

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 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 of the Mountain-Prairie
Region of the U.S. Fish and Wildlife Service;
DAVID BERNHARDT, in his official capacity as the Secretary of the U.S. Department of the
Interior;
MARGARET EVERSON, in her official capacity as the Principal Deputy Director (Exercising
the Authority of the Director) of the U.S. Fish and Wildlife Service;

Respondents.

PETITIONERS' OPENING MERITS BRIEF

Expedited Consideration Requested¹

Oral Argument Requested

¹ Pursuant to the agreement that the parties negotiated to avoid burdening the Court with preliminary injunction proceedings, Intervenor Nebraska Public Power District (“NPPD”) agreed only to defer undertaking major construction activities associated with the R-Project through March 31, 2020. *See* ECF No. 10 ¶¶ 1-3; ECF No. 11. Accordingly, to avoid the need for a preliminary injunction regarding major construction activities after that date, Petitioners respectfully request that the Court issue a merits ruling no later than March 31, 2020 if the Court’s schedule allows. Alternatively, if this timeline is not feasible, Petitioners respectfully request that the Court schedule a call with counsel for all parties before March 31, 2020 to assist the parties in determining whether there are grounds for maintaining the status quo and avoiding the need for preliminary injunctive relief until the Court can issue a merits ruling.

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TABLE OF AUTHORITIES

ACRONYM LIST

ABB	American Burying Beetle
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FWS	U.S. Fish and Wildlife Service
HCP	Habitat Conservation Plan
ITP	Incidental Take Permit
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NHT	National Historic Trail
NPPD	Nebraska Public Power District
NRHP	National Register of Historic Places
PRB	Nebraska Power Review Board
ROD	Record of Decision
SHPO	State Historic Preservation Office
SPP	Southwest Power Pool

INTRODUCTION

The federal action challenged here is the U.S. Fish and Wildlife Service’s (“Service”) issuance of an incidental take permit (“ITP”) to Intervenor Nebraska Public Power District (“NPPD”) authorizing a massive transmission line (the “R-Project”), which will slice through the Central Flyway in the unique Nebraska Sand Hills ecosystem. Despite being charged with protecting species listed under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, the Service issued an ITP for the R-Project knowing that it will cause significant, irreversible impacts to wildlife and their habitat, including the critically endangered whooping crane and other at-risk species. Likewise, contrary to Congress’s goal of preserving historic resources, the Service authorized the R-Project’s permanent degradation of pristine segments of National Historic Trails (“NHT”) that serve as iconic reminders of American westward expansion and are listed (or eligible for listing) on the National Register of Historic Places (“NRHP”).

Moreover, this is a highly unusual case in which the Service’s final decision ignores—and indeed contradicts—detailed conclusions from the agency’s own biologists who have decades of expertise evaluating impacts to whooping cranes. Because only 505 individual whooping cranes remain, the Service’s specialists determined, consistent with extensive analysis by independent whooping crane experts, not only that it is reasonably certain that the R-Project will kill and injure whooping cranes, but also that these impacts will likely be so severe as to impair the species’ ability to survive and recover. Nevertheless, the Service’s Regional Office overrode its own experts, disregarding the dire status of the species and the overwhelming scientific evidence that the R-Project will “take” whooping cranes and impair the species’ recovery. And despite conceding that transmission line collisions are the leading cause of

whooping crane mortality, the Service’s Regional Office refused even to include the whooping crane as a covered species in the ITP.

In addition, the Service failed to lawfully analyze the impacts of, and alternatives to, the R-Project, as required by federal law. In particular, the Service refused to examine the foreseeable effects of wind energy development that the R-Project is expressly intended to facilitate, which will only further harm whooping cranes and other affected resources. The Service also failed to consider a reasonable range of alternatives, and abandoned without adequate explanation an alternative transmission line route that would significantly reduce impacts to wildlife and historic resources, which the Service itself determined to be economically and technically feasible.

Accordingly, the Service’s issuance of an ITP for the R-Project was arbitrary, capricious, and not in accordance with federal law.

BACKGROUND

I. STATUTORY AND REGULATORY FRAMEWORK

A. Endangered Species Act

The ESA is the “most comprehensive legislation for the preservation of endangered species ever devised by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1973)). Congress declared a broad policy that “all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.” 16 U.S.C. § 1531(c)(1). Its purposes are to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and to “provide a program for the conservation of such endangered species and threatened species.” *Id.* § 1531(b).

The ESA makes it unlawful for “any person” to “take” any endangered or threatened species without authorization from the Service. *Id.* § 1538(a)(1); *see also* 50 C.F.R. §§ 17.31(a), 17.31(c). “Take” is defined by the ESA to include “harass,” “harm,” “wound,” or “kill.” 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 17.3 (defining “harass” and “harm”).

The ESA provides that the Service may, under narrow circumstances, authorize take that would otherwise be prohibited. Section 10 provides that for any take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,” the Service may permit take when certain criteria are satisfied, including that the applicant prepares a habitat conservation plan (“HCP”) specifying “what steps the applicant will take to minimize and mitigate” the activity’s impacts. 16 U.S.C. §§ 1539(a)(1)(B), (a)(2)(A). To approve an HCP and lawfully issue an ITP, the Service must find that the “applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking” and that the “taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” *Id.* §§ 1539(a)(1)(B)(ii), (a)(1)(B)(iv).

The ESA also requires that each federal agency “shall, in consultation with and with the assistance of the [Service], insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). This “consultation” process “shall use the best scientific and commercial data available,” *id.*, and culminates in a Biological Opinion issued by the Service. *Id.* § 1536(b). Where, as here, the Service is both the “action agency”—because it is asked to issue a permit under Section 10—and the consulting agency, it engages in “intra-Service consultation under section 7(a)(2).” USFWS_12_ADD_2479.

The Biological Opinion must “[e]valuate the effects of the action and cumulative effects on the listed species,” and address whether the action, “taken together with cumulative effects, is likely to jeopardize the continued existence of listed species” 50 C.F.R. §§ 402.14(g)(3), (4). The “effects of the action” include the “direct and indirect effects” on listed species “together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” *Id.* § 402.02. The “action area” is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” *Id.* “Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.* “Cumulative effects” are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.*

B. National Environmental Policy Act

The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA aims to “help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment,” and to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” *Id.* §§ 1500.1(b), (c). NEPA’s implementing regulations, *see id.* §§ 1500-1508, are “binding on all federal agencies.” *Id.* § 1500.3.

NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An EIS must describe (1) “the environmental impact of the proposed action”;

(2) the “adverse environmental effects which cannot be avoided”; and (3) feasible alternatives to the proposed action. *Id.* §§ 4332(C)(i)-(iii). Each EIS must “rigorously explore and objectively evaluate” the impacts of “all reasonable alternatives” to the proposed action. 40 C.F.R. §§ 1502.13, 1502.14. The alternatives analysis is the “heart” of the EIS because it “present[s] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.* § 1502.14.

In evaluating alternatives, NEPA requires that agencies take a “hard look” at the effects of the proposed action and all feasible alternatives. 40 C.F.R. §§ 1502.1, 1502.16. The EIS must address the direct, indirect, and cumulative impacts of the proposed action. *Id.* § 1508.25. Direct effects are those “caused by the action and occur at the same time and place,” while indirect effects are those “caused by the action” that occur “later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8. Cumulative impacts result from the “incremental impact[s]” of the proposed action when added to the impacts of other past, present, and reasonably foreseeable future actions. *Id.* § 1508.7.

C. National Historic Preservation Act

The National Historic Preservation Act (“NHPA”) aims to preserve the “historic and cultural foundations” of the United States in order to “insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation,” particularly in response to proposals to expand “industrial developments” in historically and culturally valuable areas. Pub. L. No. 89-665, 80 Stat. 915 (Oct. 15, 1966). The NHPA directs the Secretary of the Interior to establish and maintain the NRHP composed of historically significant “districts, sites, buildings,

structures, and objects.” 54 U.S.C. § 302101. To be listed in the NRHP, a resource must be historically significant; be over fifty years old; and maintain its integrity. *See* 36 C.F.R. part 60.

Section 106 of the NHPA provides that federal agencies, “prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.” 54 U.S.C. § 306108. Congress directed agencies to consult with the Advisory Council on Historic Preservation as well as each State’s designated Historic Preservation Officer (“SHPO”) to assess the impact on historic resources. *Id.* § 304108. The Section 106 regulations explain that the “goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties.” 36 C.F.R. § 800.3(a). An agency “shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.” *Id.* § 800.3(c). In assessing whether an action will have adverse effects on historic resources, the Section 106 consultation process must consider all “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” *Id.* § 800.5(a)(1).

D. Administrative Procedure Act

Under the Administrative Procedure Act, a reviewing court “shall” set aside agency actions when they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or when they are adopted “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D). An agency action is arbitrary and capricious if the agency “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’s decision “is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. FACTUAL BACKGROUND

A. The Nebraska Sand Hills Region Is Home To Exceptional Resources That Will Be Gravely Impacted By The R-Project

1. Diverse Wildlife Resources

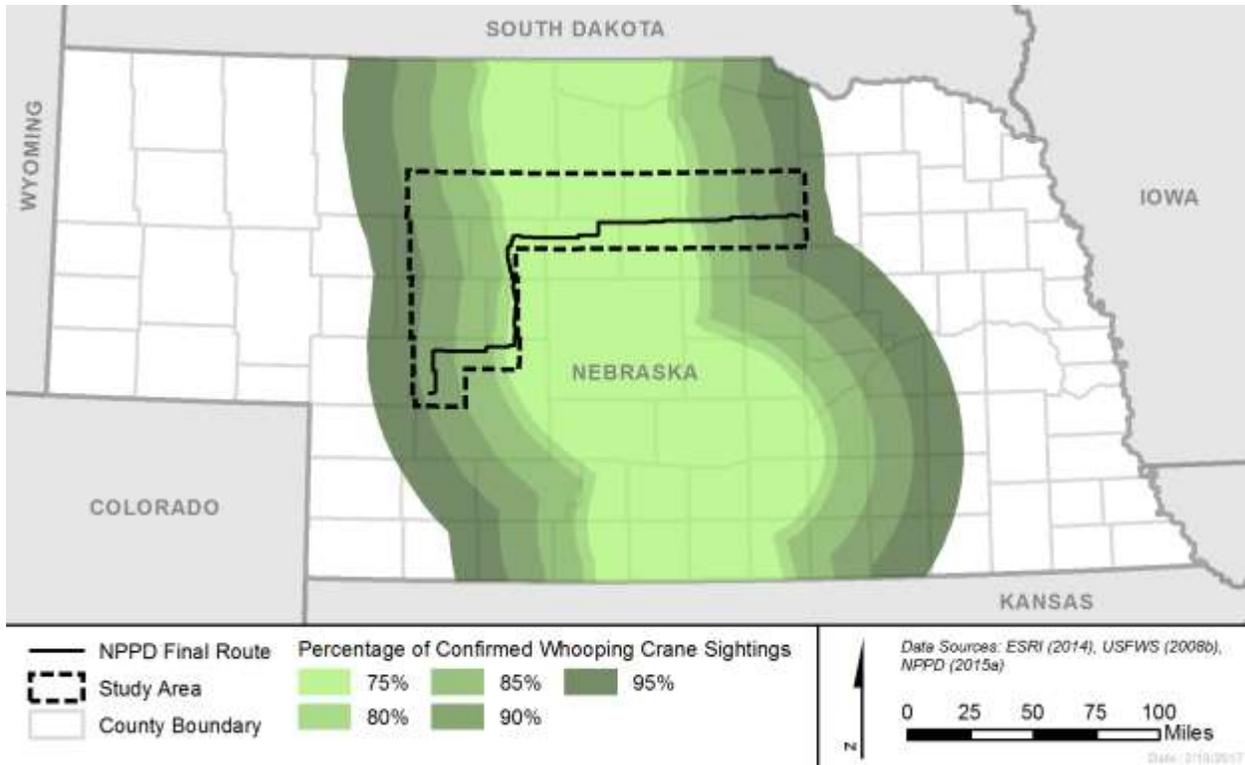
The Service’s Final EIS (“FEIS”) recognizes that the R-Project “would be situated in the unique Nebraska Sandhills ecoregion, which provides vast and largely undisturbed, unfragmented habitat for diverse wildlife species.” USFWS_LIT_CITED_32415-16. The area “contains a variety of habitats that are home to hundreds of wildlife species.” *Id.* It includes a “series of Biologically Unique Landscapes” that the “Nebraska Natural Legacy Project” has determined “should be targeted for priority management and conservation efforts.” USFWS_LIT_CITED_32417. Multiple “conservation easements, held by non-governmental organizations, serve as wildlife conservation areas.” USFWS_LIT_CITED_32420. The R-Project route “also includes many privately owned lands that provide suitable habitat for wildlife,” where “[l]and management . . . is designed to sustain ranching activities while providing positive benefits to wildlife.” USFWS_LIT_CITED_32421.

