

**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.

**CENTER FOR BIOLOGICAL DIVERSITY, INTERNATIONAL CRANE
FOUNDATION, AMERICAN BIRD CONSERVANCY AND NATIONAL AUDUBON
SOCIETY**

MOTION TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

INTRODUCTION

Proposed amici Center for Biological Diversity, American Bird Conservancy, National Audubon Society, and the International Crane Foundation (collectively, the Conservation Groups) seek the Court’s leave to file an amicus brief in support of Petitioners’ Opening Merits Brief, ECF No. 22. The proposed amicus brief is attached as Exhibit A to this motion.

Under *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994), this matter, as judicial review of agency action, is governed “by referring to the Federal Rules of Appellate Procedure.” Proposed Amici therefore seek leave of this court to file pursuant to Fed. R. App. P. 29. Furthermore, district courts have broad authority to accept an amicus brief and commonly do so where, as here, the brief is timely, will be useful to the Court, and does not merely repeat the parties’ arguments. The Conservation Groups have conferred with the parties regarding this motion. Petitioners consent to the filing of the proposed amicus brief, Nebraska Public Power District takes no position, and the Government reserves its position until it reviews the proposed brief.

INTERESTS OF THE PROPOSED AMICI

In this action, Petitioners seek to invalidate the Habitat Conservation Plan (HCP) and Incidental Take Permit (ITP) for the proposed R-Project transmission line. Nebraska Public Power District (NPPD) plans to construct, operate, and maintain the R-Project, a new 225-mile-long transmission line in north-central Nebraska. The R-Project would span the central flyway, which is the migratory route for hundreds of birds that travel across the Great Plains each year, including the whooping crane—one of the rarest birds in North America and a symbol of national and international efforts to recover endangered species.

As set forth in the attached brief, collisions with power lines are the greatest known source of mortality for migrating whooping cranes, and the species is hovering on the brink of extinction. Due to the location of the R-Project across the migratory corridor, it is likely to result in take of whooping cranes, which could jeopardize the continued recovery of this iconic endangered species.

Proposed amici are environmental non-profit conservation organizations that have spent considerable time and resources protecting endangered migratory birds, including the whooping crane. The Conservation Groups have a concrete interest in the R-Project and the adverse impacts it would have on the endangered whooping crane, as well as the proper application of the Endangered Species Act, and therefore their interests are directly affected by the outcome of this case.

The Conservation Groups have members, supporters, and staff that live, work, recreate, and otherwise enjoy the areas that would be directly affected by the R-Project. In addition, some of the Conservation Groups' members and staff study and enjoy observing protected species, including whooping cranes and other federally protected Great Plains migratory birds, whose survival and recovery are threatened by the R-Project. The Conservation Groups' staff and members include scientists and naturalists who have researched, studied, observed, and sought protection for endangered species, including the whooping crane. The Conservation Groups' members and staff derive scientific, recreational, conservation, and aesthetic benefits from rare species' existence in the wild, including the whooping crane, and intend to continue to visit and observe, or attempt to visit and observe, these species in the near future. The R-Project therefore threatens the recreational, economic, professional, scientific, and aesthetic interests of the Conservation Groups' members, staff, and other supporters.

Furthermore, the Conservation Groups' interest in protecting endangered species is directly affected by how the Endangered Species Act (ESA) is interpreted and applied to activities that may adversely affect listed species, such as the R-Project. The Conservation Groups work to achieve their missions by ensuring that federal agencies and private corporations comply with the requirements of the ESA, and they rely on the ESA, among other laws, to protect species. Therefore, the Service's failure to properly apply the ESA to the R-Project implicates the Conservation Groups' interests in ensuring that the law is followed with respect to the protection of endangered species.

The Center for Biological Diversity (the Center) is a non-profit organization dedicated to the protection of endangered species and wild places that works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center currently has over 1.7 million online activists and over 70,000 members, including over 200 members that live in Nebraska. Center staff and its members are dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands through science, policy, education, and environmental law. Development and loss of habitat are having a profound impact upon native ecosystems and the species that depend upon them. The Center tracks the status of species, and where necessary works to prevent harm and ensure that environmental laws and regulations, including the ESA, are properly applied and sufficient to protect species, ecosystems, and the interests of the Center's members and local communities, including their enjoyment of the natural world.

The Center has worked for years to protect imperiled species that would be harmed by the R-Project. The Center has been involved in reviewing the R-Project since it was proposed in 2014, and has submitted several comment letters and other information to the Service regarding

the environmental analysis for this project. Furthermore, the Center has a long history of taking action to protect the whooping crane. For example, the Center has pursued litigation to protect whooping cranes from harm associated with pesticides and continues to oppose transmission line projects that may affect this iconic species. The Center has shown a direct and specific interest in the protection of whooping cranes, even going so far as to post a reward for information on the illegal killing of a whooping crane in 2017.

