to construct the power line. LIT_CITED_032200; 03224–79. This preferred alternative reduces the disturbance of beetle habitat and also provides approximately 600 acres of mitigation lands to conserve beetle habitat. *Id*.

The Service initially conducted a separate and independent programmatic level routing study to identify alternative conceptual routes, which were economically and technically feasible and would avoid or minimize effects on beetle habitat, including a central conceptual route known as the Central Route. LIT_CITED_032268; ADD_00187–90. Section 2.6.6.2 of the final EIS, entitled Reasons for Elimination of the Central Route from Further Analysis, outlines multiple reasons for eliminating the Central Route: 1) the Service lacks authority to require NPPD to implement this route; 2) the Central Route fails to meet the purpose and need of the R-Project; and 3) the Service determined, under NEPA regulations (40 C.F.R. §§ 1500–1508), that the Central Route is not a reasonable alternative. LIT_CITED_032276–77.

Chapter 4 of the final EIS describes the cumulative impacts of the various alternatives and examines the cumulative impacts of past, present, and reasonably foreseeable actions within the vicinity of the R-Project. LIT_CITED_032733–75. Section 4.3 outlines reasonably foreseeable future actions expected to result from the preferred alternative, including wind development. LIT_CITED_032746–53. Section 4.4 analyzes the cumulative effects of these future actions on wildlife, including the whooping crane. LIT_CITED_032756–62.

After issuing the final EIS, the Service received a number of comments, which it reviewed, and responded to these comments when it issued the ROD. ADD_01021–36.

III. Assessment of Potential for Take of Whooping Cranes

As discussed above, because take of the whooping crane is not reasonably certain to occur, NPPD decided not to include it as a covered species in the Section 10 application. However, the Service needed to independently determine if there was a reasonable certainty that a crane would strike the R-Project lines over the 50-year project lifetime; if so, the Service would have advised NPPD to add the crane as a covered species. The record shows that the Service engaged in a significant, multi-year analysis of this issue considering analyses from NPPD, outside expert reports submitted through the public comment process, their own risk assessment, an independent peer reviewer, and finally a synthesis and evaluation of all of this data in January 2019 before finalizing the EIS.

NPPD's initial assessment in 2016 averaged the known power line strike mortalities to develop an annual collision risk, then performed further analysis with the 326,000 total miles of power lines in the U.S. portion of the crane's migratory corridor,

the 225 miles of line to be added by the R-Project, and the 50-year life of the project. WHCR_000195. This assessment calculated a collision risk of 0.016 cranes for the life of the project. *Id.*; *id.* at 000202-13 (detailed explanation of risk assessment). NPPD identified the factors that would likely further reduce this risk, such as the fact that only 123 miles of the 225-mile project are in suitable crane habitat and that none of the known power line strike mortalities occurred on lines marked with bird flight diverters, as NPPD proposed to do. WHCR_000196. NPPD also proposed to amend the HCP and permit to add the crane if there is a strike of an R-Project line or similar transmission line. WHCR_000197.

The Service's Nebraska office reviewed NPPD's 2016 assessment using some different assumptions, the key difference being whether crane mortality was proportional to their lifecycle or whether a higher percentage of crane mortality occurred during migration. WHCR_000215. The Service's 2016 assessment thus estimated a collision risk of 0.5 cranes for the life of the project. WHCR_000216. The Service's 2016 assessment performed a second estimate incorporating population growth over 50 years, which it calculated would result in a collision risk of 0.5 cranes for the life of the project. *Id.*

The Service conducted another risk assessment in 2017, which was appended to the draft EIS. WHCR_000184. This assessment refined the population growth assumptions and attempted to apportion collision risk between smaller distribution lines and transmission lines such as the R-Project. *Id.* The maximum likelihood estimates suggested that between 0.422 and 0.619 whooping cranes would strike the R-Project

over the 50-year life of the project.[5] *Id.* The 2017 analysis emphasized the "enormous" uncertainty in these calculations and stated that the lack of data undermines the ability to scientifically derive a meaningful collision risk. WHCR_000222. During the second public comment period on the draft EIS, on behalf of some of the plaintiffs, Ecosystems Advisors submitted a collision risk assessment incorporating the newly available tracking data on the wild crane population that migrates through the project area.[6] WHCR_000184. This analysis presented a significantly higher estimate of collision risk, ranging from 1.73 to 4.46 crane strikes per year. *Id.*

Because of the "vast differences" in the results of these four risk assessments, the Service retained an independent peer reviewer, Dr. Craig Davis, to evaluate the studies. WHCR_000185. Overall, Dr. Davis emphasized the sparseness of the available data, which introduces substantial uncertainty into any analysis of how the R-Project will impact cranes. WHCR_000302-03. Dr. Davis concluded that the NPPD 2016 analysis likely underestimated collision risk, but that the Ecosystems Advisors report likely overestimated collision risk by relying on problematic assumptions and unexplained mathematical logic. WHCR_000185. Dr. Davis appreciated the attempts in the Service's 2017 analysis to account for uncertainty and concluded that, even if the Service had been able to use the tracking data, it still would not fill the data gaps on actual frequency of crane and power line collisions. *Id.* Dr. Davis ultimately concluded, like the Service's

[5] Petitioners incorrectly characterize this result as estimating that as high as five cranes could strike the R-Project. E.g., Pets. Br. (ECF No. 22) at 20. However, they refer to the 90% confidence intervals, which ranged from 0 to 5 strikes. Confidence intervals are a measure of plausibility, or a margin of error, and should not be confused with the maximum likelihood estimate, which is the best single answer from the available data.

[6] This assessment was authored by Drs. Karine Gil and Enrique Weir and is also referred to in the administrative record as Gil and Weir (2017).

2017 assessment, that these data gaps prevented any calculation of collision risk at a scientifically defendable level of certainty. WHCR_000303.

The Service gave Ecosystems Advisors the opportunity to respond to Dr. Davis's review. Ecosystems Advisors' 2018 response addresses points raised by Dr. Davis and provides clarification of other points. WHCR_000307-16. On many points, the response reflects reasonable scientific disagreement about extrapolations from certain studies or data or how much uncertainty impacted model results. Concurrently, NPPD had retained its own independent review of the Ecosystems Advisors assessment, which reflected many of the same concerns identified by Dr. Davis – namely, that the model could not be reproduced and key assumptions were insufficiently explained. WHCR_000185, 000328.

The Service's Nebraska office also performed additional risk assessments in 2018, attempting to integrate new telemetry tracking data. WHCR_000186. The Service's internal review identified significant concerns with the methods and basis of the initial Nebraska office 2018 assessment, which was further revised in September of 2018. *Id.* That assessment predicted a wide range of strikes over the life of the project, ranging from 16 to 155, but with maximum likely estimates of 40-84 strikes. WHCR_000380. Given the issues with the prior assessment and the wide-ranging uncertainty, the Service's regional office again conducted an internal review of the September 2018 assessment. WHCR_000186. The internal review found that the Nebraska office's first method over-estimated potential strikes by an order of magnitude and proper use of the data would result in an estimate of 0.46 strikes over the life of the Project. WHCR_000402. This reduced estimate does not even re-calculate some of the

problematic assumptions, such as how many times migrating cranes would cross areas with R-Project transmission lines. WHCR_000403. The internal review found the Nebraska office's second method unclear and suffering from logic errors. WHCR_000405. Thus, the results could not be properly recalculated. WHCR_000406. However, the review pointed out that the results implausibly predicted that a 4.7% increase in transmission lines would result in a 189% to 2,116% increase in strikes. WHCR_000406-07. Overall, the review stressed that a scientifically defensible method of incorporating the recent tracking data would be necessary before that data would provide anything more than "marginal value" for assessing the risk of whether cranes will strike a specific set of power lines. WHCR_000410. The review also conducted an assessment using existing data and incorporating aspects of the tracking data, estimating a likelihood of 0.58 crane strikes over the life of the project. WHCR_000408-11.