“More than 300 species of resident and migratory birds have been documented in the Nebraska Sandhills ecoregion.” *Id.* It is the “best grassland bird place in the United States,” and the R-Project route “falls within the Central Flyway migration corridor[], which provides nesting, breeding, overwintering, and stopover habitat for a large diversity of migratory species, including grassland specialists, waterfowl, shorebirds, and passerine songbirds in the Nebraska Sandhills.” *Id.* The area “provides breeding and wintering grounds for hundreds of thousands of waterfowl annually.” USFWS_LIT_CITED_32422.

The Service identified numerous locations that are of “particular importance for migratory birds” and would be impaired by the R-Project. USFWS_LIT_CITED_32424-25. The R-Project “would be located in habitats known to support as many as 17 special status species,” including the whooping crane. USFWS_LIT_CITED_32439 “During spring and fall migrations, whooping cranes travel along the Central Flyway[], frequently traversing” the area in which the R-Project and associated wind power turbines will be constructed, and “using palustrine wetland and riverine habitats in the study area as stopover roost sites.” USFWS_LIT_CITED_32460. The whooping crane, the tallest bird in North America, “was near extinction by the mid-twentieth century, and despite intensive management efforts, the whooping crane remains one of the rarest birds in North America, the only continent on which it occurs.” USFWS_LIT_CITED_32459.

The R-Project bisects the migratory path of the “only remaining self-sustaining population and the last remaining naturally migrating population” of whooping cranes. *Id.* In 2008, a “migration corridor map for the Aransas-Wood Buffalo population was created based on documented sightings of migrating whooping cranes from 1975 to 2007.”

USFWS_LIT_CITED_32460. “This migration corridor map delineated the area containing 95 percent of all whooping crane sightings,” and the “entire 7,039-square-mile study area for the R-Project falls within and would span nearly the entire 95 percent whooping crane migration corridor.” *Id.*



USFWS_LIT_CITED_32461.

“Collision with power lines has been documented as one of the greatest known sources of mortality for fledged whooping cranes in the Aransas-Wood Buffalo population.”

USFWS_LIT_CITED_32459. Between 1950 and 2009, collisions with power lines caused 20 percent of known whooping crane mortalities.” *Id.*

Two other ESA-listed bird species are present in the project area. The endangered interior least tern “likely” crosses the project area during migration, USFWS_LIT_CITED_32451, and the Service acknowledges that the “R-Project transmission line would create a collision hazard, possibly resulting in injury or death to individuals.” USFWS_LIT_CITED_32452; *see also id.* (explaining that there has been a confirmed death of at least one interior least tern from a transmission line in Nebraska). The threatened piping plover is also likely present in the project area during migration, and hence the Service acknowledges that “[o]peration of the R-Project

transmission line would result in a long-term collision hazard” to piping plovers.

USFWS_LIT_CITED_32454.

The R-Project area also provides habitat for large numbers of the endangered American burying beetle (“ABB”). USFWS_LIT_CITED_32479. It is characterized by distinctive orange markings on its wing coverings and thorax. USFWS_LIT_CITED_32476. The “major threat to the beetle is habitat fragmentation, to which the massive overall decline of this species has been attributed.” USFWS_LIT_CITED_32478. Construction of the R-Project will crush and displace beetles, and destroy and degrade its habitat. USFWS_LIT_CITED_32481-82. Because NPPD concedes that its project will “take” ABBs, NPPD cannot lawfully construct the project without an ITP. USFWS_LIT_CITED_32476; USFWS_NEPA_1775.

2. Iconic Historic And Cultural Resources

The R-Project area contains historic and cultural resources of exceptional importance, including four NHTs Congress designated as having unique value. USFWS_LIT_CITED_32577. These trails—the Oregon Trail, California Trail, Mormon Pioneer Trail, and Pony Express Trail—were used by settlers to “travel[] westward by the thousands,” and remnant wagon ruts still exist where NPPD will build its massive transmission line. *Id.* O’Fallon’s Bluff is a portion of the Oregon-California NHT containing “[s]ome of the most clearly defined and well-preserved remnants of the Oregon-California Trails,” which “remain as evidence of the great westward migration of the mid-nineteenth century.” USFWS_LIT_CITED_32579. This area, which is listed in the NRHP, is “located immediately adjacent to the Project corridor to the east,” and NPPD itself documented “[t]hirteen well-preserved trail traces . . . within the R-Project area.” USFWS_LIT_CITED_32580. One segment of the Mormon Pioneer NHT “located adjacent to the Project corridor” has been determined to be eligible for listing in the NRHP. *Id.*

This area is of particular importance because “[c]onspicuous ruts mark the spot where wagons once made a steep descent from the Sandhills into the North Platte River valley to reach a well-known camp near the river.” *Id.*

The R-Project will have severe adverse effects on these and many other unique historic and cultural resources. With regard to O’Fallon’s Bluff, “NPPD’s final route would run north-south over a section of extremely well-preserved and intact trail ruts that are highly visible in aerial imagery as well as on the ground.” USFWS_LIT_CITED_32586. The “alignment of NPPD’s final route” will “bisect[] the intact portion of the ruts,” and the enormous transmission line “would become the most dominant feature of the landscape, contrasting sharply with the rural feel of the area.” USFWS_LIT_CITED_32587. As conceded by the Service, this “visual impact would compromise the resource’s integrity of setting, feeling, and association, which are important characteristics of the site that qualify it as a NRHP-listed property.” *Id.* Consequently, the Nebraska SHPO found that NPPD’s preferred route “would have a long-term, high-intensity” impact on O’Fallon’s Bluff,” and “strongly recommend[ed] that an alternative route for the transmission line” be adopted. *Id.*; USFWS_CORRESPONDENCE_738. Likewise, the Nebraska SHPO determined that NPPD’s project “would greatly diminish” the historic value of the Mormon Pioneer NHT, USFWS_LIT_CITED_32588; USFWS_CORRESPONDENCE_738, and the Service found that the R-Project will impair many other historic and cultural resources, although NPPD has yet to conduct surveys of all affected areas. USFWS_LIT_CITED_32594.

B. R-Project Goals And Financing

NPPD intends to construct a 225-mile-long, 345-kV transmission line, which “traverses a large portion of the Nebraska Sandhills.” USFWS_LIT_CITED_32204. The R-Project has three purposes: (1) to improve reliability in the “existing western Nebraska area transmission system

by increasing east-west power transfer capability across the NPPD system”; (2) “reduce significant congestion issues by providing an additional outlet path from” NPPD’s existing Gerald Gentleman Station; and (3) “provide transmission access to renewable energy resources (i.e., wind projects) in an area of Nebraska with wind resources.” USFWS_LIT_CITED_32211. The R-Project is critical to the substantial development of wind turbines in the Nebraska Sand Hills. USFWS_LIT_CITED_32216 (“Until the new R-Project is constructed, no new load growth (i.e., new sources of power generation) could be accommodated in the western half of the north-central Nebraska region”).

Although NPPD is the developer of the R-Project, it will ultimately be responsible for only a small fraction of the project’s costs. NPPD asserts that the R-Project responds to a need for energy transmission identified by the Southwest Power Pool (“SPP”), which is a Regional Transmission Organization responsible for ensuring a reliable regional electrical grid in fourteen states. USFWS_LIT_CITED_32210. NPPD is a member of the SPP. *Id.* Although NPPD will pay for the R-Project’s initial capital costs, “pursuant to the SPP’s cost allocation methodology, [NPPD] will recoup all but approximately \$25 million of the costs of the line” because other utilities in the SPP that will use the transmission line must share the costs. USFWS_NEPA_385-86. Because NPPD “constitutes about seven percent of the load in the SPP operating area,” it will recoup all but “approximately seven percent of the total cost of the project.” *Id.*; *see also* USFWS_NEPA_994 (NPPD cost sharing analysis indicating that “other SPP members are responsible for the remainder of the annual revenue requirements (approximately 95%)”).

C. NPPD’s Application For An ITP Was Fraught With Serious Disagreements

In 2013, NPPD contacted the Service about the R-Project, and the Service designated its “Nebraska Field Supervisor” Eliza Hines as the agency’s “designated representative” and

“primary contact” on the R-Project. USFWS_NEPA_5. NPPD and the Service “agreed” that a Section 10 HCP “is the correct level of ESA compliance for the Proposed Project,” and that NPPD “anticipates applying for an ITP for the ABB and whooping crane.” USFWS_HCP_2. However, over the next six years NPPD changed course, instead seeking to exclude the whooping crane from the HCP, a proposal that the Service strongly opposed. Likewise, NPPD refused to consider alternative project configurations, whereas the Service wished to analyze alternative viable routes that would better protect listed species and historic resources.

NPPD vehemently objected to nearly every effort by the Service to protect the environment, listed species, and historic resources. In 2014, when the Service “determined that the Preferred Alternative . . . convey[s] great risk to migratory birds, primarily through risk from avian collision with the R-Project power lines,” USFWS_EMAIL_145, NPPD objected to the Service’s conclusion that an EIS was required. USFWS_CORRESPONDENCE_67-70. NPPD also challenged the scope of the Service’s authority to consider alternative routes and other means of reducing harm to listed species. USFWS_CORRESPONDENCE_72-73. Likewise, NPPD supplied a purported “rationale” for no longer covering whooping cranes in its HCP. USFWS_CORRESPONDENCE_91-100. Deepening the dispute, NPPD notified the Service in August 2014—long before the Service had an opportunity to examine feasible alternatives under NEPA or the ESA—that NPPD had, without the Service’s input, selected a final routing configuration and requested approval for this route from the Nebraska Power Review Board (“PRB”). USFWS_CORRESPONDENCE_80; USFWS_CORRESPONDENCE_300. In so

doing, NPPD foreclosed the possibility that it might select any other practicable route later advocated by the Service as less harmful to ESA-listed species.²

Although NPPD attempted to render the R-Project route a *fait accompli*, the Service undertook an EIS process that was initially open to alternatives, issuing a scoping notice in October 2014 and requesting public comments. USFWS_NEPA_404-06. Members of the public, including Petitioners, raised significant concerns about NPPD’s preferred route and the irreparable harm it would cause to wildlife and historic resources. Stakeholders identified alternative routes that could satisfy NPPD’s stated purpose and need while significantly reducing impacts to federally protected wildlife and historic resources. Although NPPD protested that no alternative route was feasible—and that NPPD would refuse to adopt an alternative in any event—the Service found that many alternative routes “would have less impact to federal trust species including the federally endangered whooping crane and migratory birds than the preferred alternative that is currently proposed by NPPD.” USFWS_EMAIL_590; USFWS_EMAIL_1254 (same); USFWS_EMAIL_1360 (same).

