

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

Civil Action No. \_\_\_\_\_-AP

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.

---

**PETITION FOR REVIEW OF AGENCY ACTION**

---

**INTRODUCTION**

1. Petitioners challenge Federal Respondents’ approval of an enormous, environmentally destructive transmission line project—known as the “R-Project”—in the Nebraska Sand Hills, an area that, as recently described by the Nebraska Legislature, “provide[s] an irreplaceable habitat for millions of migratory birds and other wildlife every year and serve[s] as the home to numerous ranchers and farmers,” as well as to “priceless” historic and archeological artifacts. Notwithstanding extensive adverse impacts on this unique and fragile ecosystem and historic region, Respondent U.S. Fish and Wildlife Service (“FWS” or “Service”) has issued a permit to the Nebraska Public Power District (“NPPD”) to “take” the American

Burying Beetle (“ABB”), a species listed as “endangered” under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. However, this Incidental Take Permit (“ITP”) and accompanying Habitat Conservation Plan (“HCP”)—without which the project could not lawfully proceed—illegally excludes coverage of (and hence protection for) the Whooping Crane, a highly endangered species. According to the Service’s own expert biologists, as well as outside experts on the species, Whooping Cranes are at extremely high risk of being killed, injured, and otherwise adversely affected by the transmission line. However, the Service’s Regional Director—based in Colorado—overruled the agency’s biologists (and others with species-specific expertise), deciding instead that an ITP should be issued without addressing the Whooping Crane as a covered species. This decision violates the ESA and is otherwise arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

2. In addition to failing to properly account for the direct impact of the project on Whooping Cranes, Respondents also violated the ESA as well as the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, and Section 106 of the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108, by failing to meaningfully address the project’s indirect effects in connection with hundreds of industrial wind turbines that will result from the project and that will have adverse impacts on Whooping Cranes, other ESA-listed species, many other migratory birds, ABBs, historic and cultural resources, wetlands, and other important natural resources.

3. Respondents’ violations of the ESA, NEPA, and NHPA are particularly egregious because there are reasonable alternatives to the R-Project that would have far less dire impacts on the exceptional environmental, historic, and cultural values of the Sand Hills. Yet

Respondents, under pressure from NPPD, have refused to engage in a meaningful analysis and comparison of such alternatives, instead deferring to NPPD's unsubstantiated assertion that any option other than NPPD's preferred approach and route would be impracticable. This is still another reason why Respondents' decision violates the ESA, NEPA, and the NHPA, and is arbitrary and capricious in violation of the APA. In view of these violations, the Court should set aside the ITP and remand the matter to Respondents for further deliberation.

#### **JURISDICITON AND VENUE**

4. This Court has jurisdiction over this matter under 28 U.S.C. § 1331 (federal question) and the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

5. Venue in this Court is proper under 28 U.S.C. § 1391(e)(1) because Respondent Walsh is in Denver, because the decision to approve the ITP/HCP was made in this jurisdiction, and because the Service conducted and finalized its environmental review in this jurisdiction.

#### **PARTIES**

6. Petitioner Oregon-California Trails Association ("OCTA") is a 1500-member national nonprofit organization headquartered in Independence, Missouri. OCTA is comprised of eleven chapters throughout the western United States, including in Colorado and Nebraska. The mission of OCTA is to protect the historic emigrant trail legacy by promoting research, education, preservation activities, and public awareness of the trails, and to work with others to promote these important causes. The number one goal of OCTA is to preserve the Historic Emigrant Trails and to preserve and promote the stories of the emigrant experience. Although mitigation is part of the preservation process, OCTA's primary goal is to preserve these unique and iconic trails and resources (not merely mitigate harm to them). Whether a direct impact to the trail itself or an indirect impact to the visual effects, emigrant trails are not a renewable

resource; once they are gone, they are gone. The R Project, as proposed, will have a devastating impact on pristine trail segments of the Oregon-California National Historic Trail and the Mormon Pioneer National Historic Trail through both direct effects and indirect effects associated with the transmission line itself and the wind energy infrastructure it is intended to facilitate in close proximity to these national historic trails. The areas of these trails that will be significantly affected by the R-Project are generally evocative of a rural, pristine setting that emigrant pioneers would have encountered hundreds of years ago, and the character of these areas, the trails themselves, and the historic feel and setting of the trails will be fundamentally altered by an enormous modern transmission line and related wind energy infrastructure.

7. Petitioner Western Nebraska Resources Council (“WNRC”) is a nonprofit organization formed in 1983 that is dedicated to preserving the quality of watersheds and native biomes while maintaining the lifestyle of Western Nebraska. WNRC members and staff work to accomplish its mission by educating the public and policymakers and through hands-on work throughout Nebraska. WNRC concurs with the scientific consensus that stressed ecosystems are capable of slipping rapidly from a seemingly steady equilibrium into catastrophic ecological change, significantly adding to climate disruption that is already negatively affecting this region through floods, livestock and crop losses, and other ecological disruptions. WNRC, its members, and its staff recognize that the Nebraska Sand Hills, and its essential ecosystem functions that sustain us, will be impaired and compromised as a result of the unlawful R-Project routing and imminent construction activities associated with the project. In particular, the R-Project will cause substantial and permanent harm, which cannot later be mitigated, by scarring the landscape with an intrusive transmission line that changes the character of this ecosystem for WNRC’s

members, biological diversity, historic and cultural resources, and other unique and iconic features of this national treasure.

8. Petitioner Hanging H East, L.L.C. is a company owned by a rancher and conservationist that will be directly and adversely affected by the R-Project. Hanging H East, L.L.C. owns and manages real estate that will be bisected by the R-Project as presently planned and that is also subject to a Conservation Easement with Wetlands America Trust, Inc., a supporting organization of Ducks Unlimited, Inc. The transmission line will cut through critical riparian habitat protected by the Conservation Easement, and hence will seriously undermine the conservation purpose of the Easement, which furthers various governmental conservation policies, including those of the North American Waterfowl Management Plan and the Nebraska Legacy Plan. This property and adjacent areas are heavily used by migratory waterfowl and other wildlife that will be devastated by the project. The property owned and managed by Hanging H East, L.L.C. is unique and one of the finest waterfowl locations in the State of Nebraska. This project will have severe adverse impacts on Hanging H East, L.L.C., the property it owns and manages, and the enjoyment thereof by the owner of Hanging H East, L.L.C. (and others) including but not limited to creating a barrier between those parts of the property bisected by the transmission line, negatively impacting its use by migratory waterfowl and other wildlife, permanently destroying the current viewshed leaving the massive modern 345 kilovolt (“kV”) transmission line as the dominant feature of the landscape, and introducing the permanent and 24/7 noise generated by this 345-kV transmission line. Such adverse impacts could be avoided by an alternate route along an existing electrical transmission corridor owned by NPPD.