Finally, NPPD revised its 2016 analysis in response to Dr. Davis's review, estimating that there is a likelihood of between 0.022 to 0.22 crane strikes over the life of the project. WHCR_000187.

The Service's synthesis of these ten different risk assessments and critiques underscored that, without further work, the recent telemetry data did not add a meaningful tool to evaluate the risk to cranes from the R-Project. WHCR_000187. Based on Dr. Davis's review and its 2018 internal review, the Service rejected the Ecosystems Advisors 2017 report and the Nebraska office's 2018 attempt as unreliable. *Id.* The Service concluded that there is a low likelihood of crane strikes of the R-Project over the life of the project. WHCR_000188. With the further reduction in risk provided by

NPPD's commitment to mark 246 miles of line with bird flight diverters,[7] the Service reasonably concluded that "incidental take of whooping cranes with the R-Line Project is not reasonably certain to occur." *Id.*

IV. The Service's Section 106 Consultation

Section 3.10.2 of the final EIS describes the R-Project's Section 106 consultation process, which is ongoing. LIT_CITED_032564. NPPD contracted POWER Engineers to survey the Area of Potential Effects for cultural resources and, at the time the final EIS was published, POWER Engineers had conducted four surveys in 2015, 2016, 2017, 2018, covering 93% of the APE. LIT_CITED_032572–76. POWER Engineers also completed a desktop visual effects analysis to model the steel poles and lattice towers of the R-Project and understand the expected effects of the project on the viewshed. LIT_CITED_032574-75.

Table 3.10-6 in the final EIS summarizes the Service's analysis of the eight historic or potentially historic resources identified as of the date of the EIS. LIT_CITED_032594. The Service explained that, as is the case with large projects of this nature, additional cultural resources may be identified because some of the route crosses private property that could not be surveyed. LIT_CITED_32568. The final EIS outlines avoidance, minimization, and mitigation measures such as micro-siting the installation of ground-disturbing features such as transmission poles, rerouting access

[7] NPPD committed to implement bird flight diverters for the 123 miles of line in potentially suitable stopover habitat, WHCR_000196, as well as another 123 miles of currently existing but unmarked lines. LIT_CITED_018510; *id.* at 018511 (specific existing lines to be marked). Reflective or glow-in-the-dark diverters will be used near water areas with large concentrations of water birds, about 10-15% of the line markings. LIT_CITED_018510. Studies using sandhill cranes have found a 50-65% reduction in strike rates for lines marked with bird flight diverters. ADD_01029.

routes, excavating archaeological sites, or pursuing creative mitigation measures to offset unavoidable impacts. LIT_CITED_032592–93.

Throughout the NEPA process, the Service responded to public comments regarding cultural resources and addressed cultural resources in the draft and final EIS. NEPA_002372–77 (Analysis of Public Comment Report); LIT_CITED_032561–95 (final EIS); ADD_00479–84 (draft EIS). After the final EIS was issued, in April 2019, a Programmatic Agreement between the Service, the Council, the Nebraska State Historic Preservation Office ("SHPO"), and NPPD was signed and continues to guide the implementation of the Section 106 process beyond the duration of the EIS process. NHPA_000543.

The Programmatic Agreement contains a provision that resolves not to perform additional work to resolve adverse effects that may result from the Thunderhead Wind Energy Center. NHPA_00545. The Programmatic Agreement also agrees to continue surveying the remaining 7% of the APE. *Id*. The Programmatic Agreement establishes how affected historic properties will be identified, evaluated, and mitigated (if applicable) if the action alternative is refined. NHPA_000545–48. Consultation regarding the identification and evaluation of historic properties and the resolution of adverse effects, including public involvement, is to continue throughout Project planning and construction. *Id*.; LIT_CITED_32568.

STANDARD AND SCOPE OF REVIEW

Judicial review of agency decisions under the APA is "highly deferential" to the agency, and is limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law." *Cure Land LLC v. U.S. Dep't of Agric.*, 833 F.3d 1223, 1230 (10th Cir. 2016) (citations omitted). An agency decision will be considered arbitrary and capricious only if "the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,'" or if the agency action 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Copar Pumice Co. v. Tidwell,* 603 F.3d 780, 793-94 (10th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

So long as the agency articulated a rational basis for its interpretation and application, and considered all the relevant factors, the Court will uphold the agency's action. *Copart, Inc. v. Admin. Review Bd., U.S. Dep't of Labor*, 495 F.3d 1197, 1202 (10th Cir. 2007). A presumption of validity attaches to agency action and the burden of proof rests with the appellants who challenge such action. *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008); *Cure Land,* 833 F.3d at 1230. Deference to the agency's decision is "especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 737, 739 (10th Cir. 2006) (*citing Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)); *see also WildEarth Guardians v. Salazar*, No. 10-CV-00091-WYD, 2011 WL 4102283, at *4 (D. Colo. Sept. 14, 2011) (granting "substantial deference to the [Service's] decision" because the decision not to list a species as endangered involves technical or scientific matters within the Service's area of expertise).

Judicial review under this standard is limited to the administrative record that was before all decision-makers, in accordance with the statutory direction that "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. "[P]ost-decisional data . . . is irrelevant to whether the [a federal agency] properly fulfilled [its] obligations prior to approving a particular project." *Utah Envtl. Cong. v. Troyer*, 479 F.3d 1269, 1282 (10th Cir. 2007). Thus, to the extent that the standing declarations submitted by Petitioners contain proffers of scientific and legal opinions (*e.g.,* ECF No. 22-2 ¶¶ 19, 25; ECF No. 22-3 ¶¶ 7-8), such statements are outside the proper scope of review. *See Dine Citizens Against Ruining Our Env't v. Klein*, No. CIVA07CV1475JLK, 2010 WL 457525, at *1 (D. Colo. Feb. 4, 2010).

ARGUMENT

I. The Service's Decisions Fully Comply with the ESA

A. The Focus of the Court's Review is the Service's Final Decisions

Before turning to Petitioners' specific claims, it is important to address a flaw that runs through much of their brief. Both in their factual background and in their merits arguments, Petitioners improperly focus on intermediate steps of the agency's analysis and decisionmaking process, seeking to elevate those interim assessments over the Service's final reasoned decisions. The Supreme Court has rejected such attempts in a similar ESA context. In *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), despite initiating ESA Section 7 consultation with the Service, the Environmental Protection Agency ("EPA") ultimately determined that it did not have a duty to consult over a decision to transfer the Clean Water Act discharge permit system to the state of Arizona. The Ninth Circuit had invalidated the decision based on internal

inconsistencies between the preliminary approach and the ultimate decision – an error corrected by the Court:

> With regard to the various statements made by the involved agencies' regional offices during the early stages of consideration, the only "inconsistency" respondents can point to is the fact that the agencies changed their minds—something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's *final* action, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

Id. at 658–59.

Relying on *Home Builders*, the Tenth Circuit recently rejected the argument that debate between the Corps and EPA about the proper regulatory interpretation of the Clean Water Act rendered the decision invalid. *Audubon Soc'y of Greater Denver v. U.S. Army Corps of Eng'rs*, 908 F.3d 593, 605 n.6 (10th Cir. 2018) (because the Court is "empowered to review only an agency's *final* action," such internal debate does not render the agency's decision arbitrary or capricious). Similarly, in *WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013), petitioners highlighted emails from local agency staff expressing the opposite opinion from the final decision as proof that the agency ignored its own experts or inexplicably changed its mind. The Court rejected this argument, stating that, even if some employees held a differing view, "a diversity of opinion by local or lower-level agency representatives will not preclude the agency from reaching a contrary decision," so long as the decision is reasonable and supported by the record. *Id.* at 1186-87; *id.* at 1192 ("an informal, preliminary opinion by an individual employee" does not render the formal position adopted by the agency arbitrary or capricious).