In January 2015, while the Service was preparing the DEIS, NPPD announced its final route, USFWS_EMAIL_1204, and stated that “no additional routes for the R-Project Transmission Line will be considered for evaluation.” USFWS_EMAIL_1501. Despite the Service’s insistence that it must consider “alternative route alignment(s) to reduce or avoid take” of listed species to comply with NEPA and the ESA, USFWS_EMAIL_1697, NPPD threatened that “[a]ny route outside [NPPD’s preferred] corridor would require starting the process over

² NPPD and its counsel repeatedly went above the heads of the Service’s lead biologists in an effort to dissuade the agency from considering alternatives to NPPD’s preferred route and from recommending inclusion of the whooping crane in the ITP/HCP. *See* USFWS_EMAIL_5239-40; USFWS_EMAIL_5357-58; USFWS_EMAIL_6390.

with the PRB and is not considered feasible by NPPD.” USFWS_EMAIL_1712; USFWS_EMAIL_1983 (“NPPD question[ing] the [Service’s] need to undertake this effort” to analyze alternatives). Service biologists stated that “it’s disappointing” that NPPD is unwilling to negotiate the route to protect at-risk species. USFWS_EMAIL_769. The Nebraska SHPO raised “concern[s] that [NPPD’s] route selection process has apparently progressed quite far without cultural resources being part of the selection criteria.” USFWS_CORRESPONDENCE_361.

In August 2015, the Service issued a white paper for evaluating alternatives and “determined there are other ways to implement the project that would minimize the impact on, and take of, ABB and still meet the R-Project purpose and need,” including by “construct[ing] the transmission line using a different route.” USFWS_EMAIL_2281. In response, NPPD’s counsel asserted that the Service could not adopt an alternative route that NPPD refused to implement, that any alternatives are “unreasonable” in light of NPPD’s refusal to implement them, and that the Service should stop considering alternatives. USFWS_EMAIL_2289. The EIS contractor nearly quit because NPPD indicated that it “may not fund” analysis of routing alternatives. USFWS_EMAIL_2274. However, the Service clarified that the agency “is ultimately responsible for the scope, content and adequacy of the EIS . . . including development of alternatives,” and “it is important that this process retain its independence, regardless of whether NPPD or their counsel like or dislike particular alternatives.” USFWS_EMAIL_2303.³

Following the Service’s instruction, the EIS contractor analyzed three alternate routes which would reduce impacts to ABBs and other protected species. USFWS_EMAIL_2963-90.

³ This extensive battle over routing alternatives continued for years. NPPD insisted that it “could not select a [new] route . . . without starting over with its two-year siting process and that starting over with the process would result in the project missing the September 2018 in-service date imposed by the SPP.” USFWS_EMAIL_2681.

The Service explained that the “Central Route” was developed “to further minimize impacts to the [ABB] because the NPPD-selected route crosses areas in the Sandhills with high densities of ABB.” USFWS_EMAIL_3020. NPPD objected to each alternative route, and asserted that the Central Route was impracticable because it would entail delay in obtaining PRB approval and would cost more than NPPD’s preferred route (without explaining that NPPD is only responsible for 5-7% of project costs). USFWS_EMAIL_3095-3101.

In 2016, other federal agencies raised serious concerns with NPPD’s route. The National Park Service explained that “the proponent’s preferred alignment of the proposed powerline would cross” four NHTs under its jurisdiction “at a particularly sensitive location,” and urged a different route. USFWS_EMAIL_4432-33. The Environmental Protection Agency “strongly recommend[ed] that the EIS should fully evaluate and consider alternative, less ecologically intrusive routes” because “NPPD’s R-Project will have a long lasting and potentially detrimental effect on what is already a fragile ecosystem,” and clarified that “[a] robust range of alternatives will include options for avoiding significant environmental impacts.” USFWS_EMAIL_4467-68.

Around the same time, consistent with the original agreement between the Service and NPPD, the Service “asked that the HCP be expanded to cover potential impacts on the whooping crane.” USFWS_EMAIL_4497-99. However, rather than attempting to resolve disagreements about the HCP’s scope with the Service’s lead biologists, NPPD’s counsel sought assistance from Service Headquarters in Washington, DC. *Id.* In response, the Regional Director explained that “over the course of the HCP development process, initiated in early 2014, the Service became more concerned about Project impacts on whooping cranes,” and that “on numerous occasions at technical meetings, Service staff verbally advised NPPD to seek coverage for the whooping crane in the ITP as the impacts appeared likely to be greater than originally

anticipated.” USFWS_EMAIL_4833. She stated that “the Service believes that NPPD has underestimated potential impacts to cranes,” and that “[g]iven the proposed 50-year permit duration, and the potential for impacts given the data at hand, the Service maintains that it is prudent to cover [] whooping cranes . . . in the HCP.” USFWS_EMAIL_4834; *see also* USFWS_CORRESPONDENCE_2867 (Service lead biologist stating that “I have serious reservations about [whooping cranes] as an evaluated species and not a covered species. . . . If NPPD needs coverage, they need to apply for it.”); *id.* (Service biologist concluding that “it’s easy to justify including th[e] [whooping crane] as a covered species”).⁴

NPPD chafed at the Service’s insistence that the HCP cover the whooping crane, and made plain that its desire to avoid covering the whooping crane was not based on conclusive evidence that the species would not be taken, but instead aimed to: (1) avoid further delay for the R-Project; (2) avoid a precedent of including whooping cranes in HCPs for similar transmission lines; and (3) avoid a conclusion by the Service that due to the species’ precarious status the R-Project would jeopardize the crane, which would require the Service to deny the ITP. *See* USFWS_EMAIL_4836 (asserting that inclusion of the crane would be “unacceptably problematic in terms of the lengthy delays it would create”); *id.* (asserting that “[t]his is not simply a technical issue related to one proposed project” because of “the implications it would

⁴ The Service’s lead biologists prepared a detailed memorandum concerning “disagreement between NPPD and the Service as to whether take of whooping cranes should be included in the ITP.” USFWS_CORRESPONDENCE_2877-78. They explained that recent information concerning whooping crane mortality “calls into question the validity of NPPD’s original risk assessment completed in 2013,” and, in fact, “[i]nformation recently provided by NPPD demonstrates that take of whooping cranes is likely” and “proposed mitigation in the HCP is insufficient” to avoid take of cranes. *Id.* They noted that “[t]here is significant disagreement between the way the Service would calculate risk to whooping cranes and the way NPPD is calculating it,” USFWS_CORRESPONDENCE_2901, and explained their expert view that “[whooping crane] take is likely.” USFWS_CORRESPONDENCE_2908.

present for all transmission lines—existing and future—in the region stretching from the Gulf of Mexico to the Canadian border”); USFWS_EMAIL_5330 (inquiring as to whether “formal section 7 consultation for the proposed issuance of an ITP for the whooping crane for the R-Project would result in a jeopardy finding”).⁵

In August 2016, leading whooping crane experts Drs. Karine Gil and Enrique Weir provided the Service with a detailed report on the best available whooping crane data and modeling tools for evaluating the R-Project’s impacts. USFWS_EMAIL_5546-65; *see also* USFWS_EMAIL_5543 (Service biologist describing Dr. Gil as “a well-respected whooping crane researcher with years of experience”). The Service’s lead biologists also conducted their own risk assessment, which “calculated the take of at least 1 whooping crane over the 50 year permit duration.” USFWS_CORRESPONDENCE_2918; USFWS_CORRESPONDENCE_2920 (same). Another Service biologist independently found with “95% confidence that the R-Project will produce between 0.28 and 1.47 cumulative strikes, with a maximum likelihood of 0.75 cumulative strikes during 2018 to 2068,” meaning it is more likely than not that at least one whooping crane will be killed by the R-Project. USFWS_CORRESPONDENCE_2928.

The Service’s lead whooping crane specialist concluded that “there is a real risk of take much higher than NPPD estimated, albeit likely still approximating or less than one [whooping crane] over the course of the project,” while recognizing that “[t]here is a lot of uncertainty with the risk calculations primarily due to population sample size and low mortality detection rates.” USFWS_CORRESPONDENCE_2905. He found that NPPD’s take estimate was artificially low,

⁵ One of many strong-arm tactics employed by NPPD was to repeatedly mischaracterize the status of the Service’s decisionmaking process as being past the point of no return, when in reality it was at in an initial stage and the DEIS—let alone FEIS—remained far from completion. *See, e.g.*, USFWS_EMAIL_4836 (objecting to the Service’s proposal to include the whooping crane in the HCP “at this late point in the ESA compliance and NEPA review processes”).

expressing concerns that “NPPD is using the same data (in opposite ways) to support the conclusion they want.” *Id.* He also objected to NPPD’s proposal to avoid covering whooping cranes in the HCP and to amend the HCP to include whooping cranes only if—and *after*—a crane collides with the R-Project or a similar transmission line. *Id.* In his view, this proposal was inadequate because “only about 9% of all [whooping crane] mortalities have actually had carcasses found,” and “[w]ith detection this low, it makes a change[d] circumstance relying on detecting [whooping crane] carcasses very difficult and possibly unreliable.” *Id.*;

USFWS_CORRESPONDENCE_2928 (“The Service has significant concerns about the detectability of a whooping crane collision with a power line ... given the miles of power lines in the Central Flyway, the location of many of these power lines in remote, unpopulated areas, and the low probability of finding a whooping crane carcass should a collision occur. . . . 546 whooping crane mortalities have occurred since 1950 and only 10 percent have been detected.”).

D. The Service’s 2017 DEIS

In May 2017, the Service published for public comment its DEIS, along with NPPD’s draft HCP. Acknowledging that NPPD’s preferred route would significantly impact extraordinary biological and historic resources, the Service considered whether to scrutinize several “conceptual” alternative routes. USFWS_12_ADD_188-200. One such route—“the Central Conceptual Route”—was “developed to remain along existing divisions of land (such as highways and county lines) just to the south of the high occurrence probability [ABB] habitat areas.” USFWS_12_ADD_194. “This route was also sited in this area because there are generally fewer water features (Sandhills lakes and marshes) and wet meadows to avoid impacts to migratory birds, including whooping cranes.” *Id.* The Service’s “[a]nalysis of the central route determined that it is feasible from both a technical and economic perspective.”