9. Petitioner Whitetail Farms East, L.L.C. is a company owned by a landowner and conservationist that will be directly and adversely affected by the R-Project. Whitetail Farms

East, L.L.C owns real estate which will be adversely impacted by the R-Project as presently planned. The affected property owned and managed by Whitetail Farms East, L.L.C. is north and adjacent to the affected property owned and managed by Hanging H East, L.L.C. The affected property owned by Whitetail Farms, L.L.C. is heavily used by migratory waterfowl and other wildlife that will be devastated by the R-Project. This project will have great adverse impacts on this property and the enjoyment thereof by the owner of Whitetails Farms East, L.L.C. and others, including but not limited to creating a barrier along the east side of the property which must be accounted for every time anyone passes along that part of the property, negatively impacting its use by migratory waterfowl and other wildlife, permanently destroying the current viewshed leaving the 345-kV transmission line as the dominant feature of the landscape, and introducing permanent and 24/7 noise generated by a 345-kV transmission line. Such adverse impacts could be avoided by an alternate route along an existing electrical transmission corridor owned by NPPD.

10. All of Petitioners' injuries result directly from Respondents' decision to approve an ITP for the R-Project in the absence of full compliance with the ESA, NEPA, the NHPA, and other federal environmental laws. As the FWS has acknowledged, because the area in which NPPD wishes to build the project is in fact occupied by species listed under the ESA, NPPD cannot lawfully build the project without first obtaining a valid ITP/HCP. In addition, NPPD has publicly declared that it will not proceed with project construction in the absence of an ITP. Consequently, the FWS's decision to approve an ITP/HCP is both a "but for" and a proximate cause of the direct and indirect environmental impacts that threaten to harm Petitioners in concrete ways.

11. A Court order vacating the ITP pending further administrative review will redress Petitioners' injuries by preventing harmful project construction, and by ensuring that the FWS will take a harder look at the myriad adverse impacts associated with the project, and less harmful alternatives than NPPD's proposed route.

12. Respondent Noreen Walsh is the Regional Director of the Mountain-Prairie Region of the U.S. Fish and Wildlife Service. She is sued in her official capacity. Respondent Walsh has ultimate authority for the actions of the Service's Mountain-Prairie Region, including for the actions challenged in this lawsuit.

13. Respondent David Bernhardt is the Secretary of the Department of the Interior. Defendant Bernhardt is sued in his official capacity. In that capacity, Secretary Bernhardt has supervisory responsibility over the Service's decision, including its decision to issue the R-Project ITP.

14. Respondent Margaret Everson is the Principal Deputy Director of the U.S. Fish and Wildlife Service, exercising the authority of the Acting Director. She is sued in her official capacity. Respondent Everson has ultimate responsibility for the actions of the Service, including for the actions challenged in this lawsuit.

## **BACKGROUND**

### **I. RELEVANT STATUTES AND REGULATION**

#### **A. The ESA**

15. The ESA is the "most comprehensive legislation for the preservation of endangered species ever devised by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1973)). The statute declares a broad national policy that "all Federal departments and agencies [of the federal government] 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). The purposes of the ESA 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). An “endangered species” is defined by the Act as one that is presently “in danger of extinction throughout all or a significant portion of its range,” and a “threatened species” means “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20).

16. Both endangered and threatened species are entitled to broad legal protections under the ESA. The ESA generally makes it unlawful for “any person subject to the jurisdiction of the United States” to “take” any species listed as endangered, in the absence of appropriate authorization from the FWS. 16 U.S.C. § 1538(a)(1). By regulation, the FWS has generally extended that prohibition on unauthorized take to threatened species as well. *See* 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). “Harm” is further defined by regulation to “include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3; *see also id.* (defining “harass” to mean an “act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering”).

17. The ESA provides that the FWS 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



the take when certain enumerated criteria are satisfied, including that the applicant prepares a “conservation plan” 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 such an ITP/HCP, the FWS must find, among other things, 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).

18. The ESA also requires that each federal agency “shall, in consultation with and with the assistance of the [FWS], 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).

19. Where, as here, the FWS is both the “action agency”—because it is asked to issue a permit under section 10 of the ESA—and the consulting agency, it engages in “intra-Service section 7 consultation.” *See* FWS, National Marine Fisheries Service, *Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (1998), at 1-5 - 1-6 (“Formal intra-Service consultation should occur on the proposed issuance of any section 10 permit.”).

20. The Biological Opinion issued at the end of the consultation process must “[e]valuate the effects of the action and cumulative effects on the listed species,” and address whether the agency action, “taken together with cumulative effects, is likely to jeopardize the continued existence of [any] 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” in the relevant “action area.” *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. NEPA**

21. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Its purposes are 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). The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA, *see* 40 C.F.R. §§ 1500-1508, which are “binding on all federal agencies.” *Id.* § 1500.3.

22. To accomplish its underlying goals, NEPA requires federal agencies to prepare a “detailed statement”—i.e., 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) alternatives to the proposed action. *Id.* §§ 4332(C)(i)-(iii).

23. Each EIS must “rigorously explore and objectively evaluate” the environmental 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 NEPA process 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.” 40 C.F.R. § 1502.14.

24. In evaluating alternatives, NEPA requires that agencies take a “hard look” at the full range of effects of the proposed action as compared to all reasonable alternatives. *See* 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 for purposes of NEPA analysis are those that result from the “incremental impact[s]” of the proposed action when added to the impacts of other past, present, and reasonably foreseeable future actions, whether undertaken by other federal or non-federal actors. *Id.* § 1508.7.

25. NEPA’s implementing regulations provide that if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” the agency “[s]hall prepare” a supplement to its draft or final EIS. 40 C.F.R. § 1502.9(c)(1)(ii).

26. In assessing the significance of an action’s environmental impacts for purposes of preparing an EIS or a Supplemental EIS (“SEIS”), a federal agency must consider various factors, including the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas”; “the degree to which the effects on the quality of the human environment are likely to be highly controversial”; “[t]he degree to which the action may establish a precedent for future actions with significant effects”; the “degree to which the action may affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources”; or the “degree to which the action may adversely affect an endangered or threatened species . . . .” *Id.* § 1508.27(b).

**C. The NHPA**

27. The purposes of the NHPA include preserving 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).

28. The NHPA directs the Secretary of the Interior to establish and maintain a National Register of Historic Places composed of historically significant “districts, sites, buildings, structures, and objects.” 54 U.S.C. § 302101. To be listed, a historic resource must be historically significant at the local, state, or national level, be over fifty years old, and maintain its integrity. *See* 36 C.F.R. part 60.

29. 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 authorized federal agencies to consult with the Advisory Council on Historic Preservation (“ACHP”) as well as each State’s designated Historic Preservation Officer (“SHPO”) to assess the impact on historic properties, and to promulgate regulations governing the implementation of Section 106. *Id.* § 304108.