The International Crane Foundation (ICF) is a non-profit organization that works worldwide to conserve cranes and the ecosystems, watersheds, and flyways on which they depend. ICF's membership exceeds 24,000 e-mail subscribers, and over 7,400 members worldwide. ICF provides knowledge, leadership, and inspiration to engage people in resolving threats to cranes and their diverse landscapes. ICF's approximately 80 staff members work with a network of hundreds of specialists in over 50 countries on five continents to safeguard crane populations in the wild, and to encourage sustainable resource management. ICF also works to protect the ecosystems along the extraordinary flyways traversed by migrating cranes during their spring and autumn migrations to ensure that vital breeding, staging, and wintering grounds are secured. Specifically, ICF has worked to protect areas that migrating whooping cranes rely on as they traverse the 2,500 mile route across the Central Flyway, where the R-Project would be placed. Endangered whooping cranes must land at the end of each day throughout migration, and each time they land they are at risk of striking power and transmission lines. ICF has been engaged in monitoring studies at locations where whooping cranes congregate, and has worked to promote avoidance of critical areas of the migration corridor as the primary strategy to protect whooping cranes. The proposed R-Project increases the cumulative impacts of multiple power

lines across the Central Flyway, and is therefore a threat to the continued viability of this endangered species, and to the interests of ICF and its members.

American Bird Conservancy (ABC) is a non-profit organization with 8,525 members and over 130,000 constituents dedicated to conserving birds and their habitats throughout the Americas. ABC's mission is to halt bird extinctions, protect habitats, eliminate threats, and build capacity for bird conservation through innovative and sound science. ABC has worked extensively to protect birds that migrate across the Central Flyway of North America, including endangered species like the whooping crane, and relies in part on the proper application of laws such as the ESA to ensure these species are safeguarded. In support of conservation of the whooping crane, ABC has developed educational materials, conducted research to identify threats and conservation solutions, and developed partnerships with power line companies and the Avian Power Line Interaction Committee to highlight efforts to prevent whooping crane collisions. Power lines are known to be the number-one cause of mortality for recently fledged migratory whooping cranes, and therefore the placement of the R-Project directly in the crane's migratory corridor poses a significant risk to the species, and the failure to include the crane in the HCP for the R-Project undermines recovery efforts and therefore harms the interests of ABC in protecting this iconic and highly endangered species.

National ` Society, Inc. (Audubon) is a national nonprofit conservation organization, dedicated to protecting birds and the places they need, today and tomorrow, throughout the Americas using science, advocacy, education, and on-the-ground conservation. Founded in 1905, Audubon has over 1.2 million members nationwide, including over 10,000 members in Nebraska. Among its many activities, Audubon operates 41 nature centers, has 23 state programs, and over 450 local chapters throughout the country. Whooping crane conservation has

been a priority since 1974 when Audubon's Rowe Sanctuary and Iain Nicolson Nature Center were established in Nebraska to conserve the Platte River, with a focus on whooping crane conservation. Every year, Rowe Sanctuary welcomes over 20,000 visitors from around the world to view the annual crane migration and support bird conservation. The Sandhills of Nebraska is an Audubon conservation priority because it is a rare intact landscape that is a stronghold for many birds including migrating whooping cranes. The risk of whooping cranes collisions with the R-Project transmission line therefore harms Audubon's interests in protecting this species for current and future generations.

ARGUMENT

Under *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994), this matter, as judicial review of agency action, is governed "by referring to the Federal Rules of Appellate Procedure." Proposed Amici therefore seek leave of this court to file pursuant to Fed. R. App. P. 29, and the proposed amicus brief is in compliance with the form, length, and timing requirements of Fed. R. App. P. 29(4)-(6).

Furthermore, district courts have broad authority to accept amicus briefs. *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006). In fact, "[d]istrict courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005); *see also United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990) ("Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case . . .").

District courts in Colorado have accepted amicus briefs where appropriate. *See, e.g., United States v. Strandlof*, 2009 WL 5126540, at *3 (D.Colo. Dec. 18, 2009) (court accepted

amicus curiae briefs on novel issue of law); *Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556, 1558, 1573–76 (D.Colo. 1997) (noting participation by amici curiae in suit challenging race-based preferences in federal contracting), *rev'd on other grounds sub. nom. Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000). While “[n]o statute, rule, or controlling case defines a federal district court’s power to grant or deny leave to file an *amicus* brief,” courts generally look to whether the brief would be “timely and useful.” See *Hydro Res., Inc. v. United States EPA*, 608 F.3d 1131, 1143 (10th Cir. 2010); *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007) *aff’d sub nom.*; *United States ex rel. Gudur v. Deloitte & Touche*, No. 07-20414, 2008 WL 3244000 (5th Cir. 2008). Here, the Conservation Groups’ brief is timely and will be useful to the Court.

First, the Conservation Groups have filed their brief within the timeframe contemplated by the Federal Rules. See FRAP 29(a)(6) (requiring amicus to file “no later than 7 days after the principal brief of the party being supported is filed”). The brief is therefore timely.