Here, as detailed above, the Service thoroughly evaluated all of the various risk assessments on crane collision risk, including seeking outside peer review and performing further internal assessment of the various analyses. The final decision rests on a thorough explanation of the strengths and flaws of the various assessments and which of the analyses constitutes the best available science. This is the final determination before the Court for review.

B. The Service Properly Evaluated the Impacts to Whooping Crane

1. The Service Reasonably Did Not Include the Crane in the Section 10 Permit

Petitioners first claim that the Service should have required NPPD to include the whooping crane as a covered species in the Section 10 permit because outside experts and some Service biologists concluded that cranes will collide with the R-Project transmission lines, resulting in the take of at least one crane over the life of the project.[8] Pets. Br. at 31. As all parties agree, the standard for determining whether a project is likely to result in incidental take is whether take is "reasonably certain to occur." ADD_2506; ADD_00983. The parties simply have different views about whether the relevant data supports the Service's determination that take is not reasonably certain to occur. In such cases, the Court should defer to the agency's well-reasoned resolution of this technical issue. *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.

[8] Petitioners also assert, in passing, that the crane should be covered because NPPD "concedes" that the presence of construction personnel and equipment "may" cause migrating cranes to avoid potentially suitable habitat. Pets. Br. at 30 (citing HCP_001738). The entire context of the cited document demonstrates that any such potentiality would have "minimal to no effect" on cranes due to the avoidance measures in place, such as daily crane surveys prior to construction work, as well as the 50,000 acres of other wetland habitat available within 10 kilometers of the Project, a short duration to migrating cranes that travel 200 to 400 miles in one day. HCP_001738.

Supp. 3d 1174, 1194 (D. Colo. 2014) (disagreement about plaintiffs' interpretation of data is "precisely the type of technical disagreement where deference to the agency is most important")

In asserting that the experts concluded that the R-Project will result in take of cranes from power line collisions, Petitioners selectively present the highly uncertain science in the administrative record. Pets. Br. at 31. The independent peer reviewer found the assessment prepared by Drs. Gil and Weir overestimated the collision risk due to problematic assumptions and unexplained mathematics. WHCR_000185; *see also* WHCR_000328 (independent review commissioned by NPPD reached same conclusions). While the Nebraska office's 2017 assessment, which was caveated by a discussion about the enormous uncertainty in the results, found that the estimate could go as high as 5 strikes, the most likely result was between 0.422 and 0.619 strikes. WHCR_000184. The Service's Nebraska office's 2018 assessment was found to suffer from fatal logic flaws; when the first method was able to be recalculated, the Service found an estimate of 0.46, rather than 40, strikes. WHCR_000402. Finally, Petitioners highlight the estimate of up to "1.47 cumulative strikes" from a Service "expert," but fail to disclose that the most likely estimate from that analysis was 0.75 strikes. CORRESPONDENCE_2928. Furthermore, the biologist stated that, if the habitat constraints and growth rate assumptions were less, then the results would most likely be "no take." *Id.* As discussed in the Nebraska office's 2017 assessment, in fact, the growth rate used in these calculations did exceed the probable estimates of growth from the Service's expert crane population modeler. WHCR_000219.

As discussed more fully above, the Service's synthesis of the ten different risk assessments and critiques carefully evaluated all of the data and reasonably concluded that take is not reasonably certain to occur. Petitioners' Section 10 argument is based on their disagreement with that conclusion and improperly asks the Court to elevate Petitioners' preferred science over the Service's reasoned resolution of a highly technical and highly uncertain area of science. "Though a party may cite studies that support a conclusion different from the one the [agency] reached, it is not [the Court's] role to weigh competing scientific analyses." *Forest Guardians v. U.S. Forest Serv*., 641 F.3d 423, 442 (10th Cir. 2011) (*per curiam*) (citation omitted); *see also Custer Cty.*, 256 F.3d at 1036 ("We cannot displace the agencies' choice between two conflicting views, even if we would have made a different choice had the matter been before us de novo.") (citation omitted).

Viewed in the proper deference context, the Service's finding that take was not reasonably certain to occur was a reasoned and well-explained resolution of uncertain science. The agency therefore did not require NPPD to include the crane as a covered species in the Section 10 permit. For these reasons, Petitioners' citation to *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988), is inapt. In *Kokechik*, it was undisputed that take of species not covered by the permit "is not merely a remote possibility but a certainty;" the Court thus found that the agency's knowing failure to include those species in the permit violated the Marine Mammal Protection Act. *Id.* at 801. This finding is inapplicable here because the Service

reasonably concluded that take was not reasonably certain to occur and so did not need to be included in the permit.[9]

Finally, Petitioners also assert that the Service should have required NPPD to include the crane because of the generalized impact of future wind development projects. Pets. Br. at 32. While the Service properly analyzed the cumulative effects and impacts of future wind development, as discussed further below, Petitioners' argument has no place in the ESA Section 10 context. Section 10 exists to provide exceptions to the take prohibition, including for private landowners and companies in connection with otherwise legal uses of private land. A Section 10 permit provides the permit holder with take authorization only for the covered activities. NPPD itself does not propose wind development as part of the R-Project and therefore does not need take authorization for such development. As the Service recognized, to the extent that future wind projects require federal authorization or an ESA Section 10 permit, those separate applicants will propose particular projects that will be analyzed at that time. *See* NEPA_002388-89.

2. The Biological Opinion's Determinations of Impacts to the Crane are Reasonable

As part of its environmental analysis of the impacts of issuing a Section 10 permit authorizing NPPD to incidentally take the American burying beetle, the Service issued a

[9] Proposed amicus Center for Biological Diversity presents additional argument criticizing NPPD's commitment to amending the Section 10 permit if new information emerges altering the analysis on the risk of crane collision. ECF No. 26-1 at 14-16. This argument does not impact the inquiry before the Court – whether the Service reasonably concluded that take of the crane was not reasonably certain to occur. The fact that NPPD voluntarily included a process for addressing new information about crane take does not change their liability under ESA Section 9 – they are not currently exempted for such take, if it does occur. Any addition of a new covered species would need to comply with the requirements of ESA Section 10(a).

biological opinion analyzing whether that action is consistent with the ESA Section 7 prohibition on jeopardizing protected species or adversely modifying designated critical habitat. The Service determined that the project is not likely to adversely affect several other species, including the crane. SECTION_7_000035. The Service's rationale for this determination rests upon its conclusion that a power line strike is not reasonably certain to occur, as well as the avoidance and minimization measures to which NPPD committed. SECTION_7_000037. Petitioners argue that the Service's determination runs afoul of the ESA's "best scientific and commercial data available" standard and that, to the extent there is uncertainty, the Service was required to resolve it conservatively and require formal consultation on the impacts to the crane. Pets. Br. at 34-40.

As an initial matter, it is useful to review what the "best available science" standard does, and does not, require. The purpose of the best available science standard is to prevent an agency from basing its action on speculation and surmise. *Bennett v. Spear*, 520 U.S. 154, 176 (1997); *id.* at 176-77 (one purpose of the standard is "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."). Under this standard, an agency must not "disregard[ ] available scientific evidence that is in some way better than the evidence [it] relies on." *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)). Moreover, if the only available data is '"weak', and thus not dispositive," an agency's reliance on such data "does not render the agency's determination 'arbitrary and capricious.'" *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir.1992) (citations omitted). An agency complies with the "best available

science" standard so long as it does not ignore available studies, even if it disagrees with or discredits them. *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006) (rejecting argument that FWS violated the best available science standard when it cited but allegedly misinterpreted three studies). Finally, what constitutes the best scientific and commercial data available is itself a scientific determination deserving of deference. *Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1265 (11th Cir. 2009) (citation omitted). For that reason "[a] court should be especially wary of overturning such a determination on review." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (citation omitted).