30. 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). Actions undertaken during the Section 106 process cannot “restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties,” and the “agency official 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).

31. In assessing whether an undertaking will have adverse effects on historic properties, 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).

## **II. FACTUAL BACKGROUND**

### **A. The Nebraska Sand Hills Region is Home to Exceptional Natural and Historic Resources That Will Be Gravely Impacted By The Project**

#### ***1. Adversely Affected Wildlife***

32. The R-Project “would be situated in the unique Nebraska Sandhills ecoregion, which provides vast and largely undisturbed, unfragmented habitat for diverse wildlife species.”

FWS, *Final Environmental Impact Statement on Issuance of an Incidental Take Permit and Implementation of a Habitat Conservation Plan for the R-Project Transmission Line* (“Final EIS”) at 3-136. The Nebraska Sand Hills ecoregion “spans approximately 20,000 square miles in central Nebraska and is one of the largest intact native grasslands in North America.” *Id.* In addition, the “largest stabilized dune system in the Western Hemisphere and the largest area of vegetated dunes in the world are located in the Nebraska Sandhills.” *Id.*

33. The Nebraska Sand Hills “contain[] a variety of habitats that are home to hundreds of wildlife species.” Final EIS at 3-137. Among the wildlife habitats found in the Nebraska Sand Hills are “high sandy dunes, dune prairies, subirrigated wet meadows, marshes, streams, shallow lakes, and rivers.” *Id.*

34. The area impacted by the R-Project includes a “series of Biologically Unique Landscapes” that the “Nebraska Natural Legacy Project” has determined “should be targeted for priority management and conservation efforts.” Final EIS at 3-138. In addition, multiple “conservation easements, held by non-governmental organizations (NGOs), serve as wildlife conservation areas and are located” in the affected area. *Id.* The area “also includes many privately owned lands that provide suitable habitat for wildlife. Land management on these private lands is designed to sustain ranching activities while providing positive benefits to wildlife.” *Id.*

35. More than 300 species of resident and migratory birds have been documented in the Nebraska Sand Hills ecoregion. Final EIS at 3-142. The American Bird Conservancy has described the Nebraska Sand Hills as the “best grassland bird place in the United States,” and the geographical area where the project will be built “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,” and is an important breeding area for many bird species, including blue-winged teal, northern shoveler, gadwall, American avocet, western grebe, black tern, sharp-tailed grouse, longbilled curlew, and bald eagles. *Id.* at 3-143.

36. The FWS has identified numerous locations in the project area that are of “particular importance for migratory birds” and would be significantly impaired by the R-Project configuration preferred by NPPD. Final EIS at 3-145; *id.* (explaining that the North and South Platte River Valley “attracts a large number and diversity of migratory birds annually that use the area as overwintering and stopover habitat during the spring and fall migrations” and that “NPPD’s final route would bisect the North and South Platte River Valley”); *id.* (explaining that Birdwood Creek “attracts large numbers of migrating shorebirds and waterfowl, including trumpeter swans” and that “NPPD’s final route crosses Birdwood Creek”); *id.* at 3-146 (explaining that Chain Lake and Carson Lake “provide important habitat for migratory birds, especially waterfowl” and that “NPPD’s final route would cross the Chain Lake/Cross Carson Lake area”).

37. The “R-Project transmission line would be located in habitats known to support as many as 17 special status species,” including bird species protected by the ESA. Final EIS at 3-160. “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 “sometimes using palustrine wetland and riverine habitats in the study area as stopover roost sites.” *Id.* at 3-181. The Whooping Crane, which is listed as endangered under the ESA, is the tallest bird species in North America with adult males approaching 5 feet in height

when standing. *Id.* at 3-180. The species “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.” *Id.*

38. Whooping Cranes currently exist in four distinct populations, with the Aransas-Wood Buffalo population being the “only remaining self-sustaining population and the last remaining naturally migrating population.” *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.” *Id.* at 3-181. 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.*

39. 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.” Final EIS at 3-180. Between 1950 and 2009, 10 whooping cranes collided with power lines, representing 20 percent of known mortalities.” *Id.*

40. In addition to the Whooping Crane, at least two other bird species protected by the ESA are likely present in the project area. The interior least tern, which is listed as endangered, “likely” crosses the project area during migration, Final EIS at 3-172, and thus the “R-Project transmission line would create a collision hazard, possibly resulting in injury or death to individuals.” *Id.* at 3-173 (explaining that there has been a confirmed death of at least one interior least tern from a transmission line in Nebraska). The piping plover, which is listed as threatened under the ESA, is also likely present in the project area during migration, and hence



“[o]peration of the R-Project transmission line would result in a long-term collision hazard” to piping plovers. *Id.* at 3-175.

41. The ABB, which is listed as endangered under the ESA, has been documented in large numbers in the project area. Final EIS at 3-200. The beetle is characterized by “black body with two distinct orange markings on each elytron (covering over the wings) and a large orange marking on the pronotum (plate-like structure covering the thorax), which distinguishes this species from all other members of the genus.” *Id.* at 3-197. The “major threat to the beetle is habitat fragmentation, to which the massive overall decline of this species has been attributed.” *Id.* at 3-199. Construction activities associated with the R-Project will directly crush and displace beetles and otherwise destroy and degrade the species’ habitat. *Id.* at 3-202 – 3-203. Because NPPD has conceded that its project will in fact “take” ABBs within the meaning of the ESA, NPPD cannot lawfully proceed with the project in the absence of the FWS’s authorization of such take. *Id.* at 3-197.

## **2. *Adversely Affected Historic and Cultural Resources***

42. The project area contains historic and cultural resources of exceptional importance, including four “National Historic Trails” specifically authorized by Congress as having unique historic value deserving of protection. Final EIS at 3-298. These trails—the Oregon Trail, California Trail, Mormon Pioneer Trail, and Pony Express Trail—were used by settlers as they “traveled westward by the thousands,” and remnant ruts still exist in the Sand Hills region of Nebraska where NPPD will build its massive modern transmission line. *Id.* at 3-298.

43. O’Fallon’s Bluff is a portion of the Oregon-California Historic Trails that contains “[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.” Final EIS at 3-300. This area, which is listed in the National Register of Historic Places, is “located immediately adjacent to the Project corridor to the east,” and NPPD’s own survey documented “[t]hirteen well-preserved trail traces . . . within the R-Project area.” *Id.* at 3-301.