Second, the proposed brief will assist the Court in determining the basis and validity of Respondents’ decision not to include the whooping crane in the HCP for the R-Project. Counsel for amici have worked extensively with whooping crane experts on this and other cases, and are therefore intimately familiar with whooping crane ecology and the facts of this case, and can provide the Court with important insight into the studies that were submitted on behalf of various parties regarding the potential for crane collisions with the proposed power line. Furthermore, the Conservation Groups have extensive experience with the application of the ESA and the legal requirements for habitat conservation plans, having participated in many other similar matters. Amici can therefore provide “unique information or perspective that can help the court beyond

the help that the lawyers for the parties are able to provide.” *NGV Gaming, Ltd.* 355 F. Supp. 2d at 1067 (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)).

The Conservation Groups’ brief does not repeat Plaintiffs’ arguments about the project’s compliance with NEPA or the ESA. Rather, the brief presents useful information about the various risk analyses that were undertaken, what they indicate about the likelihood of whooping crane collisions with the proposed transmission line, and why the decision not to include the whooping crane as a covered species is inconsistent with the purpose, goals, and precautionary nature of the ESA. Thus, the proposed brief will provide the Court with a more complete understanding of the issues at stake in this lawsuit.

CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully request that the Court grant their motion to file the proposed amicus brief.

DATE: November 14, 2019

Respectfully Submitted,

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PROPOSED AMICUS BRIEF IN SUPPORT OF PETITIONERS

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Center for Biological Diversity, International Crane Foundation, American Bird Conservancy, and National Audubon Society hereby declare that they are all 501(c)(3) non-profit corporations, and that none of these entities have parent corporations or stock owned by a publicly held corporation.

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I. IDENTITY OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D) and (E), proposed amicus curiae Center for Biological Diversity, International Crane Foundation, American Bird Conservancy, and National Audubon Society submit that they are 501(c)(3) non-profit conservation organizations that have spent considerable time and resources protecting endangered migratory birds, including the whooping crane. Proposed amici have moved the Court to accept this amicus brief in order to protect their interest in ensuring that the Endangered Species Act (ESA) is properly applied to the R-Project, and to prevent the project from precluding the recovery or jeopardizing the continued existence of the endangered whooping crane. The brief was authored by counsel for the Center for Biological Diversity on behalf of the proposed amici on a pro bono basis, and no money was contributed to fund or prepare the brief.

II. INTRODUCTION

The whooping crane (*Grus americana*) is one of the rarest birds in North America and remains a symbol of efforts to recover endangered species. The U.S. Fish and Wildlife Service (Service) opines that “if one had to choose a species... to symbolize the endangered species program, the whooping crane would be the prime candidate.”¹ This critically endangered bird was listed as endangered in 1967 – one of the very first species listed under the ESA. 32 Fed. Reg. 4,001 (Mar. 11, 1967).

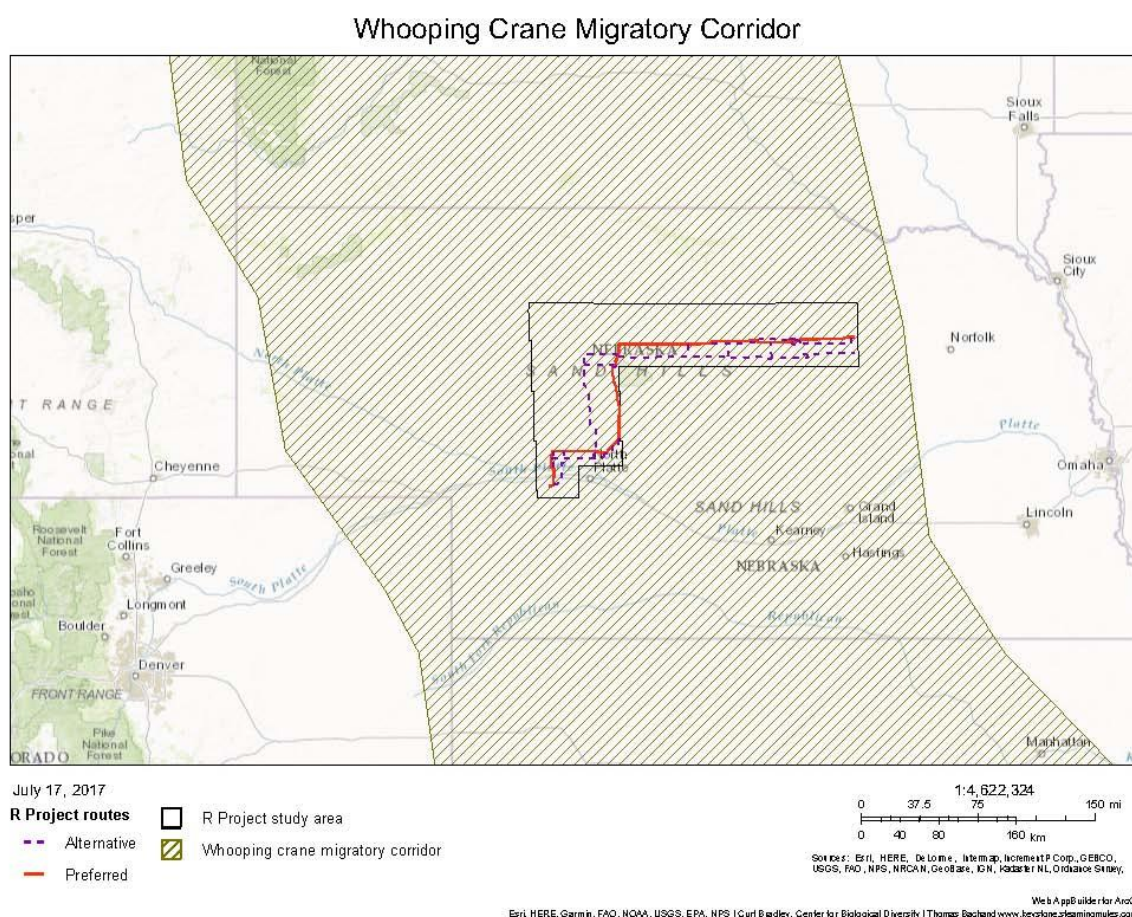
While the species’ numbers are slowly increasing, “they are far below the level required for recovery.” USFWS_LIT_CITED_031667. Whooping cranes have a low reproductive rate and limited genetic variability, which derives from the mere 15 or so individuals that remained in