Here, the agency substantially evaluated the relevant data, competing analyses, and high uncertainty to evaluate whether a crane was likely to strike the R-Project; it determined that this issue could not be resolved by reliance on generalized statements about possible species presence in the area or "basic common sense," as Petitioners repeatedly urge. Pets. Br. at 34-35. The ten competing risk assessments and critiques demonstrate that Petitioners' assumptions are, in fact, not borne out by the data. The Nebraska office's 2016 assessment estimated 0.5 crane strikes for the 50-year life of the project, and its 2017 assessment indicated the maximum likely result is 0.42 to 0.62 crane strikes. WHCR_000216; WHCR_000184. Similarly, the first method used in the Nebraska office's 2018 assessment, when corrected for errors after an internal review, resulted in an estimate of 0.46 crane strikes, and the new assessment done by the Service's internal review in 2018 estimated 0.58 strikes over the life of the project. WHCR_000402, 000408-11. The errors found in the analyses relied upon by Petitioners are rebutted above and do not need to be repeated here, except to reiterate that the

Service's determination that these analyses were not the best available science is an expert determination entitled to deference. *Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234, 1241 (9th Cir. 2015) (courts "give wide latitude" to the determination of what constitutes the best available science).

Overall, acknowledging the high uncertainty and the lack of validated methods to incorporate the new tracking data that became available in 2017, as well as the additional mitigation commitments from NPPD such as marking 246 miles of line with bird flight diverters, the record shows that the Service reasonably concluded that the data did not support a determination that the R-Project would result in a crane strike.[10] Petitioners' argument is not that there is additional data on this issue unconsidered by the Service, but that the Court should find that the Service should have resolved the competing science in the opposite direction. But "in an area characterized by scientific and technological uncertainty, [courts] must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1000–01 (D.C. Cir. 2008) (quotations omitted); *see also Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983)

[10] As the record demonstrates a robust evaluation of the collision risk and a reasoned resolution, Petitioners' spurious attack on Regional Director Walsh has no place here. Pets. Br. at 36 n.7. In any event, the district court in the case cited by Petitioners also expressed its respect for Ms. Walsh's sincerity, dedication, and credentials. *Defs. of Wildlife v. Jewell*, 176 F. Supp. 3d 975,1000, 1003 (D. Mont. 2016). Petitioners' innuendos do not meet the high bar of agency predetermination and should be rejected by this Court. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 718 (10th Cir. 2010) (no evidence of predetermination even though agency had a preferred alternative shared by outside stakeholder and there was internal, and occasionally intemperate, disagreement between FWS biologists).

(noting that a reviewing court must be "at its most deferential" when examining conclusions made "at the frontiers of science").

Petitioners argue that none of the experts felt that they could state that a power line strike is not reasonably certain to occur, Pets. Br. at 37, but what they really mean is that none of the experts concluded the collision risk is zero. This is true. But there were also multiple assessments that concluded the risk was less than one crane over the 50-year life of the project. *Supra* at 11-16. Petitioners' insistence on a quantifiable 0% risk is more than the statute requires, as the ESA accepts a certain amount of uncertainty. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010) ("[T]he ESA accepts agency decisions in the face of uncertainty" and "does not require that the [agency] act only when it can justify its decision with absolute confidence."); *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 219 (D.D.C. 2005) ("some degree of speculation and uncertainty is inherent in agency decisionmaking, even in the precautionary context of the ESA."). That is why the statute and regulations speak in terms of probabilities. 16 U.S.C. § 1536(a)(2) ("likely to jeopardize"); 50 C.F.R. § 402.02 ("reduce appreciably the likelihood of both the survival and recovery . . ."). There is nothing that requires the Service to eliminate all uncertainty before concluding a proposed action is not likely to jeopardize a listed species. *Locke*, 776 F.3d at 995 (stating that the "best available science" requirement does not "require an agency to conduct new tests or make decisions on data that does not yet exist"). Here, the agency undertook a critical examination of the best available science, including commissioning independent peer review, and candidly acknowledged the uncertainty before making an informed judgement as to the likely effects of the Project. *Ctr. for Biological Diversity v.*

FWS, 807 F.3d 1031, 1050 (9th Cir. 2015) (upholding a biological opinion when the effect of the action "is not known and has not been tested" because "FWS still possessed sufficient data to make an informed prediction").

Seeking to circumvent the result of proper deference to the Service's determination, Petitioners and proposed amicus Center for Biological Diversity argue that the "benefit of the doubt" doctrine directs a different result. Pets. Br. at 38; ECF No. 26-1 at 17-20. In essence, they argue this doctrine required the Service to conclude that take *would be* reasonably certain to occur despite their reasoned evaluation that the data did not demonstrate such a result. However, simply because there was uncertainty in the various collision analyses does not mean that the statute requires the Service to assume an adverse effect where it finds no scientific support for one. "The need to give a species the benefit of the doubt cannot stand alone" as a challenge to the Service's ESA Section 7 analysis. *Miccosukee Tribe*, 566 F.3d at 1268; *id.* at 1267 ("benefit of the doubt" case law concerned with failure to consider the best available data and "does not suggest that there is any presumption in favor of the species" if the agency considered the data).

In *Alliance for the Wild Rockies v. Bradford*, No. CV 09-160-M-DWM, 2012 WL 12892360 (D. Mont. July 23, 2012), the plaintiffs similarly argued that the "benefit of the doubt" required protection of the species where there is conflicting evidence. But the *Bradford* court held that "[t]he weight of authority rejects such an expansive reading of that argument. The benefit of the doubt is warranted, not in every case, but only where the agency fails to consider the best available data and the analysis of its experts." *Id.* at *1 (citing cases). The *Bradford* court did not apply the "benefit of the doubt" doctrine

because it found that the agency considered all data, even conflicting evidence, on whether grizzly bears were present in a timber sale project area and made a rational determination that bears were not present.

Similarly, in *Oceana*, a plaintiff challenged the National Marine Fisheries Service's ("NMFS") choice between two estimates of how much take a particular type of fishing gear would cause. The agency chose the lower estimate, reasoning that it was the "best estimate possible." 384 F. Supp. 2d at 227. The plaintiff argued that this estimate failed to give the "benefit of the doubt" to the species. *Id.* at 228. Although the lower estimate was uncertain, the district court reasoned that "the ESA does not require an agency to reject the 'best estimate possible' in favor of a more 'conservative' estimate that, according to its scientists, would be lacking in support." *Id*.

Petitioners also imply that "the benefit of the doubt" requires the Service to at least engage in formal consultation. Pets. Br. at 38. But this is not the case. Even where a "not likely to adversely affect" decision is "close", the benefit of the doubt does not require a court to second-guess the agency's evaluation of the data. *Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, 46 F. Supp. 3d 1254, 1291 (M.D. Fla. 2014); *id.* at 1331-32 (upholding "not likely to adversely affect" determination because conservation measures mitigated "serious" impacts to insignificant level), *aff'd*, 835 F.3d 1377 (11th Cir. 2016). *Bradford*, *Oceana*, and *National Parks* show that "the benefit of the doubt" doctrine does not aid Petitioners here because it does not change the deference due to the agency's rational resolution of conflicting evidence. This Court should reject Petitioners' argument that "the benefit of the doubt" requires a reversal of

the Service's reasoned finding that issuance of the Section 10 permit is not likely to adversely affect the crane.

C. The Service Properly Assessed Wind Project Impacts on Protected Species

While there are no wind turbines or related infrastructure proposed as part of the R-Project, one of the project purposes is to provide opportunities for the development of renewable energy, including wind power. LIT_CITED_32198. Thus, the Service appropriately evaluated future wind development in the cumulative effects section of the biological opinion. SECTION_7_000027. Cumulative effects are those effects of "future State, tribal, local, or private activities" that are reasonably certain to occur in the action area. *Id.* With respect to future wind projects, the Service recognized that whether such projects would impact the beetle, and how intense any impacts might be, would vary greatly depending on site- and project-specific factors, as well as avoidance, minimization, and mitigation measures implemented for such projects. *Id.* The Service looked at the only proposed wind project in the action area (a portion of the larger Thunderhead project) but could find no specific information on the proposal or whether it would occur in beetle habitat. *Id.* at 27-28. While recognizing the potential for future wind projects, the Service could find no proposed projects in the area reasonably certain to occur with the level of detail necessary to analyze specific effects. *Id.* at 28.