USFWS_12_ADD_197. Nonetheless, the DEIS dismissed this alternative “because it would add even greater delays than those already experienced by NPPD with respect to the in-service date identified by SPP, which is part of NPPD’s need for the Project.” *Id.* Thus, the DEIS eliminated the environmentally preferable Central Route from “further analysis” because it would not comport with NPPD’s and SPP’s preferred schedule for project construction. *Id.*

While acknowledging the R-Project would, as intended, “encourage future wind energy farms to be built” in this fragile area, the DEIS refused to consider and analyze their effects absent a signed “interconnection agreement with NPPD,” purportedly because “predicting when, where, and what size future wind farms would be built is speculative.” USFWS_12_ADD_663.

Relying heavily on NPPD’s risk assessment, the DEIS concluded that the whooping crane need not be included as a “covered” species in the ITP/HCP, ostensibly because the “risk of whooping crane mortality from collision with the R-Project transmission line would be low,” and the effects “would not rise to the level of take because of the use of bird flight diverters and the abundance of nearby suitable habitat.” USFWS_12_ADD_381. However, in Appendix E to the DEIS, the Service issued its own detailed—and contradictory—whooping crane risk assessment. USFWS_12_ADD_911-16. Modeling six population growth scenarios, the Service concluded that the level of likely whooping crane take resulting from the R-Project “range[s] from a low of essentially zero R-Project transmission line strikes (0.008 cranes), to a high of essentially five R-Project transmission line strikes (4.96 cranes),” meaning that it is “plausible” that up to five whooping cranes could be killed by this project. USFWS_12_ADD_915. Due to “a tremendous amount of uncertainty,” the Service explained that “the decisions to be made [about whether the HCP must cover the whooping crane] will essentially be a risk tolerance policy decision, not a science-directed decision.” *Id.*

In comments, conservation groups, historic preservation organizations, and affected members of the local community strenuously opposed NPPD's route and urged the Service to analyze alternative routes and the impacts of wind turbines that the R-Project would facilitate. USFWS_CORRESPONDENCE_831 (American Bird Conservancy stating that the project "poses an unacceptably high risk to protected wildlife" and that the whooping crane and other protected bird species are "likely to be harmed"); USFWS_CORRESPONDENCE_3176 (Ducks Unlimited commenting that project "construction will encourage and facilitate wind turbines to be constructed and operated along the entire route of the line," and that the "potential of thousands of wind turbines along the route of the R-Project Transmission Line will create a collision risk for whooping cranes and other migratory birds that does not currently exist"); USFWS_CORRESPONDENCE_3127 (Sierra Club stating "that the proposed R-line present[s] unavoidable adverse effects on the Nebraska Sandhills, threatened and endangered species, and migratory bird and bat species within the Central and Great Plains").

Commenters also explained that the Service could not lawfully issue an ITP without including the whooping crane as a covered species because cranes will likely be taken during the 50-year permit term. Specifically, leading experts Drs. Gil and Weir submitted an extensive whooping crane "scientific analysis." USFWS_CORRESPONDENCE_2797-2854. They concluded that even with NPPD's proposed mitigation measures (e.g., bird flight diverters), "the proposed R-Project would result in several Whooping Cranes collisions each year, and potentially dozens over the 50-year life of the Project." USFWS_CORRESPONDENCE_2825; USFWS_CORRESPONDENCE_2831 ("[I]t is our expert opinion that this Project is likely to result in several Whooping Crane collisions over the 50 year life of the Project."). Moreover, they explained the likely population-level effects, concluding that "the harm to the Whooping

Crane population associated with this Project, which numbers just over 300 and must be over 1,000 to be genetically viable, will jeopardize the species, undermining recovery efforts and risking the continued existence of this iconic species.” USFWS_CORRESPONDENCE_2831.

Likewise, regarding the ABB, leading expert Dr. Jon Bedick conveyed serious concerns that “the proposed HCP and DEIS do not adequately consider the impacts that the R-Project would have on ABB[s].” USFWS_CORRESPONDENCE_3112-26. Specifically, Dr. Bedick explained that “[t]he analysis and assumptions regarding the density of ABBs in the Project area are not supported by reliable data, and therefore the potential for ‘take’ of ABBs (as defined under the ESA) may be significantly higher than what has been assumed by NPPD.” *Id.* He also noted “several incorrect assumptions underlying NPPD’s analysis, which render it suspect,” NPPD’s improper “timing of the surveys used to calculate ABB density,” insufficient support for NPPD’s “claims regarding the extent of habitat impacts,” and NPPD’s inaccurate “assessment of ABB density” due to “readily apparent” defects in the model used. *Id.* Thus, he concluded that “I do not believe that the best available science has been used to arrive at NPPD and the Service’s conclusions regarding impacts to ABB” and further that “NPPD and the Service have failed to adequately consider the impacts this Project would have on the ABB population.” *Id.*

E. The Service Sidelines Its Own Project Leads At NPPD’s Request

As the Service moved toward an FEIS, information continued to come to light raising further questions about the R-Project. In April 2018, the Service retained Dr. Craig Davis to independently review both NPPD’s whooping crane risk assessment and the take analysis prepared by Drs. Gil and Weir. USFWS_EMAIL_8933-55. Dr. Davis found that “NPPD’s mathematical equations used to assess risk certainly oversimplify the potential risk that the R-Project poses to migrating whooping cranes.” USFWS_EMAIL_8935; *id.* (criticizing the “rather

simple mathematical equation” that NPPD used to estimate whooping crane take). Dr. Davis also faulted NPPD’s reliance only on historic whooping crane sightings, noting that “the best available scientific data” requires utilizing GPS transmitter data collected by the Whooping Crane Tracking Partnership from 2010-2014, which are “unbiased,” consisten[t],” and “accura[te].” USFWS_EMAIL_8934. Thus, Dr. Davis concluded that NPPD’s approach to calculating collision risk was “not justifiable,” and “skew[ed] their results lower.” USFWS_EMAIL_8936-40. In contrast, while Dr. Davis noted some relatively modest “concerns about some aspects of Gil and Weir’s approach,” he concluded that they “have attempted to base their approach on the best available scien[tific]” evidence. USFWS_EMAIL_8945. Dr. Davis ultimately concluded that “in this case, I do not believe that the necessary data is actually available to obtain an estimate of take that is at a level of certainty that is scientifically defensible.” USFWS_EMAIL_8953.

In May 2018, Drs. Gil and Weir responded to Dr. Davis. USFWS_EMAIL_9353-64. They explained that “[i]t is not necessary to rely on a sophisticated model to see that this project represents a major obstacle to the Whooping Cranes’ migration, and presents a significant risk of collision harm.” USFWS_EMAIL_9353. They further explained that “regardless of any model it is evident that this project will result in harm to Whooping Cranes, and that such harm could jeopardize the species, since it is so critically endangered.” *Id.*

Based on all available information, the Service’s lead biologists prepared the agency’s “Rationale for Inclusion of the Whooping Crane as a Covered Species in the R-Project ITP.” USFWS_EMAIL_9607-10. This Rationale explained the Service’s view that significant new information existed that “constitutes the best available science”—including “the quality controlled USGS telemetry data and [Dr.] Davis’ Independent Scientific Review”—compelling

the conclusion that “the whooping crane should be included as a covered species” in the ITP. *Id.* In particular, the new “[t]elemetry data demonstrates that whooping cranes cross and use habitats in the R-Project study area in greater frequency during spring and fall migrations than previously thought in NPPD’s R-Project HCP.” *Id.* That same telemetry data “shows that the R-project area is used as stopover habitat by whooping cranes during migration,” and that “[t]he proposed R-Project bisects at least six whooping crane use clusters.” *Id.* The Service explained that “the NPPD assumptions for their risk assessment and thus the contingency plan developed in the HCP are unsupportable,” that bird flight diverters (i.e., NPPD’s principal take minimization measure) “are only 40-60 percent effective because they cannot be seen at night and are less visible in inclement weather (rain, snow and fog),” and that “physiological characteristics of cranes limit their ability to avoid a powerline even when it is marked with [bird flight diverters].” *Id.* The Service noted that “90-95 percent of all whooping cranes will cross the R-Project 50 times over their life given the approximate lifespan of a wild whooping crane (25 years).” *Id.*

Despite mounting evidence that the R-Project would take whooping cranes (and thus that they must be covered by any ITP/HCP), the Service’s Regional Director “decided to expedite completion of the R-Project EIS/HCP.” USFWS_EMAIL_9265. The following month, the Service’s lead biologists explained that “getting the [Regional Office] to even be willing to consider looking at the [whooping crane] telemetry data has been very difficult.”

USFWS_EMAIL_10167. For its part, NPPD continued to complain about the Nebraska Field Office’s statements that foreseeable wind projects (e.g., Cherry County wind facilities) “would require considerable additional analysis” by the Service. USFWS_EMAIL_10527. As NPPD complained about the Nebraska Field Office conducting the analysis that federal law requires, Nebraska Senator Tom Brewer (whose district overlaps with the R-Project) commended the

“outstanding job” by the “talented and experienced staff in Eliza Hines and Bob Harms representing” the Service. USFWS_EMAIL_11025. Senator Brewer explained that “I have good reason to believe NPPD has retained outside legal counsel/government services representation (Sandy Snodgrass, Holland & Hart, LLP) to lobby the [Service] offices in Denver in an effort to apply undue influence to secure a favorable outcome for this power line project.” *Id.*

In September 2018, the Nebraska Field Office issued its final whooping crane take calculation for the R-Project. USFWS_WHCR_372-95. Incorporating the best available science and applying two different models to estimate take, the Service found “an expected take of 40-84 whooping cranes over the 50-year life of the R-Project using two take calculation methods.” USFWS_WHCR_373. The Service further concluded that in light of the species’ extremely limited numbers, “operation of the R-Project over the 50-year life of the Project has negative implications for recovery of this species,”—i.e., it will likely jeopardize the species. *Id.* This detailed analysis—conducted by three biologists and a statistician—corroborated similar conclusions from external whooping crane experts (such as Drs. Gil and Weir).

The Service’s Regional Office abruptly removed the Nebraska Field Office biologists from the R-Project—including the Nebraska Field Supervisor that the agency had previously appointed as the Service’s “designated representative” and “primary contact” on the R-Project, USFWS_NEPA_5—evidently because the Regional Office viewed the biologists’ concerns as causing undue delay to NPPD (which had lobbied the Regional Office to expedite the process and disregard evidence of whooping crane risk). After September 2018, the record contains no communications from Eliza Hines or Bob Harms who, for more than five years, had served as

the agency's project leads. Rather, the Regional Office sidelined those officials and began the process of swiftly issuing an FEIS. *E.g.*, USFWS_EMAIL_13258-59.⁶

F. The Service's FEIS

Once the Service's Regional Office took over R-Project review, it rushed through the FEIS while brushing aside serious concerns raised both by the Service's lead biologists and outside experts. In November 2018, the Regional Office issued its FEIS, in which the agency effectively adhered to the same positions in the DEIS. For example, while acknowledging that "the Service no longer views a signed interconnection agreement with an electrical utility company as necessary to conclude that a wind project is reasonably foreseeable" for purposes of cumulative impacts analysis, the agency nevertheless analyzed only the single wind project with a signed interconnection agreement with NPPD. USFWS_LIT_CITED_32746-47.