¹ U.S. FISH AND WILDLIFE SERVICE, REGION 2, WHOOPING CRANE RECOVERY PLAN at 1 (1994).

the 1940s. *Id.* Despite returning from the brink, the species remains at critical risk of extinction.

Id.

Collisions with power lines during migration is recognized as one of the principal threats to this iconic imperiled species and the proposed R-Project transmission line would be constructed directly across the center of the whooping crane migratory corridor, creating a high risk of injury and death from collisions.



The U.S. Fish and Wildlife Service (Service) is well aware of the potential for take of whooping cranes from the R-Project. Several studies have been conducted regarding the likelihood of collisions, and while there is some disagreement as to the level of take that would

occur, it is readily apparent that the R-Project increases the baseline risk to migrating cranes. For example, Drs. Karine Gil and Enrique Weir of Ecosystem Advisors, LLC, who are regarded as two of the most prominent crane researchers in the world, supplied the Service with a detailed report concluding that the R-Project poses significant risks to individual whooping cranes and the population as a whole. USFWS_CORRESPONDENCE_2831.² Their report, which set forth a model for calculating the potential for whooping cranes collisions with the proposed transmission line using the best available whooping crane sighting and telemetry data, determined that the R-Project is likely to result in take of several cranes over the life of the project. *Id.*

However, it is not necessary to even rely on risk assessment modeling to determine that the R-Project poses a significant risk to migrating whooping cranes. Collisions with power lines are the greatest known source of mortality for the species, and the R-Project would place a transmission line directly across the Central Flyway and in areas that provide known stopover habitat for migrating cranes. There is simply no way that any reasonable person, much less a biologist with even a basic understanding of whooping crane ecology, could conclude that the R-Project does not pose a significant risk of collisions. That is an illogical and indefensible position

² Dr. Gil is a Biologist with a Masters in Applied Ecology and Ph.D. in Wildlife and Fisheries Sciences from Texas A&M University. Her research experience concerns bird reproductive biology, demography, distribution, diet, and modeling population dynamics of migratory birds. Dr. Gil has been a whooping crane and sandhill crane researcher since 2002, and has extensively analyzed whooping crane data and modeled whooping crane demography. She was also the Whooper Watch coordinator for 5 years in Nebraska at the Crane Trust. Dr. Weir is an Ecologist with a Ph.D. in Ecosystems and Population Ecology from the University Simon Bolivar. He completed his Post-Doctoral research in Ecology and Systems Analysis and Simulations at Texas A&M University. His research experience includes bird community ecology, whooping crane demography, research on crane populations and migratory waterbirds, and risk analysis and economic valuations of wetlands ecosystems. From 2007-2017, Dr. Weir was a Systems Ecologist at the Crane Trust.

and, most important, impossible to reconcile with the precautionary standard dictated by the ESA for the Service's consideration of impacts to listed species.

Moreover, the loss of whooping cranes attributable to the R-Project could very well jeopardize the continued existence of the species given the existing baseline threats, in violation of the ESA. 16 U.S.C. § 1536(a)(2). Given the species' low numbers, slow reproduction, and other factors, many experts in the scientific community believe that the loss of even a few breeding adults could preclude recovery of this iconic species.³

The decision to not include the whooping crane in the HCP for the R-Project—and to grant, rather than deny, an incidental take permit (“ITP”) on this basis—is therefore inconsistent with the best available science, and ultimately jeopardizes the species. It is also inconsistent with the Service's HCP handbook, which requires that an HCP cover all listed species that are expected to be taken by the proposed activities. Moreover, this politically motivated and economically driven decision runs contrary to the purpose, goals, and precautionary nature of the ESA. The Service's and NPPD's failure to comply with their clear duties under the ESA is unlawful, and constitutes textbook arbitrary and capricious agency action within the meaning of the APA, 5 U.S.C. § 706(2).