Petitioners fault the Service's assessment and argue that it should have included future wind development as an indirect effect[11] of the issuance of the Section 10 permit.

[11] The Service and NMFS recently promulgated revisions to the ESA implementing regulations, including those implementing Section 7(a)(2) of the ESA. 84 Fed. Reg. 44976 (Aug. 27, 2019). While the revised regulations did not carry forward the separate concepts of "indirect effects" or "interrelated/interdependent actions," the regulations are

Pets. Br. at 32, 45-48.[12] Petitioners assert that doing so would have greatly expanded the "action area" evaluated in the biological opinion and also would have expanded the scope of impacts to species like the crane, plover, and tern. *Id*. at 46-47. Petitioners' arguments put the cart before the horse, as an impact is only required to be evaluated as an "indirect effect" if it is legally caused by the action under consideration and "reasonably certain to occur." *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 n.15 (9th Cir. 1987) (indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur). Petitioners claim this test is met by the Service's recognition that no new wind development could occur without the R-Project. Pets. Br. at 46. But even if the R-Project is a necessary antecedent to future wind power development, such generalized "but for" causation is not enough. The impacts of any such projects on particular listed species also must be "reasonably certain to occur" and the record shows that that is not the case here.

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not retroactive and, therefore, not relevant to the Service's determinations or this Court's review. *Id*. at 44976. In any event, the concepts in the revised regulations are not that different, in that "effects of the action" is defined as "all consequences" caused by the proposed action "including the consequences of other activities that are caused by the proposed action." 50 C.F.R. 402.02. "A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 84 Fed. Reg. at 45016. These concepts are further defined in 50 C.F.R. § 402.17.

[12] Petitioners also incorrectly assert that future wind development could be considered an "interrelated action". Pets. Br. at 46 n.9. An interrelated action is defined as an activity that is part of the proposed action and depends on the proposed action for its justification. SECTION_7_000024. While one of the purposes of the R-Project was to provide capacity and access for future development of wind resources, LIT_CITED_018628, any such future development is not an activity that is part of the R-Project. NEPA_002390 ("NPPD is not proposing to construct any transmission lines, distribution lines, or substations to connect the R-Project to any wind energy project(s).")

First of all, indirect effects are typically not separate projects, but rather biological impacts from the proposed action that are farther away and/or later in time. For example, in *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985), the Corps denied a request for a permit for a reservoir because the increased water usage would dewater crane critical habitat 150 miles downstream. Here, Petitioners do not identify any such effects of the construction or operation of the R-Project that the Service failed to consider. Rather, they argue that, because the R-Project will facilitate the development of future wind projects by providing expanded transmission capacity, all the impacts of those separate future wind projects should be deemed "indirect effects" of the R-Project. The ESA is not so expansive.

While the Service's Section 7 Consultation Handbook[13] states that indirect effects can also include other Federal actions that have not undergone Section 7 consultation but "will result from the action under consideration," Handbook at 4-29, Petitioners here do not identify any such future Federal actions. To the extent that such future Federal actions could be the Service's issuance of an ESA Section 10 permit to wind developments, for such actions to be considered indirect effects of the R-Project, they must be reasonably certain to occur "as evidenced by appropriations, work plans, permits issued, or budgeting." *Id.* There are no such actions here.

In response to public comments on the draft EIS, the Service broadened its assessment of future wind development to include an array of generalized wind

[13] Courts have taken judicial notice of the Handbook. *E.g.*, *Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1161 (E.D. Cal. 2010). Handbook available at: https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf (last visited Dec. 13, 2019).

development. LIT_CITED_032746-47, 032757-62. However, this generalized assessment does not mean that specific future wind projects in the area are reasonably certain to occur. Because the load of the entire system that the R-Project connects into is dynamic, "it is impossible to predict the number of [wind] turbines that the R-Project would be able to accommodate or to predict what other loads or supplies could also materialize that would consume the capacity of the line." NEPA_002388; LIT_CITED_018628 (after in-service date of R-Project, future renewable project development will be determined by extensive detailed study work on future capacity). While the Service was generally aware of leases or investments for the purposes of future wind development, or some specific project names, it could find no public information on any projects that had moved to a specific-enough stage for any further analysis. NEPA_002388-89. There was insufficient information "in terms of the number of projects, their configuration, whether funding exists, whether environmental reviews have occurred, and whether permits have been issued or power purchase agreements entered into." LIT_CITED_032747. In short, the Service could find no information on any particular wind project "reasonably certain to occur" in order to assess the impacts to protected species.

This situation is thus distinguishable from cases cited by Petitioners. For example, in *Sierra Club v. United States*, 255 F. Supp. 2d 1177 (D. Colo. 2002), the proposed mine expansion held to be an "interrelated" action with the road easement had already been issued an expanded mining permit from the Colorado Department of Natural Resources, county rezoning approval, and an air quality permit from the Colorado Department of Health, and the mining company had already developed a

detailed mining plan. *Id.* at 1180, 1185. This case is more like *Medina County Environmental Action Ass'n v. Surface Transportation Board*, 602 F.3d 687 (5th Cir. 2010), where the court rejected arguments that the potential future development of the entire 1,700+ acres of a limestone quarry was an indirect effect of the authorization of a rail line to serve the first 640-acre phase of the quarry. *Id.* at 703–04. Despite the company holding a long-term lease for the entire property, the court recognized that this did not equate "to a reasonable certainty that financial incentives will exist in the future to develop the land—certainly not in any way sufficiently specific for the respondents to conduct a meaningful scientific assessment of the development's effects." *Id.* at 702. So it is here. The Service properly evaluated generalized cumulative effects of future wind development but reasonably did not include such impacts as an effect of the R-Project when no wind projects had sufficiently concrete plans to allow assessment of impacts to species.

D. The Service Reasonably Assessed Impacts to Terns and Plovers

Petitioners also argue that the Service should have required NPPD to cover the potential take of Interior least terns and piping plovers in its Section 10 permit application. Pets. Br. at 33-34. Petitioners rely on statements from the final EIS that these species are present in the project area and that the Service recognized the R-Project would be a collision hazard. *Id.* Beyond this, Petitioners do not provide any record evidence for their allegations that terns and/or piping plovers will be taken by collision with the R-Project. Petitioners' attacks on the Service's ESA Section 7 determination for these species rest on the same allegations. *Id.* at 35-36, 40. Because

Petitioners fail to acknowledge the other findings from the EIS and the record relevant to the impacts on these species, their arguments should be rejected.

Data from the Nebraska Natural Heritage program does not indicate occurrences of Interior least terns in the project study area, nor is there documented nesting or suitable nesting habitat. LIT_CITED_018681. But, because there is a small nesting area upstream of the project study area, it is possible the tern may pass through the project area. *Id.* There is only one documented tern mortality after a power line collision; other data suggests that power line collisions are extremely rare. LIT_CITED_018496; *id.* at 018707. Furthermore, the Service's recovery plan does not include power line collisions in the potential threats to the species. LIT_CITED_018707. While the Service recognized that the R-Project could create a collision hazard, this hazard is minimized by the species' agility, siting the R-Project river crossings in areas without tern habitat, and marking the lines with bird flight diverters. LIT_CITED_032452. As discussed above, line marking reduces the possibility of line collisions by 50-80%, reducing the already-low risk of collision even further. Reflective and glow-in-the-dark diverters will be used at river crossings and other low-light conditions, constituting about 10-15% of the new line markings. NEPA_ 002351; LIT_CITED_018510. The Service thus reasonably concluded that the project, with these mitigation measures, would not likely result in take of the tern. LIT_CITED_032452.