44. A segment of the Mormon Pioneer Trail, known as the Sand Hill Ruts, “is located adjacent to the Project corridor” and has been determined to be eligible for listing in the National Register of Historic Places. Final EIS at 3-301. This area is of particular historic 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.*

45. The R-Project will have severe adverse effects on these and many other unique historic and cultural resources in the Sand Hills region. For example, with regard to the O’Fallon’s Bluff site, “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.” Final EIS at 3-307. 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.” *Id.* at 3-308. As conceded by the FWS, 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.* at 3-308. Consequently, the Nebraska SHPO “strongly recommend[ed] that an alternative route for the transmission line” be adopted. *Id.* (admitting that the project as constituted “would have a long-term, high-intensity” impact on the O’Fallon’s Bluff site). Likewise, the Nebraska SHPO determined that NPPD’s project “would greatly diminish” the

historic value of the Sand Hill Ruts segment of the Mormon Pioneer Trail, *id.* at 3-309, and the FWS has found that the project will significantly impair many other unique historic and cultural resources, although resource surveys of all the affected areas have yet to even be conducted by NPPD. *Id.* at 3-315 (Table reflecting “Important Cultural Resources Identified to Date”).

**B. The R-Project Is Intended To Trigger A Significant Expansion of Industrial Wind Turbines in the Nebraska Sand Hills**

46. NPPD intends to construct, operate, and maintain a new, approximately 225-mile-long, 345-kV transmission line, which “traverses a large portion of the Nebraska Sandhills grassland.” Final EIS at 1-1. According to NPPD, 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” for industrial wind power projects in Nebraska. *Id.* at 1-8. According to both the FWS and NPPD, the development of the R-Project is critical to the substantial expansion of industrial wind power in the Nebraska Sand Hills. *See id.* at 1-13 (“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”).

47. NPPD has maintained that it is building the R-Project in response to a need for power identified by the Southwest Power Pool (“SPP”), which is a Regional Transmission Organization responsible for ensuring a reliable electrical grid for a region encompassing all or parts of 14 states. Final EIS at 1-7. NPPD is a member of the SPP. *Id.* Although NPPD will pay for the initial capital construction costs for the R-Project, “pursuant to the SPP’s cost allocation methodology, [NPPD] will recoup all but approximately \$25 million of the costs of the line” because the other utilities that are members of the SPP and will benefit from the project will

share in the cost of the transmission line. *See In the Matter of the Application of the Nebraska Public Power District Requesting Authorization to Construct 220 Miles of 345 Kilovolt Transmission Line*, PRB-3774 (Dec. 9, 2014 Order, State of Nebraska Power Review Board), at ¶ 31. Because NPPD “constitutes about seven percent of the load in the SPP operating area,” it will “recoup the costs associated with the project except for approximately seven percent of the total cost of the project.” *Id.*

**C. NPPD’s Application for an ESA Section 10 Permit and the FWS’s Draft EIS**

48. On October 30, 2014, the FWS notified the public that it intended to prepare an EIS in connection with NPPD’s application for an ESA section 10 permit allowing it to crush and otherwise take ABBs. The Service initiated the EIS process by soliciting public “scoping” comments identifying topics that should be addressed in an EIS. *See FWS, Final Scoping Summary Report: EIS on Incidental Take Permit (ITP) and Associated Habitat Conservation Plan (HCP) for [NPPD] R-Project Transmission Line* (June 2015), at 5.

49. In written comments and at several public hearings, members of the public raised a host of strenuous objections to the R-Project as proposed by NPPD, *id.* at 9-12, including that: the project as proposed will have “[l]asting and detrimental effects on an unspoiled and fragile ecosystem”; the project poses a grave risk to Whooping Cranes and other migratory birds; there was a “[n]eed to refine the ‘action’ under NEPA review to include the number, spatial distribution, height, and rotor area (windswept area) of wind turbines” associated with the project; and the project would have irreparable impacts on “historic sites, including O’Fallon’s Bluff (an important site on the Oregon Trail)” and “remnants of the Mormon Trail.” *Id.* As acknowledged by the FWS, “[o]ne of the resonating themes of the comments received during the public scoping process was the need for consideration of alternative routes for the R-Project”

and/or other means of lessening the project's severe environmental impacts, such as maximizing the use of already disturbed corridors and placing the line "underground in ecologically sensitive areas." *Id.* at 9.

50. In May 2017, the FWS published for public comment a Draft EIS, along with a draft HCP prepared by NPPD and other associated documents. Acknowledging that the project as proposed by NPPD would have significant adverse impacts on an area of extraordinary biological and historic import, the FWS considered whether several "conceptual" alternative routes should be afforded serious scrutiny in the NEPA process. Draft EIS at 2-41 – 2-54. One such route, "identified as 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 beetle habitat areas," and "[t]his 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." Draft EIS at 2-48. The FWS's [a]nalysis of the central route determined that it is feasible from both a technical and economic perspective." *Id.* at 2-51. Nonetheless, "while reasonable and feasible from a technical perspective, the central route was considered but dismissed as an alternative in the DEIS 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.* at 2-51. In other words, the environmentally preferable central route was eliminated from "further analysis" in the Draft EIS because it would not comport with NPPD's and SPP's preferred schedule for project construction. *Id.*

51. In comments on the draft EIS, both national conservation organizations and members of the local community affected by the project strenuously opposed the project and

urged the FWS to consider alternatives in view of the project's extensive adverse impacts. The American Bird Conservancy commented that the project "poses an unacceptably high risk to protected wildlife" and that the Whooping Crane, piping plover, and other protected bird species are "likely to be harmed" by the project. Ducks Unlimited commented 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," and that needs to be analyzed in detail before project approval. The Sierra Club commented that "[w]e strongly believe 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" and that the "discussion and analysis of the cumulative effects of this proposed project on threatened and endangered species, migratory birds, and habitat fragmentation in the Sandhills is totally inadequate."

52. Many commenters explained that the FWS could not lawfully approve an ITP without including the Whooping Crane as a covered species because there is an extremely high likelihood that members of the species will be killed, injured, and otherwise taken over the 50-year permit term requested by NPPD. The Center for Biological Diversity ("Center") and Petitioner Hanging H East, L.L.C. submitted, along with their comments, an analysis by leading Whooping Crane experts Karine Gil-Weir and Enrique Weir-Lopez that explained that NPPD had severely underestimated both the number of Whooping Cranes using the project area and the amount of crane habitat to be affected by the transmission line. According to the Gil-Weir and Weir-Lopez analysis, even with mitigation measures proposed by NPPD—including the use of "bird flight diverters"—the project will likely result in at least one to three "Whooping Crane

collisions each year,” and will “almost certainly result in take of Whooping Cranes over the 50-year life of the Project.”

53. Along with its comments, the Center also submitted a statement from a leading ABB expert, Dr. Jon Bedick, who opined that the take of ABBs from construction of the transmission line is likely to be significantly higher than that estimated by NPPD, including because NPPD failed to accurately assess the density of ABBs in the Project area; NPPD’s surveys do not appear to properly consider the timing and distribution of ABBs; NPPD has failed to afford sufficient consideration to the impact of construction equipment on ABBs, especially in view of climate change effects on the thickness of ice in the beetle’s habitat; and NPPD’s reliance on ABBs avoiding disturbed areas is scientifically insupportable.