Likewise, the Service eliminated from detailed consideration the Central Route, which would be less damaging for ABBs, whooping cranes, and other resources. The Service relied on "a reevaluation of the costs" of the Central Route suggesting that it would cost \$38 million more than NPPD's preferred route, but failed to acknowledge that NPPD would bear only 5-7% of that cost. USFWS_LIT_CITED_32276-77. The Service also dismissed this alternative because, as would be true for *any* alternative route other than the one NPPD adopted in 2014 without Service input, there could be up to a "3-year delay" to obtain approval from the Nebraska PRB. *Id.*

⁶ Federal Respondents may have withheld such communications from the record under a purported application of the deliberative process privilege. Although the government produced a privilege log in this case, it did not reflect any ostensibly deliberative materials because Federal Respondents relied on out-of-circuit authority for the proposition that deliberative materials are not properly included in an administrative record. Although Petitioners strongly disagree with the government's position about deliberative materials, which is not countenanced by courts in this Circuit, Petitioners did not seek judicial relief on this matter in order to maintain the previously negotiated briefing schedule to avoid burdening the Court with injunction briefing.

Regarding the whooping crane, the Regional Office concluded that “there is no scientifically reliable evidence that take of whooping cranes from collision with the R-Project transmission line is reasonably certain to occur.” USFWS_LIT_CITED_32465. Hence, the Service adopted NPPD’s position that it need not cover the whooping crane in its HCP and, instead, could “amend the HCP and permit for the R-Project to include the whooping crane as a covered species” if in the future there are “any confirmed whooping crane collisions with 115-kV or higher power lines that have been marked with bird flight diverters documented to be at least as effective as those installed by NPPD on the R-Project transmission line.” *Id.* The FEIS did not discuss the extremely low carcass detection rate that its own experts previously stressed, which makes it nearly impossible to find whooping crane carcasses and ascertain how they died.

After issuance of the FEIS, the Regional Office developed a brief “critique of risk assessments,” which criticized the detailed evaluations from internal and external whooping crane experts and asserted that take of that species “is not reasonably certain to occur.” USFWS_WHCR_183. Remarkably, while acknowledging that there is no “comprehensive and scientifically robust methodology” for calculating “collision risk for power lines at a site-specific scale” which “makes it challenging to evaluate the risks to whooping cranes of a specific power line project,” the Service nevertheless stated unequivocally that “incidental take of whooping cranes with the R-Line Project is not reasonably certain to occur.” USFWS_WHCR_188.

In March 2019, in response to the Regional Office, Drs. Gil and Weir reaffirmed their expert analysis that “this Project poses a significant risk to Whooping Cranes” and explained that, “[i]n fact, our model is conservative and including more parameters would likely result in a higher estimation of mortality due to powerline collisions.” USFWS_EMAIL_13733-34. Drs. Gil and Weir opined that “it is not even necessary to rely on a sophisticated model to see that this

Project represents a major obstacle to the Whooping Cranes' migration, and presents a significant risk of collision harm." *Id.* Given the "location of the proposed Project across the migratory corridor and the historical use of the area by Whooping Cranes as shown in the telemetry data, and the fact that it has been acknowledged that power lines are the greatest cause of mortality for migrating Whooping Cranes," Drs. Gil and Weir expressed their "expert opinion—after having worked on Whooping Crane issues for the past 15 years—that this Project *will result in collision mortality for Whooping Cranes*, and that the loss of cranes could jeopardize the species, since it is so critically endangered." *Id.*

G. The Section 106 NHPA Programmatic Agreement

In April 2019, the Service and other stakeholders finalized a Programmatic Agreement that purported to comply with the Service's duties under Section 106 of the NHPA. The Programmatic Agreement conceded that not all areas affected by the transmission line have been assessed for adverse impacts to historic resources. USFWS_NHPA_544-45. In addition, the Agreement failed to address the impact on historic sites of the industrial wind turbines that will be triggered by the project. Instead, the parties to the Agreement expressly "recognize[d] that the proposed Thunderhead Wind Energy Center is a reasonably certain foreseeable action" resulting from the R-Project, but remarkably "agree[d] that no further work will be done to resolve any adverse effects to historic properties that may result from that project for purposes of this [Programmatic Agreement]." USFWS_NHPA_545.

H. The Service's Biological Opinion and ROD

In a June 2019 Biological Opinion, the Service concluded the Section 7 consultation process. The Opinion concedes that the "action area" that must be analyzed under ESA section 7 is "defined as all areas to be affected directly or indirectly by the Federal action and not merely

the immediate area involved in the action.” USFWS_SECTION_7_5. However, the Opinion defines the action area for the R-Project as encompassing only areas of ABB habitat that will be *directly* affected by construction of the transmission line itself, and therefore excludes all areas that will be *indirectly* affected by industrial wind turbines enabled by the R-Project.

USFWS_SECTION_7_27-28. To that end, the Opinion erroneously characterizes the Thunderhead Wind Energy Project as a “cumulative effect,” rather than as an indirect effect, which would necessitate expanding the “action area” to encompass at least that 171-turbine project. *Id.* The Opinion does not address whether any turbines associated with the Thunderhead project—even those in Wheeler County (which the Service acknowledged “may occur in the action area”)—pose threats to whooping cranes or other ESA-listed bird species. *Id.*

The Biological Opinion contains no discussion of impacts to whooping cranes—from the transmission line itself or the associated wind turbines—but, rather, simply asserts that the species “is not likely to be adversely affected.” USFWS_SECTION_7_3. The Opinion also summarily asserts that the transmission line is “not likely to adversely affect” the interior least tern and piping plover. *Id.*

Relying on NPPD’s assessment of the impacts of the project, the Biological Opinion concludes that the R-Project will take 167 ABBs, and that this level of take “is not likely to jeopardize the continued existence of the ABB.” USFWS_SECTION_7_29-30. The Opinion does not address any of the criticisms of NPPD’s methodology that were proffered by leading ABB expert Dr. Bedick, who determined that NPPD had significantly underestimated the amount of ABB take. In a June 2019 Record of Decision (“ROD”), Regional Director Walsh “recommend[ed] issuance of an [ITP] to NPPD for incidental take of [the ABB] in accordance with the HCP.” USFWS_12_ADD_1012-20,

ARGUMENT

I. PETITIONERS HAVE STANDING

This Court has Article III jurisdiction over Petitioners' claims. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 180-81 (2000) (explaining the requirements for Article III standing). As explained in the accompanying standing declarations, Petitioners and their organizational members have longstanding, cognizable interests in wildlife and historic resources that will be impaired by the Service's issuance of the R-Project ITP and related actions. *See* Exhibits A-C. Given the Service's rubberstamping of NPPD's preferred route without seriously considering routes that would minimize harm to affected resources, the record amply establishes the significant harm that the R-Project will cause to Petitioners' interests in the absence of judicial relief. *See, e.g.*, USFWS_EMAIL_3552 (Service official concluding that NPPD's preferred route would "extinguish[]" the "entire conservation value" of the easement held by Petitioner Hanging H East); USFWS_EMAIL_2428 (Service finding that the R-Project "would reduce the originally intended conservation values of this parcel not to mention present a tremendous risk of collision by migratory birds"). Accordingly, Petitioners have plainly established standing to challenge the Service's ITP issuance.

II. THE SERVICE VIOLATED THE ESA

A. The Service's Failure To Treat Whooping Cranes And Other ESA-Listed Bird Species As Covered Species In The ITP Violates Section 10 Of The ESA

NPPD's HCP concedes that the R-Project "may cause migrating whooping cranes . . . to avoid potentially suitable whooping crane habitat," and that it will "present a potential collision hazard for whooping cranes." USFWS_HCP_1738. Nonetheless, the HCP, adopted with the Service's concurrence, unlawfully fails to treat the crane as a covered species. Likewise, the Service granted an ITP for the ABB only, which does not address the whooping crane as a

covered species or contain any binding terms or conditions pertaining to the crane.

USFWS_HCP_1927-30. The failure by the Service (and NPPD) to ensure that the ITP/HCP includes the whooping crane as a covered species—and, in turn, to make the requisite findings that the HCP “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking” of the crane, 16 U.S.C. §§ 1539(a)(1)(B)(ii)—violates ESA Section 10 and the Service’s own formal interpretation of that provision.

The Service’s ITP/HCP Handbook states that “all [listed] species *likely to be taken*” must be “covered by the permit,” and, if they are not, the applicant “face[s] the risk that [the Service] would be unable to process the permit application” USFWS_12 ADD_2532 (emphasis added); USFWS_12 ADD_2576 (stating that “[t]he applicant must include ESA-listed animal species that are expected to be taken by proposed . . . activities as covered species in the HCP.”).

Whooping crane experts, as well as the Service’s own lead biologists, concluded that the *direct* effects of the R-Project—construction and operation of the transmission line itself—are likely to kill and otherwise “take” at least one whooping crane (and likely many) over the 50-year life of the project. *See* USFWS_CORRESPONDENCE_2825 (experts Drs. Gil and Weir concluding that the R-Project is likely to kill “dozens [of cranes] over the 50-year life of the Project”); USFWS_WHCR_373 (the Service’s lead biologists finding “an expected take of 40-84 whooping cranes over the 50-year life of the R-Project using two take calculation methods”); USFWS_12 ADD_915 (Service biologists calculating the high end of whooping crane mortality at “essentially five R-Project transmission line strikes (4.96 cranes)”); USFWS_CORRESPONDENCE_2928 (Service whooping crane specialist estimating up to “1.47 cumulative strikes” from the R-Project). Accordingly, for that reason alone, the Service and

NPPD are violating the ESA by failing to incorporate the whooping crane into the ITP/HCP despite substantial evidence that take of at least one crane is likely.

Moreover, the R-Project will also cause the take of whooping cranes by triggering the construction and operation of industrial wind power projects in the whooping crane's essential migratory corridor that each bird passes through twice annually. The Service concedes that an explicit "purpose of the R-Project includes providing transmission access" to industrial wind power projects "in an area of Nebraska with wind resources," USFWS_LIT_CITED_32746, and that the industrial wind projects that will interconnect with the R-Project pose a serious threat to migrating whooping cranes. *Id.* Yet the ITP/HCP do not address *at all* the likely take of the crane associated with the hundreds (if not thousands) of wind turbines in whooping crane habitat that the transmission line is *intended* to instigate. This constitutes a flagrant violation of the ESA, especially in view of the Service's own recognition that poorly sited wind turbines pose grave threats to whooping cranes—both from collision risk and "take in the form of harm by significant habitat modification," USFWS_LIT_CITED_31666-67. *See State Farm*, 463 U.S. at 43 (action is arbitrary if agency "entirely failed to consider an important aspect of the problem").

Although the Service's issuance of an ITP that fails to cover a protected species that is likely to be taken by a permitted activity is an issue of first impression under the ESA, the D.C. Circuit addressed this scenario under a functionally indistinguishable statutory scheme. In *Kokechik Fishermen's Ass'n v. Sec'y of Commerce*, the D.C. Circuit confronted an agency's incidental take permit for commercial fishing activities under the Marine Mammal Protection Act, which, like the ESA, prohibits "take" absent federal authorization. In *Kokechik*, the agency authorized take of certain statutorily protected species but did not cover other species that were likely to be taken by the permitted activity. 839 F.2d 795, 799-803 (D.C. Cir. 1988). The court

rejected the agency's issuance of a permit that failed to cover all species that were likely to be taken by the permitted activity, reasoning that "[w]hile the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals" are likely to be taken, the agency "has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by that Act." *Id.* 801-02. Thus, the D.C. Circuit held that the agency could not lawfully issue a permit—thereby conferring federal authorization for the activity to proceed—that was likely to result in take of a protected species not covered by the permit. *Id.*

The same outcome is required here. While the project proponent must decide whether to seek an ITP in the first instance, the Service acts arbitrarily and capriciously (and in violation of Section 10) by granting—rather than denying—a permit when the Service knows that the permitted activity is likely to take other ESA-listed species, such as the whooping crane, in violation of the ESA's strict prohibition against taking *any* listed species, 16 U.S.C. § 1538(a)(1)(B). *See State Farm*, 463 U.S. at 43 (agency action is "arbitrary and capricious" where the agency "entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence before the agency").