Similarly, there is no data of piping plover occurrences in the study area or suitable or documented nesting habitat. LIT_CITED_018682. Because the plover has been documented at the same nesting area upstream of the project area as the tern, it is possible that individuals may migrate through the area. *Id.* Collisions with

transmission lines is not considered a major threat to the species and not addressed in the species' recovery plan. LIT_CITED_018710. Collision risk is minimized by the project crossing the North and South Platte rivers at narrow reaches that lack nesting habitat, and the lines will be marked with bird flight diverters. *Id.*; LIT_CITED_032455. The Service thus reasonably found that the project was also unlikely to result in take of the plover. LIT_CITED_032455.

Petitioners also assert in passing that the Service unreasonably discounted impacts to terns and plovers from future wind development. Pets. Br. 34. Tellingly, they do not cite any record evidence to support this argument, instead pointing to a case involving an offshore wind project in Nantucket Sound. *Id.* (citing *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016) for impacts to different tern species and piping plover). But, as the Service recognized in its assessment of the cumulative impacts of future wind development and the R-Project, wind project impacts to waterfowl and shorebirds "tends to be relatively minor" compared to impacts on other types of bird species. LIT_CITED_032758. Furthermore, such impacts depend on the number, location, and other site- and project-specific characteristics, as well as avoidance, minimization, and mitigation measures. LIT_CITED_032762; *id.* at 032757 (factors impacting bird/bat mortality and Service recommendations for wind project siting/operation, best management practices, and mitigation). Thus, the Service reasonably evaluated the impacts of generalized future wind development on plovers and terns. To the extent that future wind projects require federal authorization or an ESA Section 10 permit, more specific impacts of particular projects will be analyzed at that time. *See, e.g.,* NEPA_002388-89.

E. The Service's Section 10 Findings for the Beetle are Reasonable

1. The Service Reasonably Found that NPPD Will Minimize and Mitigate the Impact of the Take to the Maximum Extent Practicable

One of the findings that the Secretary must make to issue an incidental take permit is that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of [the incidental] taking." 16 U.S.C. § 1539(a)(2)(B)(ii). Petitioners claim that the Service's finding here is improper because the agency did not independently determine that the "Central Route" alternative is impracticable.[14] Pets. Br. at 41-44. These arguments misinterpret the minimization and mitigation requirements of ESA Section 10.

In 2016, the Service and the National Marine Fisheries Service jointly issued the updated Habitat Conservation Planning and Incidental Take Permit Processing Handbook ("Section 10 Handbook"). ADD_02454. The Section 10 Handbook states that the statutory standard of "to the maximum extent practicable, minimize and mitigate the impacts" of incidental take "will always be met if the HCP applicant demonstrates that the impacts of the taking will be fully offset by the measures incorporated into the plan." ADD_02633. Only if the applicant cannot fully offset the impacts of the take must the Service conduct an analysis to independently determine if the proposed conservation measures meet the "maximum extent practicable" standard. ADD_02638;

[14] Petitioners also assert that the Service failed to make this finding for the crane, tern, and plover. Pets. Br. at 40-41. The arguments that the Service should have required NPPD to include these species in the Section 10 application are rebutted above. These additional arguments fail because it is clear from the statutory language that the required Section 10 findings apply only to the "incidental taking" of the species for which the applicant seeks a permit. 16 U.S.C. § 1539(a)(2)(B). The arguments made by proposed amicus Center for Biological Diversity, about whether NPPD had to minimize and mitigate impacts on cranes, are misplaced for the same reason. ECF 26-1 at 12-14.

NEPA_002416 ("as long as implementation of the HCP's minimization and mitigation measures will result in a full offset of the impacts of the take, the Service is not required to examine whether more or other measures are practicable").

Here, the HCP includes several avoidance and minimization measures, including avoidance of beetle high-density and most likely habitat areas, limited nighttime construction when the beetles are active, and helical pier foundations which require less footprint and excavation. SECTION_7_000011-13; LIT_CITED_018739-51. With respect to mitigation of the remaining impacts, NPPD followed the common practice of basing its strategy on acres of affected habitat. HCP_001945. Construction of the project is anticipated to result in the temporary loss of 1,042 acres and permanent loss of 33 acres of habitat. HCP_001944. In addition, anticipated emergency line repairs over the 50-year life of the project would result in another 208 acres of temporary habitat loss. *Id.* at 001944-45. NPPD proposed to mitigate the 33 acres of permanent habitat loss at a ratio of 3 acres of mitigation habitat to every 1 acre of impact, which is based on the conservative assumption that all impacted acres are prime habitat. HCP_001945-46. The same ratio was utilized for temporary impacts, but since those areas will be restored into useable habitat after five years, NPPD used a 10% multiplier[15] for the temporary impacts in order to determine the amount of acres needed to mitigate for these impacts. *Id.*

Overall, NPPD calculated that it needed to acquire at least 473 mitigation acres in order to fully offset impacts to the beetle. HCP_001945. Based on scientific principles

[15] The rationale for this multiplier is that the temporary acres are only unavailable for five years out of the 50-year life of the project, or 10% of the time. HCP_001945.

for conservation, the Service recommends that stand-alone mitigation property for the beetle be a minimum of 500 acres; thus, NPPD committed to obtaining at least this much mitigation acreage. *Id.* However, NPPD secured an option to purchase approximately 600 acres of high-quality habitat as mitigation, exceeding the HCP commitment by 100 acres. HCP_001948. Therefore, the Service found that NPPD's proposal more than fully offsets the impacts of the take. *Id.*; NEPA_002417. As set forth in the Handbook, nothing more is required.

This interpretation of the statute was upheld in *Union Neighbors United v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016). While that case turned more on whether the ESA Section 10 permit applicant had to do more to minimize the take of individual bats from a wind development, the Service similarly determined that further analysis was not necessary because the applicant's plan fully offset the impact of the taking. *Id.* at 583. In upholding the determination, the Court stated "[i]n other words, if combined minimization and mitigation fully offset the take, it does not matter whether [the applicant] *could* do more; [it] has already satisfied what is required under the ESA." *Id.*

Contrary to Petitioners' argument, *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002), does not require a different result here. In the first instance, the *Union Neighbors* court expressed skepticism that such cases were even governed by its earlier decision. *Union Neighbors*, 831 at 584 ("Assuming that *Gerber* has implications for a situation in which the agency (as here) finds that minimization and mitigation fully offset the take…."). If the independent assessment of practicality discussed in *Gerber* did apply, the *Union Neighbors* court found the obligation satisfied by the Service's assessment of one of the project alternatives that would further reduce take of individual bats but would

result in less clean energy and millions of dollars of lost revenue, and would likely result in the project not being built. *Id.* Here, even if the court found *Gerber* to apply, the record similarly shows that the Service considered five conceptual routes, including the Central Route favored by Petitioners. LIT_CITED_032268-79. The Service "independently examined" the costs and consequences associated with a five-year delay along with additional costs of over $38,000,000, increased costs to rate payers, and impacts to power generation reliability. NEPA_002417. The Service thus concluded that the Central Route, which would still result in some take of the beetle, is not practical. *Id.* Since the Service had already determined that NPPD fully offset its impact to the beetle, this independent evaluation more than satisfies the agency's Section 10 obligations.

2. The Service Considered All Comments Concerning the Beetle

Petitioners also incorrectly assert the Service's assessment of the impacts on the beetle are flawed because they failed to address comments raised by Dr. Jon Bedick. Pets. Br. at 44-45. While the Service may not have mentioned Dr. Bedick by name, the response to comments and the final documents address the concerns that he presented. *Compare* CORRESPONDENCE_003113-16 (concerns with density estimate/sampling leading to possibility of higher take than estimated and soil compaction) *with* NEPA_002362-33 (addressing these concerns).