54. Many commenters explained that the Draft EIS had unlawfully discounted the foreseeable, intended impacts of the project on the expansion of industrial wind power in Nebraska and, in turn, the adverse impacts this will have on Whooping Cranes, other migratory birds, ABBs, historic and cultural properties, and other resources. Comments explained that these are foreseeable indirect effects of the project that the FWS is legally obligated to address under NEPA and the ESA but that the draft EIS had failed to address these impacts. Comments submitted by Petitioner Hanging H East, L.L.C. explained that the FWS had failed to address wind power impacts on the arbitrary grounds that a signed interconnection agreement with a specific wind project was necessary to assess impacts and that, even as to a wind project with such an agreement—the Thunderhead Wind Energy Center—the Service had failed to take a hard look at project impacts.

55. By letter dated May 23, 2018, Petitioner Hanging H Real Estate Co. LLC, along with other landowners affected by the project, formally petitioned the FWS to prepare a

Supplemental Draft EIS (“Supplemental DEIS”). The petition explained that a Supplemental DEIS was required by the NEPA implementing regulations in view of new information demonstrating a much higher risk to Whooping Cranes than NPPD had previously acknowledged or the FWS had considered in the DEIS. In addition, the petition pointed to new information regarding the project’s anticipated impact on industrial wind energy expansion—information that contradicted the DEIS’s assertion that wind power development was too speculative to be afforded meaningful analysis in the NEPA process. The petition highlighted maps developed from readily available public records, which showed that wind energy development associated with the R-Project was already occurring in Cherry County, in areas within the ranges of both the Whooping Crane and ABB. In addition, the petition for a Supplemental DEIS identified impacts to historic and cultural resources that had never been afforded a hard look in the NEPA process.

56. On September 10, 2018, FWS biologists with the Service’s Nebraska Field Office—which at that time had the lead role in assessing the impact of the R-Project—issued a new “Take Calculation for Whooping Cranes [] for the Nebraska Public Power District’s R-Project Transmission Line.” The new analysis was performed by Eliza Hines, the Field Supervisor for the Nebraska Field Office, along with Wildlife Biologists Robert Harms and Amanda Ciurej, and with analytical support by Dr. Sherri Harms, a Professor and Chair at the University of Nebraska at Kearney. The analysis “demonstrated that take of the endangered crane [] is reasonably certain to occur over the 50-year life” of the R-Project and that “operation of the R-Project over the 50-year life of the Project has negative implications for recovery of this species.”

57. The September 2018 conclusion by the Service’s Field Office “is based on (1) a calculated probability of collision, which includes a projected number of whooping cranes that



would be taken over the 50-year life of the R-Project; (2) the amount and distribution of stopover habitat adjacent to the R-Project; (3) the use of stopover habitat by whooping cranes adjacent to, and bisected by, the R-Project; and (4) the physiological characteristics that make whooping cranes disproportionately susceptible to power line collisions, which limits the efficacy of NPPD’s proposal to mark the R-Project with bird flight diverters.” The Service’s analysis found: “(1) an expected take of 40-84 whooping cranes over the 50-year life of the R-Project using two take calculation methods; (2) over 600 permanent water features (i.e., roosts) . . . identified within 3.35 miles of the R-Project centerline; and (3) an expected 8,223 crane stopovers and 36,730 crane days of usage within 3.35 miles of the R-Project centerline over the 50-year life of the R-Project.”

**D. The FWS’s Final EIS and Refusal To Prepare a Supplemental EIS, and Petitioners’ Additional Comments**

58. In February 2019, the FWS published a Federal Register Notice announcing the issuance of its Final EIS for the R-Project along with certain “associated documents.” 84 Fed. Reg. 2,900 (Feb. 8, 2019). The Service’s announcement stated that it “propose[d] to issue a 50-year permit for incidental take of the [ABB] if NPPD’s HCP meets all the ESA’s section 10(a)(1)(B) permit issuance criteria” for take of the ABB, and that “[w]e will evaluate the permit application, final HCP, and public comments to determine whether the application meets the requirements of section 10(a) of the ESA.” *Id.* at 2,901. The Notice—which was issued by the Assistant Regional Director of the Service’s Mountain-Prairie Region in Lakewood, Colorado—stated that “we are not requesting public comments on the Final EIS and HCP, but that any written comments we receive will become part of the public record associated with this action.” *Id.* The Notice also stated that the Service’s final determination on whether to issue an ITP would “include[] our compliance with section 7 of the ESA through an intra-Service

consultation,” the results of which would be shared with the public only when the final decision was made on issuance of the permit. *Id.*

59. The Service’s Final EIS analyzed in detail only two alternatives, which differed in minor respects and both of which used the same footprint that had been strongly criticized by affected members of the community, conservation organizations, and the Service’s own biologists. Final EIS at 2-15 – 2-45. The Service eliminated from detailed analysis any alternative, less damaging routes—including the central conceptual route, which the DEIS found to be economically feasible and less environmentally harmful. *Id.* at 2-45 – 2-53.

60. The Final EIS asserted that the “conclusion in the DEIS that the central conceptual route would be technically and economically feasible was based primarily on assumptions that construction costs would be similar to those of NPPD’s final route,” but that because the central route “would be 17.9 miles longer than the proposed route” this would increase the cost of constructing the central route” to approximately \$30 million “more than constructing NPP’s final route.” *Id.* at 2-53. However, the Final EIS failed to disclose any documentation supporting this asserted cost increase, and also failed to explain why such an additional cost when added to a project that, according to NPPD’s public website, will be \$417 million, *see* <https://rproject.nppd.com/project-status>, would render the central route impracticable or infeasible, especially in view of the fact that NPPD itself is obligated to pay only 7% of the total project costs, with the SPP committed to paying for the rest of the project.

61. With respect to the R-Project’s express purpose of substantially expanding industrial wind power, the Final EIS again failed to consider any of the adverse impacts associated with such an expansion as “indirect effects,” notwithstanding the fact that they are a predictable, intended result of the project itself. Instead, the Final EIS improperly characterized

such effects as “cumulative” impacts and again failed to take a hard look at the adverse impacts of the anticipated wind power expansion on Whooping Cranes, ABBs, other wildlife species, and historic and cultural resources. The Final EIS stated that, as urged by public comments, 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 and is acknowledging that wind energy projects are sufficiently likely to occur over the next 50 years to warrant additional discussion.” Final EIS at 4-1. Yet the Final EIS then proceeded to rely on the fact that “only one wind energy project is located in the analysis area with a signed interconnection agreement (the Thunderhead Wind Energy Center),” and even as to that project, the Final EIS failed to analyze the impacts of that project on Whooping Cranes, other migratory birds, ABBs, and other affected resources.