By the same token, the Service and NPPD are violating the ESA by issuing an ITP that excludes the interior least tern and piping plover as covered species. The FEIS concedes that both species are present in the action area, and that transmission lines pose a substantial threat to them. USFWS_LIT_CITED_32451-55. Nonetheless, the FEIS asserts that the risk of take is low, and hence they are not being treated as covered species by the ITP/HCP. *Id.* As with the whooping crane, this finding is unsupported and insupportable, and the failure to treat the tern and plover as covered species violates Section 10 and its implementing regulations. The best available science demonstrates that it is likely that one or more least terns and/or piping plovers

will collide with the R-Project over its fifty-year life, in addition to wind turbines facilitated by the R-Project. *See Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1088 (D.C. Cir. 2016) (noting that the Service predicted that the 130-turbine Cape Wind project would “kill 80-100 endangered roseate terns and ten threatened piping plovers over the life of the project”).

B. The Service’s “Not Likely To Adversely Affect” Determination For ESA-Listed Bird Species Violates Section 7 Of The ESA

1. The Service’s Determination Is Not Based On The Best Available Scientific Evidence

For many of the same reasons, the Service’s “not likely to adversely affect” determination for these same species violates Section 7 of the ESA and its regulations. Before issuing an ITP, the Service must engage in “intra-Service consultation under section 7(a)(2).” USFWS_12_ADD_2479. As with all Section 7 determinations, the decision of whether a project is likely to adversely affect a species—thereby requiring formal consultation and a Biological Opinion analyzing the effects to that species—must rely upon the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The Service plainly flunks this test here.

Just as the Service decided not to cover the whooping crane in the ITP/HCP, the agency also avoided formal consultation under Section 7 for this species by determining that the R-Project purportedly “is not likely to adversely affect” the species. USFWS_SECTION_7_3. However, the Service’s conclusion that the R-Project is not likely to result in *any* adverse effect to whooping cranes is impossible to harmonize with the Service’s acknowledgment that “[c]ollision with power lines has been documented as one of the greatest known sources of mortality for fledged whooping cranes representing 20 percent of known mortalities,” and the fact that cranes “frequently travers[e] the [R-Project] study area, and sometimes us[e]

palustrine wetland and riverine habitats in the study area as stopover roost sites.”

USFWS_LIT_CITED_32459-60.

Basic common sense—and corroborating input from independent experts—compel the conclusion that placing a massive transmission line in the whooping crane’s migratory pathway and on top of stopover roost sites is likely to result in *some* adverse effect to the species over the project’s 50-year lifespan, even setting aside the additional impacts that will result from the R-Project’s facilitation of substantial wind turbine development in the region. Indeed, this is why leading whooping crane experts Drs. Gil and Weir opined that “it is not even necessary to rely on a sophisticated model to see that this Project represents a major obstacle to the Whooping Cranes’ migration, and presents a significant risk of collision harm.” USFWS_EMAIL_13733-34. Nevertheless, several detailed risk analyses *were* completed, and no less than *four* external and internal evaluations by recognized whooping crane experts determined that it was likely that at least one whooping crane (and possibly many more) would be taken by the R-Project. *See* USFWS_CORRESPONDENCE_2825; USFWS_WHCR_373; USFWS_12_ADD_915; USFWS_CORRESPONDENCE_2928. Accordingly, in light of voluminous evidence that the R-Project will likely take whooping cranes, the agency failed to rely upon the “best scientific . . . data available” in reaching the counterintuitive and arbitrary determination that NPPD’s project is not likely to adversely affect the crane in any way whatsoever. *See Preserve Our Island v. U.S. Army Corps of Eng’rs*, No. 08-cv-1353, 2009 WL 2511953, at *14 (W.D. Wash. Aug. 13, 2009) (finding a “no adverse effect” conclusion arbitrary and capricious “in the face of scientific evidence in the record which suggests specific and serious effects”).

The Service also failed to apply the best available scientific data standard in determining that the R-Project is not likely to adversely affect least terns and piping plovers, especially in

light of the Service’s concessions that these species are “likely” present in the project area including during migration, and that “[o]peration of the R-Project transmission line would result in a long-term collision hazard” to both species. USFWS_LIT_CITED_32451-54. Coupled with the fact that, despite extremely low carcass detection rates, “one interior least tern mortality resulting from a transmission line collision has been reported in Nebraska,” *id.*, the Service ignored the best available scientific data in concluding that the R-Project (let alone wind energy projects fostered by the R-Project) would not result in *any* adverse effects whatsoever.⁷

2. At Minimum, The Inherent Uncertainty In Estimating Take Requires Affording The Benefit Of The Doubt To Listed Species (Not NPPD)

Given the abrupt nature of the Regional Office’s commandeering of the R-Project from the Nebraska Field Office, the Court must view with significant skepticism the Regional Office’s cursory and result-oriented whooping crane critique asserting that take of that species “is not reasonably certain to occur due to collisions with the power lines in the R-Project.” USFWS_WHCR_183. Not only is this conclusion inconsistent with multiple detailed evaluations by leading whooping crane experts both within and outside the Service utilizing various modeling methodologies, but it also fails to comport with basic common sense.

Moreover, even if the Regional Office’s assessment is taken at face value—rather than as merely an effort to arrive at a preordained outcome urged by NPPD—it fails to support the conclusion that the R-Project will not take a single whooping crane. Even as to the transmission

⁷ Another court has held that the Service’s Regional Director (who was heavily involved here in commandeering R-Project review from the Nebraska Field Office and rubberstamping NPPD’s preferred project) violated the ESA’s best available science standard. *See Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1002 (D. Mont. 2016) (finding that Regional Director Walsh elicited “an unpublished, unreviewed, personal opinion . . . in the eleventh hour to back fill her foregone conclusion” not to list a species under the ESA, and holding that this process “served to justify a decision already made” by Regional Director Walsh which is “the essence of arbitrary and capricious decisionmaking”).

line itself (i.e., putting aside the industrial wind power impacts), the Regional Office’s critique explains that any attempt to calculate a whooping crane take estimate is plagued with “substantial uncertainty” due to “lack of data,” USFWS_WHCR_183, and goes so far as “recommend[ing] that an independent and broad group of experts . . . convene to develop a comprehensive and scientifically robust methodology for . . . calculations of collision risk for power lines at a site-specific scale. . . . [to] help close a gap in the scientific literature . . . [which] makes it challenging to evaluate the risks to whooping cranes of a specific power line project.” USFWS_WHCR_188.⁸

The Regional Office’s acknowledgement of “substantial uncertainty” calls into serious question how it could be “comfortable concluding that whooping crane collision with the R-Project is not reasonably certain to occur.” *Id.* Not a *single* internal or external whooping crane expert felt comfortable reaching that same conclusion. In addition, the Service’s ultimate determination that such “substantial uncertainty” (insofar as it actually exists) should be resolved *against* protection of the highly endangered whooping crane, and in favor of issuing a 50-year permit authorizing a transmission line in the midst of prime whooping crane habitat, contravenes Section 7 of the ESA and its implementing regulations that require formal consultation for actions that are likely to adversely impact listed species. *See* 50 C.F.R. § 402.14. Citing the ESA’s legislative history, the Supreme Court has stated in unequivocal terms that “the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which [Congress] described as ‘institutionalized caution.’” *Tenn. Valley Auth.*,

⁸ Whooping crane experts also identified immense uncertainty involved in take calculations related to the R-Project, but *none* concluded that such uncertainty equated to *no* adverse effect. *See, e.g.*, USFWS_CORRESPONDENCE_2905; USFWS_12 ADD_915; USFWS_EMAIL_8952.

437 U.S. at 194; *id.* at 185 (Section 7 “reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies”).

Thus, because Section 7 was designed to embody a policy of “institutionalized caution” in addressing the plight of endangered species, the ESA mandates that the Service—the agency principally tasked with conserving endangered species—take steps to protect whooping cranes from the construction of transmission lines and industrial wind turbines in the heart of the species’ migratory habitat. It is not concordant with the requirements of Section 7(a)(2) for the Service to sidestep its fundamental duty to protect the whooping crane from jeopardy—let alone even analyzing that question in a Biological Opinion—simply by asserting that there is “substantial uncertainty” as to how this decades-long project will impact the highly imperiled whooping crane. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (holding that Section 7(a)(2) requires that the Service and other federal agencies “give ‘the highest of priorities’ and the ‘benefit of the doubt’” to listed species (quotation omitted)); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006) (“To the extent that there is any uncertainty as to what constitutes the best available scientific information, Congress intended ‘to give the benefit of the doubt to the species’” (internal quotation omitted)).

Although Petitioners disagree that this is a close call based on the best available scientific evidence, even taking the Regional Office at its word about the “substantial uncertainty” inherent in calculating whooping crane take compels the conclusion that the agency’s avoidance of formal consultation altogether for the species was arbitrary and capricious. *See Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 390 F. Supp. 2d 993, 1008 (D. Mont. 2005) (holding under Section 7 that although the Service confronted “equivocal evidence” and decided “that the apparent risk is

worth taking,” “a tie in the evidence should go to the species” because of “the principle that Congress has expressed a preference for the species in a context of uncertainty”). Indeed, as the Service explained, the decision of whether the ITP/HCP and Biological Opinion must cover the crane is “a risk tolerance policy decision, *not a science-directed decision*” due to a “tremendous amount of uncertainty. USFWS_12_ADD_915 (emphasis added). But, Congress did not authorize the Service to bypass the best available science and play Russian roulette with a highly imperiled species by resolving manifest uncertainty (assuming it exists) in favor of environmentally destructive projects and *against* whooping cranes and other imperiled species.

The Regional Office’s conclusion that the R-Project is “not likely to adversely affect” the whooping crane is particularly egregious because experts inside and outside the agency concluded that the R-Project is instead “likely to jeopardize the continued existence” of the crane, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. For example, Drs. Gil and Weir twice determined that the R-Project “will jeopardize the species, undermining recovery efforts and risking the continued existence of this iconic species.” USFWS_CORRESPONDENCE_2831; USFWS_EMAIL_13733-34 (same). And the Service’s lead biologists concluded that the R-Project “has negative implications for recovery of this species.” USFWS_WHCR_373.

In short, due to the precarious status of this species and the well-established fact that the additive death of even one or two cranes could have significant adverse recovery implications for the species, *see* USFWS_EMAIL_13625-26 (peer-reviewed study concluding that “1 to 2 additional mortalities per year could result in a declining population”), the Regional Office contravened the statutory prohibition against “jeopardizing the continued existence” of the whooping crane by failing even to subject the species to formal consultation (let alone analyzing the action’s recovery implications).