As explained by the Service, the density estimate is based on the 99th percentile of current and historical trap data that were collected inside and outside the permit area and that met specific survey requirements identified by the Service. NEPA_002362. This is a conservative estimate that assumes all disturbed areas have the highest

recorded density, regardless of actual habitat quality. *Id.; see also* SECTION_7_000026. To the extent that Dr. Bedick questions the veracity of the current and historical trapping data used to derive the density estimates, there is no ground to do so. Historic surveys were conducted by researchers and consultants with a permit from the Service, using best practices. SECTION_7_000025. Surveys conducted by NPPD also used best practices. SECTION_7_000019 (protocol-level surveys done same days of the year in August 2016-2018); LIT_CITED_018736; *id.* at 033214 (surveys conducted after the summer brood-rearing period more accurately represent beetle presence prior to overwintering). At bottom, beyond questioning the density estimate, Dr. Bedick's comments did not provide any alternative density estimates that the agencies should have considered. *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 223 (D.D.C. 2011) (finding it irrelevant "that plaintiffs can point to a few shortcomings here and there" if they "do not point to any *superior* data that the Service should have considered").

Nor does Dr. Bedick explain whether higher possible take estimates would result in a different conclusion about the impact of the take to the beetle species. Section 10 requires the Secretary to determine that the proposed taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv). Here, the Service's biological opinion evaluated the impact of the take by analyzing the impact on the species' reproduction capacity, numbers, and distribution. SECTION_7_000028. While construction would render that habitat unavailable for reproduction until habitat restoration, this is a very small portion of habitat available for reproduction in the permit area. SECTION_7_000025 (permanent

and temporary disturbances = 0.26% of available habitat in permit area and 0.014% of potential habitat in the Sandhills analysis area). The Service also determined that the take, even if higher than estimated here, would not have a long-term impact on the Sandhills beetle population because it is only a "small percentage" of the estimated population, even using the more conservative estimate of about 10,000 beetles. SECTION_7_000029. Because the take would have little to no impact on the Sandhills population, the Service did not expect an impact to the rangewide population of about 50,000 beetles. *Id.* Finally, because the beetle is expected to recolonize the areas of temporary disturbance and the 33 acres of permanent habitat loss are scattered throughout the permit area, the Service found that this loss of a small fraction of the Sandhills habitat would not meaningfully impact the species' distribution. *Id.* Thus, Dr. Bedick's generalized concerns do not undercut the Service's detailed findings about the impact of the take on the species.

II. The Service Complied with NEPA

A. The Service Considered a Reasonable Range of Alternatives

The Service considered a reasonable range of alternatives given the purpose and need of the proposed action and the R-Project, as articulated in the final EIS, and adequately explained its reasons for dismissing other alternatives during the NEPA process. NEPA requires the Service to rigorously explore all reasonable alternatives to the Project, including a "no-action" alternative, compare the alternatives, and address each alternative in detail in the EIS. *See* 40 C.F.R. §§ 1502.1, 1502.14(a)-(b), (d); 42 U.S.C. § 4332(2)(C)(iii) & (E); *Colo. Envtl. Coal.*, 185 F.3d at 1174; *Custer Cty.*, 256 F.3d at 1039. A reasonable alternative must be non-speculative, *Colo. Envtl. Coal.*, 185

F.3d at 1174; *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541 (11th Cir. 1990), and bounded by some notion of feasibility. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978). *See also Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1172 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003). Courts employ a "rule of reason" to ensure that an agency's NEPA documents contain sufficient discussion of the relevant issues and opposing viewpoints to enable the agency to take a hard look at the environmental impacts of a proposed project and reasonable alternatives, and to make a reasoned final decision. *Custer Cty.*, 256 F.3d at 1039–40.

Petitioners assert that the Service did not adequately consider a sufficient range of alternatives because the Service disregarded the Central Route, Petitioners' preferred alternative, without explaining why additional costs and delays render the route infeasible. Pets. Br. at 48–50. But the Service did not simply rubber-stamp NPPD's route. The Service conducted its own programmatic routing study and identified several conceptual routes separate and apart from NPPD's routing study. ADD_00187–90.

The Service undisputedly considered the Central Route in the draft EIS (ADD_00194–98), and in the Final EIS and gave multiple separate reasons for dismissing the Central Route in the final EIS. LIT_CITED_032276–77. The Service explained that it lacked authority to require NPPD to implement this route. *Id.* Under the ESA, although the Service could make route recommendations, it was required to issue the ITP if the applicant meets all the permit issuance criteria which, as explained above, NPPD has. *Id*.; *see supra* II.E. In addition, the Central Route called for an eastern

terminus, which conflicted with the SPP notice, and would have placed the route in areas more prone to ice storms, which would have decreased energy reliability, thus diminishing one of the needs of the R-Project. *Id*. Importantly, the Service also determined, under 40 C.F.R. §1500–1508, that the Central Route was not a reasonable alternative because some beetle take was still anticipated, so NPPD would still need an ITP and an HCP. And, because the Central Route covered new ground, NPPD would have to establish and review a new study area, revise its HCP, and seek additional public input, all of which would extend the project an additional three years. LIT_CITED_032276–77. The Service adequately explained its reasons for dismissing the Central Route and thus complied with the requirements set forth in 40 C.F.R. § 1502.14(a) ("for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated").

The Service's reasoned explanation here is nothing like the agency's in *New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 689-90 (10th Cir. 2009), where two reasonable alternatives were eliminated without any analysis. *Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 813 (9th Cir. 1999), is likewise inapposite as the alternatives considered by the Service here are sufficiently varied. And, unlike in *Union Neighbors*, 831 F.3d at 576, where the agency did not even consider an impact-reducing alternative, the Service properly considered the Central Route before dismissing it.

The Service considered a reasonable range of alternatives and its consideration and later dismissal of the Central Route as an alternative was well-reasoned. Petitioners' NEPA claim amounts to nothing more than a disagreement with the

Service's ultimate decision, but NEPA is a procedural statute that does not mandate substantive results or outcomes. *Colo. Envtl. Coal.*, 185 F.3d at 1171–72. Petitioners' dissatisfaction with the Service's decisionmaking is insufficient to render the Service's approval of the ITP and HCP arbitrary and capricious.

B. The Service Took the Requisite Hard Look at the Direct, Indirect, and Cumulative Effects of Reasonably Foreseeable Wind Projects

The Service took the requisite "hard look" at the cumulative effects of wind development and adequately explained the inherent and unavoidable limitations of its analysis. "An environmental impact statement must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts." *Custer Cty.*, 256 F.3d at 1035 (citation omitted). *See also* 40 C.F.R. §§ 1508.7; 1508.8 (including ecological, aesthetic, historical, cultural, economic, social, and health impacts); and 1508.25(a)(2), (c). Cumulative impacts include reasonably foreseeable future actions. 40 C.F.R. § 1508.7. The Department of the Interior's NEPA regulations address what actions are considered reasonably foreseeable:

> Reasonably foreseeable future actions include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a responsible official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite (43 CFR 46.30).

LIT_CITED_032746.

Petitioners argue that the Service failed to take a hard look by refusing "to even generally assess impacts resulting from wind turbines for projects that have not yet signed an interconnection agreement with NPPD." Pets. Br. 50. But the Service

adequately analyzed the cumulative effects of wind generally and also reasonably explained the inherent limitations of its analysis. In the draft EIS, the Service considered only future wind energy projects with signed interconnection agreements as reasonably foreseeable future actions. However, in response to public comment on the draft EIS, the Service revisited its approach. LIT_CITED_032746-47. Indeed, the final EIS does address generally the potential impacts of wind energy development. LIT_CITED_032756–62. While noting that no whooping crane mortality had been documented at wind energy facilities, the Service recognized that sandhill crane collision deaths were documented at a Texas wind energy facility. LIT_CITED_032760–61. The Final EIS directly addressed the potential for whooping crane collision with future wind development and noted "[f]or these reasons, future wind development may result in long-term, low- to moderate-intensity, adverse impacts on special status bird and bat species." LIT_CITED_032761. Indeed, throughout the NEPA process, the Service addressed concerns about impacts of future wind energy development on wildlife. ADD_01035 (summarizing responses)

Second, the Service reasonably explained that it lacked the requisite data to analyze the cumulative effects of future wind projects in further detail. The Service recognized that the development of wind power projects "are sufficiently likely to occur over the next 50 years to warrant additional discussion" but noted that any new project "involve[d] numerous steps, each of which takes considerable time[.]" LIT_CITED_032746-47. The steps that must be taken prior to construction of a wind project include siting studies, land acquisition, development of interconnection

agreements, regulatory approval, and development of power purchase agreements, among others. *Id*.