62. Rather than accept the Nebraska Field Office’s analysis that the transmission line will result in Whooping Crane take, the FWS’s Branch of Decision Support in the FWS’s Regional Office in Denver critiqued the Field Office’s conclusions and, in particular, its methodology for assessing the number of times Whooping Cranes can be expected to cross the proposed transmission line in light of recent telemetry data. The Branch of Decision Support concluded that the Field Office’s “method and the issue in general, should be assessed jointly by knowledgeable scientific staff from USFWS, USGS [United States Geological Survey], and NPPD to determine if a consensus scientifically defensible method can be identified and recommended as the standard method moving forward.” However, while highlighting uncertainty in the projections of future impacts and “recommend[ing] that an independent and broad group of experts with knowledge of whooping cranes convene to develop a comprehensive and scientifically robust methodology for incorporating telemetry data into future calculations of

collision risk for power lines at a site-specific scale,” with regard to the R-Project, the Regional Office in Colorado declared that “incidental take of whooping cranes with the R-Line Project is not reasonably certain to occur,” and justified the exclusion of the Whooping Crane from the ITP on that basis.

63. Along with the Final EIS, the FWS made available to the public an “Evaluation of the Need for a Supplemental [EIS] for the Application of the for an Incidental Take Permit for the R-Project Transmission Line.” While conceding that there were new scientific analyses of the risk to Whooping Cranes since issuance of the DEIS—including the dire analysis by the agency’s own Field Office—the FWS asserted that this did not constitute new information triggering the need to prepare a Supplemental DEIS because these analyses “did not change” the agency’s ultimate “conclusion that the risk of collision by whooping cranes is low.”

64. With respect to whether anticipated expansion of industrial wind power supported the need for a Supplemental EIS, the FWS acknowledged that the Nebraska Energy Office website identified a 147-turbine project “to be constructed for the Cherry County Wind Farm from July 2018 to July 2020 by Bluestem Energy Solutions,” but the Service stated that it “was not able to find any publicly available information that specifically describes the status of this potential project, its specific potential location, or other details essential to analyzing the specific cumulative impacts it might pose.” The FWS did not explain why it was basing its analysis only on “publicly available information” rather than soliciting additional information from the wind power company regarding the “specific potential location” of turbines and other information that might be necessary to meaningfully analyze project impacts. The Service asserted that “[o]verall, the specific locations and details of reasonably foreseeable future wind development activities are unknown, except for the Thunderbird Wind Energy Center, which is the only wind energy

project located in the analysis area with an interconnection agreement,” but, once again, the Service provided no explanation for why the adverse impacts associated with that directly related wind power project could not be afforded a hard look in any NEPA document.

65. As with the DEIS, the Service’s Final EIS was met with intense criticism from the local community, conservation organizations, and others. By letter dated February 25, 2019, Audubon Nebraska told the FWS that it “is deeply disappointed that a Supplemental [EIS] to address Whooping Crane [] potential mortality was not completed.” By letter to the Service dated March 8, 2019, Drs. Gil-Weir and Weir-Lopez reaffirmed their analysis that “this Project poses a significant risk to Whooping Cranes” and 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.” Drs. Gil-Weir and Weir-Lopez further 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” and that, 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 . . . it is our 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” (emphasis in original).

66. By letter dated March 8, 2019, Petitioners submitted comments on the Final EIS explaining that the EIS and associated documents failed to reasonably respond to the issues previously raised by Petitioners and others. Petitioners again stressed that a Supplemental EIS is

required for many reasons, including because of the intense disagreement between the FWS and other experts, and even within the Service itself, regarding the project's risk to Whooping Cranes—thus triggering the NEPA significance criterion for a “highly controversial” impact, 40 C.F.R. § 1508.27(b)(4). With respect to the large number of industrial wind turbines that the project is intended to trigger, Petitioners' comments stressed that the Final EIS again failed to take a hard look at adverse impacts, either with regard to the Thunderbird project—which is being built in an area of extensive Whooping Crane presence and hence poses an additional significant threat beyond the transmission line—or any of the other wind projects that will predictably flow from the project and will have adverse impacts on Whooping Cranes, other migratory birds, ABBs, and historic/cultural resources. Petitioners' comments pointed to an abundance of publicly available information ignored in the Final EIS—including data from the SPP for Generator Interconnection Requests and the Federal Aviation Administration—providing specific information about industrial wind projects that are expected to connect to the R-Project and have significant adverse effects on wildlife and historic resources.

67. As an additional basis for preparation of a Supplemental EIS, Petitioners' March 8, 2019 comment letter explained that since the DEIS was issued in May 2017, the FWS had fundamentally changed its interpretation of the Migratory Bird Treaty Act (“MBTA”) by reversing the FWS's longstanding position that transmission lines, industrial wind projects, and similar industrial activities that foreseeably kill and injure migratory birds violate the MBTA's prohibition on the unauthorized take of migratory birds. Under the Service's new interpretation, such “incidental take” is not prohibited by the MBTA. Petitioners explained that a Migratory Bird Conservation Plan (“MBCP”) prepared by NPPD and relied on by the FWS in assessing impacts to migratory birds could no longer be based on the premise that NPPD was legally

required by the MBTA to minimize the take of migratory birds. Accordingly, Petitioners explained that the FWS's dramatic reinterpretation of the MBTA as only encompassing actions specifically directed at taking migratory birds—thus excluding activities such as the R-Project and its associated industrial wind turbines—was a major new development that significantly increased the project's risk to migratory birds, thus further reinforcing the need for a Supplemental EIS.

68. By letter dated March 22, 2019, Petitioners submitted additional comments on the Final EIS and also put the FWS and NPPD on notice that they are in ongoing violation of the ESA, including by failing to treat the Whooping Crane, interior least tern, and piping plover as covered species for purposes of NPPD's ITP/HCP.

**E. The FWS's Programmatic Agreement with NPPD Pursuant to Section 106 of the NHPA**

69. In April 2019, the FWS, along with NPPD, the Advisory Council on Historic Preservation, and others 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 land parcels affected by construction of the transmission land have been assessed for adverse impacts to historic resources. 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 that the proposed Thunderbird Wind Energy Center is a reasonably certain foreseeable action" resulting from the project; "however, the parties agree 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]."

**F. The FWS’s Biological Opinion and Record of Decision**

70. In a Biological Opinion signed in June 2019, and made available to the public for the first time on the FWS’s website on June 19, 2019, the Service concluded the ESA section 7 consultation process. The consultation was carried out between the Service’s Mountain-Prairie Region in Denver, Colorado, as the “consulting agency,” and the Service’s office in Lakewood, Colorado, as the entity responsible for preparing the Biological Opinion. 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,” and yet 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 as a result of the industrial wind turbines stemming from the transmission line.