³ See U.S. Fish and Wildlife Service, Whooping Crane Species Profile at 25 (available at <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=B003>) (“[T]he species is in a race against time as the limited genetic material that survived the bottleneck continues to be lost in each generation. Thus, it is important to accelerate the rate of species recovery to minimize genetic loss.”); *see also* USFWS_CORRESPONDENCE_002831 (Ecosystem Advisors' expert conclusion that “the harm to the Whooping Crane population associated with this Project . . . will jeopardize the species, undermining recovery efforts and risking the continued existence of this iconic species”).

III. ARGUMENT

A. The best available science indicates the R-Project will cause take of whooping cranes and could jeopardize the continued existence of the species

Up to 225 million birds are killed annually by the increasing number of power lines and related infrastructure in the U.S. USFWS_LIT_CITED_31680. For the whooping crane, the primary known cause of mortality is collisions with power lines, and power line mortalities have been well documented in the Aransas-Wood Buffalo population that migrates across the Great Plains where the R-Project would be placed, with 49 documented fatal collisions, representing 39 percent of all known mortalities to this population since 1956.

USFWS_CORRESPONDENCE_1284. The actual number of deaths may be quite higher, given the difficulty in establishing the precise cause of death for these migratory birds.

Power lines in or near areas that attract birds (such as wetlands), result in higher mortality rates. *Id.*⁴ For whooping cranes, research has found that “power lines dividing wetlands used for roosting from grain fields used for feeding caused the most collisions for cranes because these circumstances encouraged crossing the lines at low altitude several times each day.”

USFWS_CORRESPONDENCE_2267. Therefore, opportunities for whooping cranes to collide with power lines are multiplied when these power lines are suspended across or located near river channels, wetlands, or other low-lying wet areas that serve as whooping cranes’ primary foraging or roosting habitats. *Id.* During migration, deaths from collisions are significantly higher “due to exposure to new hazards in unfamiliar environments,” with losses comprising 60-80% of annual mortality for the species. *Id.* Power lines placed near migratory stopover sites

⁴ During their migration, whooping cranes use a variety of stopover habitats closely associated with river bottoms, prairie grasslands, seasonally or semi-flooded palustrine wetlands, shallow portions of reservoirs for roosting, and undisturbed, submerged sandbars commonly found in river channels.

pose a significant risk of harm, since the birds are flying at low altitudes as they approach these locations, often in low-light conditions. *Id.*

Using this understanding of whooping crane ecology and the factors that influence risk of collisions, it is possible to undertake an analysis to “predict” the likelihood of whooping crane collisions for the R-Project. In fact, several such analyses were provided during the review of the R-Project, including the Ecosystem Advisors’ report; NPPD’s risk assessment; the Service’s own analysis of risk; and a report by an independent expert hired by the Service, Dr. Craig Davis.⁵

The various risk assessments did not agree as to the level of likely harm, and there is still some uncertainty as to the amount of take that may occur from the R-Project. This uncertainty, however, is inherent in risk assessments, as it is never possible to predict with certainty what will occur in the future with regards to actual collisions from a proposed transmission line. However, the best available science indicates that whooping crane collisions are likely over the life of the R-Project, with the potential for several each year. USFWS_CORRESPONDENCE_2799; USFWS_CORRESPONDENCE_2831.

While NPPD’s analysis found the risk of collisions to be “negligible,” the methodology used was biased, unscientific, and the results were roundly rejected by Dr. Craig Davis in his independent analysis. Dr. Davis’s confirmed that NPPD’s risk assessment “oversimplifie[d] the potential risk that the R-Project poses to migrating whooping cranes.”⁶ Indeed, NPPD relied on

⁵ See Craig A. Davis, *Review of Whooping Crane Risk Assessment Documents for the Draft Environmental Impact Statement on Issuance of an Incidental Take Permit and Implementation of a Habitat Conservation Plan for the R-Project Transmission Line 3* (2018) (“Davis Report”). USFWS_EMAIL_8933-55.

⁶ Dr. Davis faulted NPPD for relying solely on the historic whooping crane sightings data compiled by the Service when a more recent and accurate location data collection based upon GPS tracking would “provide a more comprehensive and accurate representation of whooping crane occurrences in the R-Project [a]rea.” USFWS_EMAIL_8935. Dr. Davis noted that the historical data used by NPPD relied on “incidental observations that are influenced by observer

inaccurate historic whooping crane sightings data despite the availability of more recent and accurate location data, improperly excluded from its analysis “factors that may make whooping cranes more vulnerable to power line collisions,”⁷ incorrectly assumed that all transmission lines within the migration corridor pose the same risk to whooping cranes,⁸ and significantly underestimated the amount of suitable habitat that would be impacted by the R-Project.⁹ Dr. Davis concluded that NPPD’s approach to calculating collision risk that was “not justifiable,” and “skew[ed] their results lower.” USFWS_EMAIL_8940. Moreover, NPPD’s conclusion is belied by the telemetry study report provided by Headwaters Corporation, which was prepared for NPPD. That report found that a substantial proportion of marked (radio-tagged) birds have been documented within 4 miles of the R-Project centerline, with as much as 10-25% of the marked birds utilizing the R-Project area in some years. USFWS_WHCR_364. Given that each marked bird may represent many other cranes travelling together, this data demonstrates a high likelihood of take from the placement of the R-Project in the proposed location.