Likewise, the Service failed to calculate take (or resolve any inherent uncertainty) with respect to the least tern and piping plover, thereby reinforcing that the Service failed to supply the benefit of the doubt (as required by Section 7) to these listed species that the Service concedes are “likely” to be present in the project area and are very susceptible to transmission line collisions. USFWS_LIT_CITED_32451-55. This, too, violates Section 7 and its regulations.

C. The Service Violated The ESA In Other Ways

1. The Service’s Finding That NPPD’s Preferred Route Minimizes And Mitigates Take Of ABBs (And Other Listed Species) Violates Section 10

With respect to all of the listed species affected by the project, the Service violated Section 10(a)(2)(B)(ii), which requires that the agency deny an ITP unless the Service finds that a project proponent will “to the maximum extent practicable, minimize and mitigate the impacts” of any takings of listed species. 16 U.S.C. § 1539(a)(2)(B)(ii). If this (or any other) statutory criterion is not satisfied, the Service must deny the ITP. USFWS_12 ADD_2799.

Here, the FEIS only evaluates three alternatives, one of which is the “no action” alternative. USFWS_LIT_CITED_32199. The only two “action” alternatives analyzed in the FEIS would follow precisely the same route but would differ only insofar as the type of transmission tower. USFWS_LIT_CITED_32200-01. In addition to the fact that this exceedingly narrow range of alternatives fails to afford the hard look required by NEPA (as discussed below), it also violates the Service’s ESA obligation to ensure that the project will “to the maximum extent practicable, minimize and mitigate” adverse impacts on listed species.

To begin with, because the Service (and NPPD) have improperly excluded the whooping crane, least tern, and piping plover as covered species, the Service concededly did not even analyze whether other project permutations that would minimize and mitigate impacts on *those* species would be “practicable” within the meaning of Section 10. USFWS_LIT_CITED_32268

(limiting analysis to “alternative routes that may avoid or reduce impacts *from take of the beetle*” (emphasis added)); USFWS_HCP_1944 (finding that NPPD’s preferred route “will, to the maximum extent practicable, minimize and mitigate the impacts of the anticipated take of beetles”). Highlighting this concern, the FEIS notes that an underground transmission line (in whole or in part) would “decrease potential impacts on migratory birds,” but summarily dismissed this alternative from detailed consideration without making any finding, as required by Section 10, as to whether underground construction in all or at least some areas would “minimize and mitigate” impacts on whooping cranes, least terns, and/or piping plovers “to the maximum extent practicable.” 16 U.S.C. § 1539(a)(2)(B)(ii).

With regard to the ABB, the Service also violated Section 10(a)(2)(B)(ii). The FEIS concedes that the Central Route would cross far less ABB habitat than NPPD’s preferred route, and would also have fewer adverse impacts on migratory birds and other sensitive resources. *See* USFWS_LIT_CITED_32273. Yet the Service “dismissed” the route “from further analysis” because it “would cause significant delays and be far more costly than the proposed route.” USFWS_LIT_CITED_32276.

However, aside from merely parroting NPPD’s asserted rationales for why this route is infeasible, the Service has not independently determined (let alone supplied the public with any analysis supporting such a determination) that a Central Route, which is far less damaging to ESA-listed species, would be “far more costly” than NPPD’s preferred route, nor has the Service explained why this additional cost renders the Central Route not “practicable” under Section 10. Neither the FEIS nor any other document sets forth any objective metric or yardstick by which route alternatives have been deemed practicable or impracticable—i.e., at what specific expense level an alternative becomes “impracticable” for NPPD and the underlying basis for that

assessment. This lack of any objective metric for the Service’s determination of economic practicability for specific alternatives that would indisputably reduce impacts to listed species—a determination the ESA requires *the Service* to make—is especially troubling because NPPD will only bear 5-7% of the costs of the R-Project. *See supra* at XX. The Service failed to consider this issue in determining that the Central Route was purportedly impracticable because it “would increase the estimated total cost of implementing the [project by approximately] \$38,000,000.” USFWS_LIT_CITED_32277.

But the total additional cost is not only modest compared to the overall cost of NPPD’s preferred project, but more critically is legally irrelevant. The key question under Section 10 is whether the Service has independently verified that *the applicant* (NPPD) has “to the *maximum extent practicable*” minimized and mitigated take. Rejecting an alternative route that would significantly reduce harm to listed species while only minimally increasing *NPPD*’s costs by no more than \$2.7 million—i.e., a fraction of the R-Project costs NPPD has already agreed to bear—plainly falls short of this statutory standard. The Service’s failure to consider (let alone evaluate) the additional costs that *NPPD* would owe, and whether that modest cost differential would render the project impracticable for NPPD, is arbitrary, capricious, and flouts Congress’s requirement that the Service analyze impracticability and make such a finding before issuing any ITP. *See State Farm*, 463 U.S. at 43 (action is arbitrary if agency “entirely failed to consider an important aspect of the problem”).

Likewise, the Service’s rubberstamping of NPPD’s other rationale for the Central Route’s impracticability—i.e., that *any* alternative route other than the one NPPD adopted without Service input five years before ITP issuance would be per se impracticable because it would occasion some additional delay to obtain permits and PRB approval—is also legally

insupportable. To begin with, this problem is entirely of NPPD's own making. Had NPPD sought advice from the Service and other agencies with expertise before selecting a route, or had NPPD actually considered the repeated recommendations in the early stages of project development by the Service, National Park Service, Environmental Protection Agency, Nebraska SHPO, and others to adopt an alternative route that is less damaging to federally protected resources, NPPD would not be faced now with any purported "delay" to obtain new approvals. *See supra* at **XX-XX**. In addition, the inherent delay in obtaining approvals if a particular alternative is selected is a foreseeable consequence in *any* Section 10 process, and thus would render *every* alternative other than the applicant's preferred project impracticable in *every* Section 10 process—thereby making completely meaningless Congress's mandate that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking." 16 U.S.C. § 1539(a)(2)(B)(ii). Finally, the FEIS concedes that NPPD's purported "Project need date" elapsed 18 months *before* ITP issuance (January 2018), and that, since that time, NPPD has managed to "address impacts to reliability, congestion, and renewable resources" through measures *other than* the R-Project. USFWS_LIT_CITED_32277. The mere fact that NPPD "must continue implementing these actions until the R-Project is completed" certainly does not render *every* alternative route impracticable, especially given the Service's concession that the "costs of these contingency actions haven't been quantified." *Id.*

Hence, because the Service has adopted NPPD's rationales for impracticability without independently determining (or supplying any analysis or rational basis for such determination) that NPPD has "to the maximum extent practicable, minimize[d] and mitigate[d] the impacts of such taking" on ABBs and other listed species, 16 U.S.C. § 1539(a)(2)(B)(ii), especially when the Service has not independently verified that either the modest additional cost to NPPD or

some additional delay would necessarily render the project impracticable (especially where NPPD is *already* implementing interim measures to mitigate delay to date), the Service’s granting of NPPD’s ITP application was arbitrary and capricious.

Indeed, this case is indistinguishable from *Gerber v. Norton*, in which the Service issued an ITP despite the existence of a reduced-impact alternative because the developer found it impracticable “out of concern that changing the design would entail additional costs and delay the process of obtaining approval from the county zoning department.” 294 F.3d 173, 185 (D.C. Cir. 2002). The D.C. Circuit explained that “before issuing the [ITP], the Service was obliged to find independently that no practicable alternative to [the applicant’s] development plan would minimize the taking of fox squirrels,” and held that the Service failed this duty because it did not supply “any *analysis* whatsoever as to whether implementation of the [alternative] would actually result in additional costs and delay, or whether the magnitude of such costs or delay would render the alternative impracticable.” *Id.*; see also *Nat’l Wildlife Fed’n v. Babbitt*, 128 F. Supp. 2d 1274, 1293 (2000) (finding that Service’s Section 10 practicability determination “is unsupported by substantial evidence in the record, and therefore is arbitrary and capricious”).

2. The Service Did Not Respond To Dr. Bedick’s Expert Comments Concerning NPPD’s Flawed ABB Take Estimate

Further showing that the Service’s failed to rely on the best available science as the ESA requires, and undermining its purported finding that NPPD’s preferred project will to the maximum extent practicable minimize and mitigate take of ABBs, the Service’s ITP, Biological Opinion, and EIS fail entirely to mention—let alone address—the serious concerns raised by leading ABB expert Dr. Jon Bedick. He found that “[t]he analysis and assumptions regarding the density of ABBs in the Project area are not supported by reliable data, and therefore the potential for ‘take’ of ABBs (as defined under the ESA) may be significantly higher than what has been

assumed by NPPD.” USFWS_CORRESPONDENCE_3112-26. Dr. Bedick did “not believe that the best available science has been used to arrive at NPPD and the Service’s conclusions regarding impacts to ABB.” *Id.*

Remarkably, although the Biological Opinion cited Dr. Bedick’s peer-reviewed studies *four times, see, e.g.,* USFWS_SECTION_7_17—underscoring his status as a recognized ABB expert—the Service *never* referenced his detailed comments or addressed them in any way. As courts have held in analogous circumstances, this is textbook arbitrary and capricious decisionmaking. *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1156-57 (D.C. Cir. 2011) (remanding “not likely to adversely affect” determination due to the Service’s failure to respond to comments by a recognized expert on the species). The Service’s failure to respond to Dr. Bedick’s expert comments—which call into question several aspects of the agency’s ITP and consultation processes—cannot be sustained. *State Farm*, 463 U.S. at 43 (action is arbitrary if agency “entirely failed to consider an important aspect of the problem”).

3. The Service’s Failure To Analyze The Effects Of Wind Power Violated The ESA

Although the R-Project is expressly intended to facilitate a substantial expansion of wind energy in this region—projects that would not be built in the absence of this transmission line—the Biological Opinion failed to evaluate the indirect effects of wind energy in conjunction with the direct effects to listed species resulting from construction and operation of the R-Project itself. This violates the ESA in two ways.

First, the Service committed a major analytical error by classifying wind power impacts to listed species as cumulative, rather than indirect, effects. USFWS_SECTION_7_27-28. Whereas cumulative effects are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action

subject to consultation,” 50 C.F.R. § 402.02, “[i]ndirect effects are those that are *caused by the proposed action and are later in time*, but still are reasonably certain to occur.” *Id.* (emphasis added). Thus, cumulative effects are unrelated to the project subject to consultation but are foreseeable actions overlapping the same geographical area as the project under review. In contrast, indirect effects are *caused by the action under review* and have the critically important effect of expanding the “action area” the Service must consider in Section 7 consultation. *Id.* Hence, because the Service concedes that “[u]ntil the new R-Project is constructed, no new load growth (i.e., new sources of power generation) could be accommodated in the western half of the north-central Nebraska region,” USFWS_LIT_CITED_32216, major wind energy development *enabled by the R-Project’s construction and operation* can only be classified as indirect (rather than cumulative) effects. The Service’s contrary treatment of wind energy development as a cumulative impact renders the Biological Opinion arbitrary and capricious.⁹

This distinction has immense practical import under the regulatory framework. The Service’s regulations define the “action area” subject to review in a Biological Opinion as “all areas to be affected directly *or indirectly* by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. *Id.* § 402.02. (emphasis added). In other words, the action area’s boundaries are delimited by the area of direct and indirect effects (but not cumulative effects). *Id.*

The importance of this distinction is highlighted by the Service’s erroneous discussion of the “cumulative” effects of the 171-turbine Thunderhead Wind Energy Project located in

⁹ Wind energy projects facilitated by the R-Project could be classified as “interrelated” actions because they “are part of a larger action and depend on the larger action for their justification.” 50 C.F.R. § 402.02. This classification would have the same legal impact as classifying them as “indirect” impacts.