71. The Biological Opinion erroneously characterizes the Thunderhead Wind Energy Project as a “cumulative effect”—rather than as an indirect effect of the transmission line itself, which would necessitate expanding the “action area” to be analyzed to encompass at least the entirety of that 171-turbine project: 137 turbines in Antelope County and 34 turbines in Wheeler County. *See* Biological Opinion at 27-28. The Opinion completely ignores the impacts associated with the 137 turbines in Antelope County and dispenses with any analysis of the 34 turbines in Wheeler County on the grounds that “we could not locate any detailed information on whether Wheeler County permits were issued, on the specific locations of the turbines, or on whether these turbines would be built in ABB habitat.” *Id.* at 28. The Opinion does not address at all whether any of the turbines associated with the Thunderhead project—even those in Wheeler County—pose threats to Whooping Cranes or other listed bird species.



72. The Biological Opinion contains no discussion of impacts to Whooping Cranes—from either the transmission line itself or the associated wind power turbines—but, rather, simply asserts that Whooping Crane “is not likely to be adversely affected” by the project at all, *id.* at 3, thus contradicting the Service’s own biologists’ conclusions that the transmission line alone poses an enormous threat to the species and will impede the species’ recovery from its highly endangered status. The Biological Opinion and an accompanying transmittal memorandum also summarily assert that the transmission line is “not likely to adversely affect” the interior least tern and piping plover—again without addressing impacts associated with project-related wind turbines—notwithstanding the Service’s own statements in the DEIS that point to adverse impacts from the transmission line itself.

73. Relying on NPPD’s assessment of the impacts of the project, the Biological Opinion concludes that construction and maintenance of the transmission line will kill and otherwise take 167 ABBs during the 50-year life of the project, and that this level of take “is not likely to jeopardize the continued existence of the ABB.” Biological Opinion at 29. The Opinion does not address any of the criticisms of NPPD’s methodology that were proffered by Dr. Bedick, who determined that NPPD had significantly underestimated the likelihood and amount of ABB take.

74. In a Record of Decision (“ROD”) signed by Respondent Walsh on June 12, 2019—and also made available to the public on the FWS’s website on June 19, 2019—Regional Director Walsh “recommend[ed] issuance of an [ITP] to NPPD for incidental take of [the ABB] in accordance with the HCP.” In an accompanying response to some of the public comments on the Final EIS, the Service acknowledged Respondents’ “new interpretation that the MBTA does not prohibit take of migratory birds from an activity” such as the R-Project. In short, the Service

concluded that the MBCP is not required under the MBTA as currently interpreted by the Service. As to the ESA, while the Service suggested that the MBCP is necessary to avoid impacts to ESA-listed birds, it simultaneously undercut that assertion by recognizing that the MBCP's chief protective measures are not, in fact, necessary to avoid impacts to listed birds. Additionally, the Service failed to explain how it could use any authority under the ESA to impose legally binding requirements for measures that protect non-listed migratory birds that are no longer protected under the MBTA, or to explain how its ITP could lawfully require measures to protect species that are not actually covered by the ITP.

75. To date, the FWS has not provided the public with a final ITP on its website or elsewhere. Nor has the FWS published notice of issuing a final ITP in the Federal Register, despite the ESA's mandate that the Service must publish certain statutory "finding[s] in the Federal Register" which provide notice to the public that an ITP has, in fact, been issued and the underlying action authorized. Despite the lack of public notification on the FWS's website or through the Federal Register, on July 5, 2019, an FWS staff member provided undersigned counsel with a copy of a final ITP via email—which was evidently signed and issued 23 days earlier on June 12, 2019.

### **PETITIONERS' CLAIMS FOR RELIEF**

#### **Claim 1: Violations of NEPA, its Implementing Regulations, and the APA**

76. Petitioners hereby incorporate Paragraphs 1-75 by reference.

77. The FWS's Final EIS violates NEPA and its implementing regulations because it does not analyze in detail a reasonable range of alternatives for avoiding or minimizing the serious adverse environmental impacts associated with the project, and because it does not take a hard look at the adverse indirect impacts associated with and stemming from the R-Project as a

whole, including the expected, intended impact of the project in stimulating the development of industrial wind turbines in the Nebraska Sand Hills. Consequently, the EIS, and the ITP issued in reliance on the EIS, are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA.

78. Because there are significant new circumstances and information that are unaddressed in the NEPA process—including, but not limited to, the FWS’s professed need for further expert analysis to devise an appropriate methodology for assessing Whooping Crane risk, and the Service’s own reversal of position on the scope of the MBTA—the Service’s refusal to prepare a Supplemental EIS is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA, and also constitutes agency action “unlawfully withheld” in violation of section 706(1) of the APA.

**Claim 2: Violations of the ESA and APA in Connection with Respondents’  
Failure to Include the Whooping Crane and Other ESA-Listed Bird Species  
as Covered Species in the ITP/HCP**

79. Petitioners hereby incorporate Paragraphs 1-75 by reference.

80. By issuing an ITP for the R-Project without treating the Whooping Crane as a covered species, the FWS has violated section 10 of the ESA, the ESA’s implementing regulations, and the Service’s own “Handbook” implementing Section 10 of the ESA. The FWS’s own specialized biologists, along with leading experts on the Whooping Crane, have concluded that Whooping Cranes are highly likely, if not certain, to be killed, injured, and otherwise taken by the transmission line itself. In addition, the R-Project will cause the take of Whooping Cranes by intentionally catalyzing the construction and operation of hundreds, if not thousands, of industrial wind turbines in Whooping Crane habitat. By issuing an ITP/HCP that does not treat the Whooping Crane as a covered species, the Service is therefore in violation of

Section 10, which requires the Service to find that the ITP/HCP “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking” and “will ensure that adequate funding for the plan will be provided.” 16 U.S.C. §§ 1539(a)(1)(B)(ii), (iii). The Service is also in violation of its own Section 10 Handbook, which provides that “all [listed species] likely” to be taken by an activity “must be covered by the permit,” and, if they are not, the “ITP applicant “face[s] the risk that we [the FWS] would be unable to process the permit application . . . .” Section 10 Handbook at 3-28.

81. The exclusion of Whooping Cranes as a covered species in the ITP/HCP also violates Sections 2(c) and 7(a)(1) of the ESA, which require the FWS to “utilize [its] authorities in furtherance of the purposes” of the ESA, 16 U.S.C. § 1531(c)(1), and to “utilize [its] programs in furtherance of the purposes of this chapter.” *Id.* § 1536(a)(1). Although the FWS has determined that transmission lines constitute one of the greatest sources of mortality for Whooping Cranes, the Service has conceded that it “cannot require NPPD” even to “monitor for the potential take of the whooping crane because it is not a covered species” under the ITP/HCP. FWS, Analysis of Public Comments on the DEIS, at 39. This is the antithesis of the FWS “utilizing [its] authorities” and “programs” under the ESA to forestall the extinction, and bring about the recovery, of the Whooping Crane.