accessibility to an area and [the] number of observers likely to be in an area.” *Id.* In contrast, the Whooping Crane Tracking Partnership’s location data – collected by marking individual whooping cranes with GPS transmitters from 2010 until 2014 – presented an “unbiased,” “consisten[t],” and “accura[te]” data collection, and the “best available science.” *Id.*

⁷ According to Dr. Davis, such factors include: “flight characteristics of whooping cranes, response to environmental conditions, vision, age and sex, behavior response to disturbance.” USFWS_EMAIL_8935.

⁸ Dr. Davis criticized the “rather simple mathematical equation” that NPPD used to estimate the risk of whooping crane collisions with the R-Project transmission line, and explicitly stated that NPPD’s assumption that all transmission lines within the migration corridor pose the same risk to whooping cranes “is incorrect given that not all transmission lines are located near or over potential whooping crane habitat.” USFWS_EMAIL_8936.

⁹ Dr. Davis also criticized NPPD’s habitat suitability model, and detailed “several flaws . . . that result[ed] in an underestimation of suitable wetlands [habitat] for whooping cranes.” Notably, NPPD’s assessment “focuse[d] on potential wetland stopover sites that may be suitable for migrating whooping cranes, but d[id] not include riverine habitats . . . that may provide roosting habitat for whooping cranes.” USFWS_EMAIL_8938. Additionally, NPPD improperly eliminated wetlands as unsuitable for whooping cranes either without sufficient explanation, or based on the incorrect assumptions. USFWS_EMAIL_8940.

On the other hand, the report by Ecosystem Advisors, LLC provides specific evidence of the threat that the R-Project poses to whooping cranes. The proximity of the proposed power line to locations where these birds are landing and taking off is critical. *See* USFWS_LIT CITED_31683. Therefore, the Ecosystem Advisors' report examined the route of the proposed power line, and assessed risk using historical whooping-crane sightings and telemetry data collected by the Service and other agencies as part of the Whooping Crane Tracking Partnership, thereby relying on the best available science to prepare a risk-assessment model to analyze the risk of harm. Their analysis shows several wetland areas frequented by whooping cranes in close proximity to the proposed line, indicating a high potential for collisions. USFWS_CORRESPONDENCE_2834.

Ecosystem Advisors' expert analysis concluded that due to the placement of the R-Project, take of whooping cranes is reasonably certain to occur, and in fact as many as 1-3 collisions can be expected *per year* from this project. *Id.* Moreover, the Ecosystem Advisors' report confirmed the opinion held by crane experts that the loss of even a few breeding whooping cranes could preclude the recovery of the species. *Id.*

Dr. Davis' independent report indicated that Ecosystem Advisors provided a thorough and reasonable attempt to calculate the likelihood of harm to cranes, based on the best available science. Dr. Davis agreed that the sighting and telemetry data constitute the best available scientific data concerning the use of the R-Project area by migrating whooping cranes, and that the mathematical basis for the Ecosystem Advisors' model was reasonable. In sum, the Ecosystem Advisors report provides a rational, if precautionary, approach to modeling the risk of whooping crane collisions from the R-Project. Unlike NPPD, Drs. Gil and Weir provided a scientifically valid analysis based on the best available science.

The Service provided its own risk assessment for the R-Project at Appendix E to the DEIS, which supports the conclusion that whooping cranes will be adversely affected by the R-Project. The Service's analysis in fact stated that there could be up to "essentially five R-Project transmission line strikes" over the life of the Project, which presents an enormous risk to this highly endangered species, and undermines the decision not to include the species in the HCP. USFWS_12 ADD_915.¹⁰

The Service itself acknowledged that take of migratory birds is likely to occur from the R-Project, stating that "birds are likely to collide with transmission line wire, resulting in *injury or mortality*." USFWS_12 ADD_350. The Service also stated that the operation of the transmission line would create a "long-term" or "permanent collision hazard" for migratory birds such as the whooping crane. USFWS_12 ADD_127, 349, 358, 381. Moreover, in an Informational Memorandum for the Regional Director, Service Biologist and Assistant Field Supervisor Eliza Hines confirmed that there was a "disagreement between NPPD and the Service as to whether take of whooping cranes should be included in the ITP," and ultimately it was her view that "[i]nformation recently provided by NPPD demonstrates that take of whooping cranes is likely; proposed mitigation in the HCP is insufficient." USFWS_CORRESPONDENCE_2877-78.¹¹ Importantly, Mrs. Hines confirmed in a subsequent email that the R-Project could have significant adverse impacts on the whooping crane, and that take is likely over the 50-year life of

¹⁰ Importantly, the Service's analysis ignored the very real risk of a multi-bird crane family or other large group of cranes colliding with the transmission line at the same time, and is therefore very conservative. This has been known to happen with other large migratory bird species, and even at NPPD-owned power lines. See <http://wildbirdsbroadcasting.blogspot.com/2017/02/dozens-of-geese-die-at-nppd-powerline.html>

¹¹ Mrs. Hines also wrote that the Service's risk assessment found a "much higher calculated risk to cranes" than what NPPD had asserted. USFWS_CORRESPONDENCE_002901.

the project.¹² This clearly undermines the ultimate conclusion that the impacts to cranes will be “negligible.”