Antelope County and Wheeler County, the vast majority of which the Service summarily dismissed from evaluation because the 137 turbines in Antelope County will not “occur in the action area.” USFWS_SECTION_7_27-28. However, had wind turbines enabled by the R-Project been properly considered “indirect effects” (or “interrelated actions”), the “action area” requiring analysis necessarily would have expanded, requiring the Biological Opinion to analyze impacts from the Thunderhead wind turbines to ABBs, whooping cranes, and other ESA-listed species occurring in Antelope County. Artificially limiting the action area by erroneously classifying indirect effects as cumulative effects cannot be reconciled with Section 7. *See Sierra Club v. U.S.*, 255 F. Supp. 2d 1177, 1188 (D. Colo. 2002) (concluding that agency’s grant of an easement to a mining operation obligated it to consult as to both the easement and the mine); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 128-29 (D.D.C. 2001) (finding Biological Opinions “deficient because of their overly narrow definition of action area, which results in the exclusion of certain relevant impacts from the environmental baseline”); *cf. Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1224-25 (9th Cir. 2015) (holding that wind project was not an indirect effect of federal right-of-way because it “would have been completed without the [agency’s] approval of the Road Project”).

Second, the Biological Opinion asserted that “the Service knows of no projects reasonably certain to occur” except for the Thunderhead project, and with respect to that project the Service avoided any ESA consultation on the grounds that it “could not locate any detailed information . . . on the specific locations of the turbines.” USFWS_SECTION_7_28. Even setting aside that members of the public repeatedly supplied the Service with detailed information about *several* wind projects that will foreseeably result from the R-Project’s construction (which alone renders the Biological Opinion defective), *see* USFWS_NEPA_2477-

79; USFWS_LITIGATION_101-07, the Service did not explain why it requires pinpoint precision of turbine locations (for the Thunderhead project or any other project) to conduct a generalized evaluation of the increased risks to ESA-listed bird species such as the whooping crane. This is especially arbitrary because the Service knows, for example, that the Thunderhead turbines will be placed within the whooping crane migration corridor where 95% of all sightings have occurred, and because the Service itself has established that wind turbines pose particularly grave threats to whooping cranes—both from collision risk and “take in the form of harm by significant habitat modification.” USFWS_LIT_CITED_31666-67.

The Service’s refusal even to roughly quantify the number of turbines that the R-Project will likely enable within the whooping crane’s migratory corridor—let alone evaluate the additive effects to cranes and other ESA-listed species that will foreseeably result from these wind turbines—cannot be squared with the Service’s ESA duties, nor the best available science standard that must guide the Service’s consultation process.

III. THE SERVICE VIOLATED NEPA

A. The Service Failed To Consider A Reasonable Range Of Alternatives, And Arbitrarily Dismissed From Detailed Analysis Alternatives That Would Reduce Impacts To Wildlife And Historic Resources

As explained above, *see supra* at **XX-XX**, the Service analyzed an exceedingly narrow range of alternatives that only evaluated two “action” alternatives in detail, both of which would follow precisely the same route and differ only as to the type of transmission tower.

USFWS_LIT_CITED_32200-01. The Service’s Regional Office ultimately dismissed from detailed consideration in its FEIS a specific alternative (the Central Route) that the agency’s Nebraska Field Office previously determined to be “feasible from both a technical and economic

perspective,” USFWS_12 ADD_197, based on NPPD’s objections that *any* routing alternative would result in some additional cost and delay. USFWS_LIT_CITED_32276.

The Service’s approach of restricting its alternatives analysis to two essentially identical action alternatives constitutes a flagrant NEPA violation that fails to “[r]igorously explore and objectively evaluate all reasonable alternatives” for the proposed action. 40 C.F.R. § 1502.14(a); *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708-11 (10th Cir. 2009) (rejecting “unduly narrow range of alternatives in the EIS process”). By definition, where all action alternatives are the same in key respects, an agency necessarily has not considered a “range” of reasonable alternatives because there is no range at all. For this reason alone, the Service’s artificially narrow alternatives analysis flouts NEPA. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (rejecting EIS that “considered only a no action alternative along with two virtually identical alternatives”).

Moreover, the Service’s patently deficient range of alternatives is even more arbitrary here because there exists a specific alternative (the Central Route)—deemed “feasible from both a technical and economic perspective” by the Service’s own project leads at the DEIS stage, USFWS_12 ADD_197—that everyone agrees would substantially reduce impacts to myriad wildlife species, historic and cultural resources, and wetlands. Although the Service summarily dismissed this reduced-impact alternative on the basis of additional costs and delay that NPPD might incur, as explained above those rationales are not remotely sufficient for dismissing such an alternative from detailed consideration in an EIS.

Once again, the Service failed to actually explain how an additional \$38 million cost would render the project infeasible for NPPD, especially when that figure is relatively modest compared to the overall cost of NPPD’s preferred project and, in any event, NPPD will only

bear, at most, 5-7% of this additional cost (no more than \$2.7 million). Likewise, NPPD's desire to adhere to its preferred schedule cannot be a lawful basis for deeming an otherwise viable option to be infeasible for NEPA purposes—especially when NPPD has sufficiently mitigated this impact through *other* measures for several years after the preferred in-service date of January 2018 (measures which the Service failed to consider as options for mitigating any asserted delay if the Central Route were adopted)—because this position would render *any* alternative to *any* project infeasible because necessary approvals will *always* take some time to obtain.

Accordingly, the Service's failure to evaluate in detail a reduced-impact alternative on the basis of fatally flawed and ill-explained rationales cannot pass muster under NEPA. *See Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016) (finding that “because the Service . . . did not consider any other reasonable alternative that would have taken fewer Indiana bats than Buckeye's [HCP], it failed to consider a reasonable range of alternatives and violated its obligation under NEPA”); *Richardson*, 565 F.3d at 708-11 (invalidating agency's dismissal from detailed consideration in EIS a reduced-impact alternative and holding that agency's rationales for dismissal were arbitrary and capricious).

B. The Service Failed To Take A “Hard Look” At The Effects Of Wind Turbines Facilitated By The R-Project

As with the ESA, the Service's decision to blind itself to the significant indirect impacts that will result from the R-Project's intended stimulation of major wind energy development violated NEPA. The Service's FEIS refused to even generally assess impacts resulting from wind turbines for projects that have not yet signed an interconnection agreement with NPPD.

USFWS_LIT_CITED_32746-47. And for the one project with an interconnection agreement (Thunderhead), the Service once again failed to seriously scrutinize the additive impacts of this project on whooping cranes and other at-risk species that are vulnerable to turbine collisions,

merely stating that the project “will create a long-term collision hazard, resulting in mortality of migratory birds and bats” that “is likely [to] be within the range of those documented at similar wind energy facilities in the region.” USFWS_LIT_CITED_32759. But stating generically that there will be major impacts—without actually *analyzing* what this means for highly endangered whooping cranes and other species in conjunction with impacts caused by the R-Project itself—fails NEPA’s mandate to take a “hard look” at all direct, indirect, and cumulative impacts.

In a functionally indistinguishable case, the D.C. Circuit addressed an agency’s duty to analyze the downstream impacts of pipelines that would occur from the burning of natural gas at power plants (some of which had yet to be built). *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017). As here, the government argued that “it is impossible to know” precisely the extent of future impacts because several facilities had yet to be constructed, but the court held that “NEPA analysis necessarily involves some reasonable forecasting, and that agencies may sometimes need to make educated assumptions about an uncertain future.” *Id.* at 1374. Accordingly, the court held that the EIS “should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.” *Id.*

The same result is required here—the Service’s FEIS should have attempted to reasonably forecast the number of turbines that will ultimately interconnect into the R-Project (and then evaluated the consequent impacts to whooping cranes and other species of placing that estimated number of turbines in this migratory flyway, based on established per-turbine collision data in this region), or explained why it could not do so, as NEPA required.

IV. THE SERVICE VIOLATED THE NHPA

The Service's issuance of an ITP and signature of the Section 106 Programmatic Agreement violated the NHPA in two ways.

First, despite pleas for NPPD to complete all surveys for historic and cultural resources *before* any final decision, the Service issued its FEIS, signed the Section 106 Programmatic Agreement, and granted NPPD's ITP while acknowledging that certain properties affected by the R-Project had not yet been surveyed for such resources. USFWS_NHPA_544-45. By issuing an FEIS and ultimately granting an ITP without even knowing whether certain resources of historic or cultural significance might be impacted on unsurveyed lands (and by failing to include in the FEIS any analysis of such impacts on resources that have yet to be surveyed), the Service acted arbitrarily and capriciously under the NHPA (and NEPA). *See Oglala Sioux v. Nuclear Regulatory Comm'n*, 896 F.3d 520, 533 (D.C. Cir. 2018) (holding that an action may not go forward without first conducting adequate historic and cultural resource surveys because “[t]he purpose of an EIS is, in part, to determine whether the land contains such resources and where they are located, so that damage to them can be avoided or mitigated”; “[i]f the project is permitted to go forward without the necessary land survey, such damage may well be done”).¹⁰

Second, with respect to wind power, the Service adopted a patently arbitrary approach in signing the Section 106 Programmatic Agreement. As with the ESA and NEPA, the Service failed to evaluate the impacts that will result from the R-Project's facilitation of hundreds (or possibly thousands) of wind turbines in this region that is filled with significant historic and

¹⁰ As an example of historic or cultural resources that have yet to be surveyed, commenters pointed out the existence of human remains near wagon ruts directly in the path of the R-Project. USFWS_LITIGATION_101-02. While acknowledging that information about these remains is “important,” the agency admitted that “[t]he exact location of the remains in relation to the R-Project is unknown.” *Id.* Had the Service properly required NPPD to complete these surveys *before* issuing the FEIS, it would have served the purposes of NEPA and the NHPA by supplying key information to the public and ensuring against any harm to these resources.

cultural resources, including many listed or eligible for listing on the NRHP. This violates the NHPA and its regulations. *See* 36 C.F.R. § 800.5 (directing that agencies “shall” evaluate all actions for “adverse effects,” including all “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative”).

In addition, the Service, NPPD, and other signatories to the Section 106 Programmatic Agreement adopted the remarkable position that the “Thunderhead Wind Energy Center is a reasonably certain foreseeable action” resulting from the R-Project; “however, the parties agree[d] that no further work will be done to resolve any adverse effects to historic properties that may result from that project for purposes of this [Programmatic Agreement].”

USFWS_NHPA_545. In other words, while conceding that the Thunderhead project is the type of foreseeable action that *must* be analyzed under the NHPA and its regulations for adverse effects *before* an agency can issue its final decision, the Service nonetheless refused to analyze (let alone resolve) such impacts to historic and cultural resources stemming from the Thunderhead project before the Service issued its ITP. This patently result-oriented approach is textbook arbitrary and capricious decisionmaking, and cannot pass muster under the NHPA.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court vacate and remand the Service’s ITP, ROD, FEIS, Biological Opinion, and Programmatic Agreement.

Respectfully submitted,

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