82. The FWS is also in violation of the ESA by failing to require that the endangered least tern and threatened piping plover be treated as covered species for purposes of the ITP/HCP. The Final EIS concedes that both species are present in the project area during migration, Final EIS at 3-172, 3-175, and that transmission lines pose a threat to both species. *Id.* at 3-173, 3-176. In addition, a scientific publication cited in the DEIS highlights the risk to interior least terns, explaining that their courtship behavior increases their susceptibility to power

line collisions and that a least tern collided with a power line in Nebraska although the power line was marked by a bird flight diverter. Consequently, the best available science establishes that least terns and piping plovers are also highly likely, if not certain, to be killed and injured by the transmission line and associated wind turbines over the 50-year life of the project, and hence are required by ESA Section 10 and the Service's own interpretation of it to be treated as covered species in the ITP/HCP.

83. For these reasons, it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, for the FWS to issue an ITP to NPPD without requiring that the Whooping Crane, least tern, and piping plover be treated as covered species.

**Claim 3: Violations of Section 7 of the ESA, its Implementing Regulations, and the APA**

84. Petitioners hereby incorporate Paragraphs 1-75 by reference.

85. Respondents' ESA section 7 consultation violates the ESA and its implementing regulations and is otherwise arbitrary and capricious. The Biological Opinion's definition of the action area to exclude areas where the project will have foreseeable indirect effects on Whooping Cranes, least terns, piping plovers, and ABBs—by virtue of the major expansion of industrial wind turbines in the Nebraska Sand Hills—violates the ESA's implementing regulations requiring that the "action area" analyzed in a Biological Opinion include 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. § 402.02. By unlawfully limiting the action area considered in the consultation to only the area affected by the transmission line itself, Respondents unlawfully and arbitrarily failed to consider the indirect effects of the ITP on Whooping Cranes, least terns, piping plovers, and ABBs.

86. Respondents' finding in the Section 7 consultation that a major transmission line directly in the path of the Whooping Crane's migratory route will not even "adversely affect" this highly endangered species is arbitrary and capricious and contrary to Section 7(a)(2)'s mandate that the FWS's Section 7 determinations be based on the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). The FWS's own formal Recovery Plan for the Whooping Crane identifies collisions with power lines as a grave threat to the species. FWS, International Recovery Plan for the Whooping Crane, at 28 (March 2007) ("Recovery Plan"). The Recovery Plan therefore provides that avoiding and diminishing collisions from power lines is a "Priority 1" action, which is defined as an "action that must be taken to prevent extinction or prevent the species from declining irretrievably in the foreseeable future." *Id.* at 78, 79. In addition, Respondents' own expert biologists, along with other leading Whooping Crane experts, have determined that the transmission line will increase Whooping Crane deaths and injuries, and stymie the recovery of the species. Consequently, Respondents' finding that the project will not "adversely affect" the Whooping Crane in any way whatsoever contravenes the "best available" science and is otherwise arbitrary and capricious, in violation of the APA.

87. The FWS's authorization of the R-Project in its current form jeopardizes the continued existence of the Whooping Crane, in violation of section 7(a)(2) of the ESA. Drs. Gil-Weir and Weir-Lopez—leading Whooping Crane experts with more than 15 years of experience studying this species—have concluded that the project "poses a significant risk to the species, which remains critically imperiled, because the loss of a few, and even one, breeding Whooping Crane could jeopardize the species' recovery and continued existence." The Service's own Nebraska Field Office likewise found, on the basis of its own expert analysis, that extensive take of the species is "reasonably certain to occur" as a result of collisions with the transmission line

itself and concluded that this “evaluation also demonstrates that operation of the R-Project over the 50-year life of the Project has negative implications for recovery of the species.”

Consequently, the FWS’s authorization of the project violates section 7(a)(2), especially in view of Congress’ desire to adopt through that provision a policy of institutionalization of caution in dealing with highly endangered species.

88. Respondents’ findings in their section 7 consultation that the least tern and piping plover will not even be adversely affected by the project contravenes the best available science in violation of section 7(a)(2) and the APA.

89. The Biological Opinion’s findings regarding the impacts of the project on ABBs conflicts with the best available science in violation of section 7(a)(2), and is otherwise arbitrary and capricious because the Opinion ignores the issues and concerns raised by a leading ABB expert, Dr. Bedick.

**Claim 4: Violations of Section 10 of the ESA by Failing to Ensure that the ITP/HCP Minimizes and Mitigates Take of the ABB**

90. Petitioners hereby incorporate Paragraphs 1-75 by reference.

91. By rejecting alternative routes, including a central conceptual route that would have less adverse impacts on ABBs, based on an asserted cost increase that would be a small fraction of the project’s overall cost and most of which would be borne by the Southwest Power Pool in any event, the FWS has violated Section 10 of the ESA, which requires the Service to find 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). Neither the FWS nor NPPD has demonstrated that it is impracticable to implement the central conceptual route, which would ameliorate the impact on ABBs (as well as Whooping Cranes and other affected wildlife) merely because it would cost somewhat more than NPPD’s preferred route.

**Claim 5: Violations of the NHPA, its Implementing Regulations, and the APA**

92. Petitioners hereby incorporate Paragraphs 1-75 by reference.

93. By conceding in their Programmatic Agreement that a major industrial wind power project is a “reasonably foreseeable” result of the R-Project, but nevertheless “agreeing that no further work will be done to resolve any adverse effects to historic properties that may result” from the anticipated, intended expansion of industrial wind turbines in the Nebraska Sand Hills stemming directly from construction of the R-Project, Respondents have violated Section 106 of the NHPA and its implementing regulations, and have otherwise acted in a manner that is arbitrary and capricious in violation of the APA. Respondents have also violated the NHPA and APA by entering into an NHPA Programmatic Agreement without taking all reasonable steps to survey for historic properties in all areas that will be affected by the transmission line and associated wind turbines.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioners respectfully request that the Court enter judgment for Petitioners ordering the following relief:

1. Declare that Respondents are in violation of NEPA, the ESA, the NHPA, and the APA, and have acted arbitrarily, capriciously, and not in accordance with law;
2. Vacate and remand the ITP, ROD, Final EIS, and Programmatic Agreement to the FWS for further consideration;
3. Preliminarily and permanently enjoin Respondents from issuing any ITP until they come into compliance with NEPA, the ESA, the NHPA, and the APA;
4. Award Petitioners their attorneys’ fees and costs pursuant to the ESA’s citizen suit provision, 16 U.S.C. § 1540(g)(4), the NHPA’s attorneys’ fees provision, 54 U.S.C. §



307105, the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or any other applicable provision of law; and

5. Issue any further relief the Court may deem just and proper.

Respectfully submitted,

/s/ William S. Eubanks II  
William S. Eubanks II  
Eubanks & Associates, LLC  
2601 S. Lemay Avenue, Unit 7-240  
Fort Collins, CO 80525  
(970) 703-6060  
[bill@eubankslegal.com](mailto:bill@eubankslegal.com)

Counsel for Petitioners