Importantly, Dr. Davis’ independent report concluded that it is very difficult to calculate a precise level of risk, since the available data is limited, especially with regards to the number of crane collisions that occur each year across Nebraska. Therefore, the available data may greatly underrepresent the harm that the R-Project poses to cranes. This is consistent with the Service’s statement that there is “immense uncertainty, such that the decisions to be made will essentially be a risk tolerance policy decision, not a science-directed decision.” USFWS_12 ADD_915. However, while amici recognize and appreciate the effort that the Service has put into establishing the risk to cranes from the R-Project, it appears that the Service got bogged down in an unnecessarily complicated effort to establish a specific calculation of risk. As Drs. Gil and Weir state in their report, it is not necessary to rely on complicated models to establish that this Project poses a significant risk of harm to whooping cranes. Collisions with power lines are the greatest known source of mortality for the species, and the R-Project would be constructed directly across the heart of the whooping crane migratory corridor, and in areas that provide known habitat for migrating cranes. There can be little doubt that take of whooping cranes over the 50-year life of the Project is likely to occur.

Furthermore, it is readily apparent that the project would not only result in take of whooping cranes, but the loss of any cranes from power line collisions associated with this project would undermine ongoing recovery efforts and even jeopardize its continued existence

¹² See USFWS_CORRESPONDENCE_2916 (stating that “while the application of the Guidance helps reduce the potential for take of whooping crane (via the installation of BFDs), there is still a risk given the 50 year permit duration and the amount of habitat surrounding the power line, and thus, that risk of take cannot be considered discountable/insignificant”); See also Eliza Hines, Informational Memorandum for the Regional Director (April 12, 2016). USFWS_CORRESPONDENCE_2877-78.

given the baseline threats to the species, in violation of Section 7 of the ESA. A major component of the Service's whooping crane Recovery Plan involves reducing mortality during migration and removing habitat constraints which might limit recovery. USFWS_LIT CITED_6209-11. The Service states in the Recovery Plan that "[a]dditional power line construction throughout the principal migration corridor will increase the potential for collision mortalities," and suggests that new power line corridors should avoid wetlands or other whooping crane high-use areas. USFWS_LIT CITED_6189.

In fact, a population viability analysis in 2004 found that an additional 3% mortality (*i.e.*, less than 8 individuals annually) would cause the species to undergo a decline and preclude recovery. USFWS_LIT CITED_31674. Studies by USFWS biologists have found that in order to be genetically viable, the population needs to reach at least 1,000 individuals; therefore the loss of even a few breeding cranes could jeopardize the species, since it is so highly imperiled. USFWS_CORRESPONDENCE_2267. This has been confirmed by Service Biologists in recent published literature, which found that "1 to 2 additional mortalities per year could result in a declining population" of whooping cranes. USFWS_EMAIL_13625-26. Since the best available data indicates that the R-Project would likely result in 1 or more collisions per year, the construction of the project as proposed has the potential to violate Section 7 of the ESA by jeopardizing this iconic but highly endangered species.

1. NPPD has failed to minimize and mitigate the impacts of the project to the maximum extent practicable

In order to grant an ITP, the Service must find that the applicant has minimized and mitigated the impacts of the project to the maximum extent practicable, and that the project will not appreciably reduce the likelihood of the survival and recovery of listed species. 16 U.S.C §

1539(a)(2)(B). Here, however, NPPD has failed to undertake several actions that are necessary to minimize and mitigate the risk of collisions for whooping cranes.

First, as set forth in Petitioners' opening merits brief, NPPD failed to implement the "Central Route" alternative, which the Service acknowledged is technically and economically feasible and would minimize and/or mitigate impacts to burying beetles, whooping cranes, and other protected migratory birds and thus reduce the adverse impacts of the project on listed species. The failure to pursue this alternative requires denial of the permit. *See* Petitioners' Brief at 41-49.

Second, NPPD has failed to follow the Service's *Region 6 Guidance for Minimizing Effects of Power Line Projects within the Whooping Crane Migration Corridor* (the "Region 6 Guidance"), and therefore has undoubtedly failed to minimize and mitigate collision risk to the maximum extent practicable. The Region 6 Guidance states that power lines should implement 5-mile buffers for documented high-use areas, and that lines should be buried within 1-mile of suitable crane habitat, and only where burying lines is infeasible should the project rely on bird flight diverters (and must then mark not only new lines, but an equal amount of existing lines to ameliorate the risk). USFWS_NEPA_24-27.