As described above, *supra* II.C, in response to public comments on the draft EIS, the Service broadened its assessment of future wind development to include an array of generalized wind development. LIT_CITED_032746-47, 032757-62. However, a general assessment of wind energy does not mean that specific future wind projects in the area are reasonably certain to occur. Because the load of the entire system that the R-Project connects into is dynamic, "it is impossible to predict the number of [wind] turbines that the R-Project would be able to accommodate or to predict what other loads or supplies could also materialize that would consume the capacity of the line." NEPA_002388; LIT_CITED_018628. While the Service was generally aware of leases or investments for the purposes of future wind development, or some specific project names, it could find no public information on any projects that had moved to a specific-enough stage for further consideration. NEPA_002388-89. There was insufficient information "in terms of the number of projects, their configuration, whether funding exists, whether environmental reviews have occurred, and whether permits have been issued or power purchase agreements entered into." LIT_CITED_032747; ADD_01036. In short, the Service could find no information on any particular wind project "reasonably certain to occur" in order to assess the cumulative impacts of such project on the human environment.

Here, the Service adequately analyzed reasonably foreseeable wind development. NEPA does not require an agency to speculate as to what may be required for future wind development beyond what is reasonably foreseeable at the time

the final EIS is prepared. The Tenth Circuit has "not required agencies to consider 'speculative' impacts or actions in an EIS, whether it be in the context of the reasonable-alternatives analysis or the reasonably foreseeable impacts of the proposed project or other projects." *Wyoming v. U.S. Dep't of Agric*., 661 F.3d 1209, 1253 (10th Cir. 2011). This rule applies equally to the cumulative impacts analysis. *Id*.; *see also Sierra Club v. Lujan*, 949 F.2d 362, 368 (10th Cir. 1991) ("NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project.").

The Service also explained in adequate detail why it lacked the necessary information to conduct further analysis. The Service explained that, to assess the effect of future wind projects, it needed more information as to "the number of projects, their configuration, whether funding exists, whether environmental reviews have occurred, and whether permits have been issued or power purchase agreements entered into." LIT_CITED_032749. The Service also required more information as to the specific avoidance, minimization, and mitigation measures that could be implemented at the time future wind projects were constructed. *Id*. at 032747. NEPA does not "require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective. What is required is information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *Colo. Envtl. Coal.*, 185 F.3d at 1174 (citation omitted). The rule of reason, which applies to the choice of alternatives, applies also to the level of detail each alternative is discussed in the NEPA documents. *Custer Cty.*, 256 F.3d at 1039–40.

Sierra Club v. Federal Energy Regulatory Comm'n, 867 F.3d 1357 (D.C. Cir. 2017) does not support Petitioners' position. In that case, the EIS had already estimated how much gas a proposed pipeline would transport. *Id*. at 1374. However, the EIS gave no reason or explanation why the estimate could not be used to estimate greenhouse gas emissions. *Id*. Here, the Service has adequately explained all of the missing data and variables that demonstrate why specific future wind energy projects are not reasonably foreseeable.

The Service properly evaluated generalized cumulative effects of future wind development and was not required under NEPA to conduct further analysis in the absence of available data regarding specific future wind projects.

III. The Service Complied with the NHPA

Petitioners complain that the Service violated the NHPA in three ways: (i) failing to complete a full survey; (ii) failing to adopt other alternatives such as the Central Route (east from Gerald Gentleman Substation); and (iii) failing to evaluate the impact of future wind projects. Pets.' Br. at 51–53. Petitioners' arguments fail for the simple reason that the Service has entered into a Programmatic Agreement that post-dates all of Petitioners' complaints about the consultation process.[16] Under the NHPA's regulations and prevailing caselaw, this signed Programmatic Agreement satisfies the Service's Section 106 consultation obligations. 36 C.F.R. § 800.14(b). "When a

[16] Petitioners have no standing to sue under the Programmatic Agreement as they are not parties to it and, in any event, have not alleged that the Service violated the agreement. Even if Petitioners somehow have standing as third-party beneficiaries, they are bound by the dispute resolution provisions in the agreement (NHPA_000548–49 (Stipulation VI)). Under Nebraska law, Petitioners bear the burden of establishing standing to the Programmatic Agreement as third-party beneficiaries. *Podraza v. New Century Physicians of Neb*., *LLC*, 789 N.W.2d 260, 267 (Neb. 2010).

governing programmatic agreement is in place, compliance with the procedures in that agreement satisfies the agency's NHPA Section 106 responsibilities for all covered undertakings." *Dine Citizens*, 923 F.3d at 846 (citing 36 C.F.R. § 800.14(b)(2)(iii)). *See also* 36 C.F.R. § 800.6(b).

Petitioners' complaints about the NHPA process, which pre-date the Programmatic Agreement, do not demonstrate that the Service violated the NHPA. The Service, NPPD, the Nebraska SHPO, and the Council all signed the Programmatic Agreement and, at the time of signing, knew that: (a) while 93% of the APE had been surveyed, the survey was incomplete; (b) the alternatives had been analyzed and the preferred alternative chosen; and (3) the parties had agreed not to resolve any adverse effects that may be caused by the Thunderhead Wind Energy Center, even though the project had been deemed reasonably foreseeable. Under these circumstances and NHPA regulations, the Programmatic Agreement is enough to satisfy the Service's Section 106 consultation obligation.

IV. Remedy, if Any, Should Be Briefed After the Resolution of the Merits

Defendants have shown that summary judgment is warranted in their favor. However, if the Court rules for Petitioners, Defendants request the opportunity to provide separate briefing on remedy. Petitioners request vacatur of the incidental take permit, the biological opinion, the Record of Decision, the final EIS, as well as the Programmatic Agreement. ECF No. 22-4. But even if the Court rules for Petitioners on any of these grounds, vacatur would not automatically follow because the Court is not required to set aside every unlawful agency action. *Dine Citizens Against Ruining Our Env't v. U.S. Ofc. of Surface Mining Reclamation & Enf't*, No. 12-CV-01275-JLK, 2015

WL 1593995, at *1 (D. Colo. Apr. 6, 2015) (*citing Pac. Rivers Council v. U.S. Forest Serv*., 942 F. Supp. 2d 1014, 1021 (E.D. Cal. 2013)). While the Tenth Circuit has not specifically addressed the factors to be considered in weighing vacatur, several courts in this circuit have found the D.C. Circuit's framework to be persuasive. *E.g., Dine Citizens*, 2015 WL 1593995 at *1; *N.M. Health Connections v. U.S. Dep't of Health & Human Servs*., 340 F. Supp. 3d 1112, 1177 (D.N.M. 2018), *appeal docketed*, No. 18-2186 (10th Cir.). The D.C. Circuit evaluates (1) "the seriousness of the order's deficiencies" and (2) "the disruptive consequences of an interim change that may itself be changed." *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). If the Court rules in Petitioners' favor, Defendants request an opportunity to brief these two factors in light of any errors identified by the Court.

CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that the Court deny the Petition for Relief and uphold the challenged agency actions.

Dated: December 13, 2019

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Certificate of Word Count

I hereby certify that the preceding memorandum, exclusive of the caption page, tables, note on administrative record citation, and signature block, contains 14,931 words, in compliance with the Court's August 14, 2019 Scheduling Order setting a limit of 15,500 words. ECF No. 11.

/s/ Bridget McNeil

Certificate of Service

I hereby certify that on this 13th day of December 2019, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will provide notice of this filing electronically to all counsel of record.

/s/ Bridget McNeil