NPPD, however, has never explained why it could not incorporate the appropriate 5-mile buffer for documented high-use areas or bury the line near suitable crane habitat. NPPD and the Service provide no analysis suggesting that they used the best available data to determine where buffers were needed or where the line should be buried in order to reduce the collision risks to whooping cranes. *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (holding failure to rely on the best available science undermines the ESA's purpose to protect listed species). The Service has access to years of whooping crane telemetry data gathered through the Whooping

Crane Tracking Partnership (of which the Service is a member), which could have been used to locate hot spots, where buffers and burying the line would be essential to reduce collision risk. This may be a small enough portion of the line that the increased costs would still be feasible for NPPD, yet no such legally required analysis was undertaken.

Rather, NPPD is relying entirely on marking the proposed power line with bird flight diverters, and has not even agreed to mark an equal amount of existing line, as the Region 6 Guidance requires. This puts the whooping crane at great risk. Whooping crane mortality via power line collision has been observed under even optimal weather conditions.

USFWS_CORRESPONDENCE_2267. However, inclement weather associated with poor visibility (fog, dense cloud cover, precipitation) and reduced flight control (i.e. from high-velocity winds) are “the most frequently described factors affecting collisions and can increase the probability of collisions.” *Id.* Conditions such as high-velocity winds have even been shown to buffet whooping cranes into “fully visible power lines with which they are quite familiar, but which they cannot avoid because they cannot maintain flight control.” *Id.*

Therefore, while marking power lines with bird diverters is commonly used to *reduce* the potential for collisions, these devices **do not prevent or eliminate the potential for harm**. In fact, most studies have found that bird diverters are around 50% effective, and thus do not come close to eliminating the collision risks for whooping crane. *See*

USFWS_CORRESPONDENCE_2827-28. Research suggests that cranes in particular have a difficult time seeing bird diverters because they have poor vision directly ahead during flight, and therefore are especially susceptible to collisions. *Id. See also*

USFWS_CORRESPONDENCE_1216-23. The Service in fact acknowledged in the R-Project DEIS that “birds are likely to collide with the transmission line wires resulting in injury or

mortality, **even with placement of bird flight diverters.**” USFWS_12_ADD_350. Therefore, Defendants’ failure to properly apply the Region 6 Guidance and their reliance on bird flight diverters to assert that the risk of whooping crane collisions with the R-Project is “negligible” is patently arbitrary and capricious.

The Service ignored the best available science and its own guidance, and NPPD has failed to minimize and mitigate the impacts to cranes to the maximum extent practicable, as the ESA requires, necessitating denial of the ITP. 16 U.S.C. § 1539(a)(2)(B)(ii).

2. The proposed adaptive management scheme for whooping cranes is unlawful

Rather than including the whooping crane in the HCP/ITP as a covered species, the Service and NPPD have attempted to circumvent the ESA requirements by substituting an “adaptive management plan” that is a transparent attempt to ignore likely take of whooping cranes and delay the analysis of impacts and implementation of mitigation measures until after the project has already been constructed. This is illogical, and clearly violates the ESA.

Pursuant to this “adaptive management plan,” if new information about the risk of whooping crane collisions comes to light, it would then require the development of an amendment to the HCP/ITP to include the crane as a covered species. USFWS_HCP_1791-92. The HCP narrowly defines what the “new information” must be. *Id.* These conditions, however, appear to be crafted to make it as unlikely as possible for the whooping crane contingency to be met.

Limiting the conditions that would require that this project obtain an ITP for whooping cranes is without support or logic. It is already well-established that power lines are the greatest source of mortality for whooping cranes, that bird diverters are only (at most) 50% effective, and therefore there is a clear risk of collisions when a transmission line is placed directly across the

migratory corridor. It remains entirely unclear why specific incidences are needed—especially such narrowly defined ones—to then decide to cover a critically endangered species that is so at risk from this project. The Service’s whooping crane specialist and biologist Matt Rabbe appears to agree, stating in an email that this plan is “unreliable” and ultimately concluding that NPPD is “selecting conflicting methods [] and using the same data (in opposite ways) to support the conclusion they want.” USFWS_CORRESPONDENCE_2903-06.

Furthermore, it would be very unlikely for a collision that meets these very specific requirements to be reported. Whooping cranes migrate across a vast area, much of which with low populations and therefore few opportunities for people to witness power line collisions. If a collision does occur, the carcass will likely be removed quickly by a scavenger, and therefore it is unlikely that such collisions would be reported. Consequently there is little chance that the adaptive management program would, in reality, work to ensure that whooping cranes are not unduly adversely affected by the R-Project.

Moreover, if and when these conditions are met and there has been a take of a whooping crane that meets the trigger, it remains entirely unclear what NPPD could do to minimize and mitigate impacts and prevent further collisions. Once the Project is constructed, it is too late to institute any genuinely effective minimization or mitigation measures, such as route placement (i.e. using the “Central Route”). If further mitigation is possible, it must be implemented now to minimize and mitigate take, rather than left until after take has already occurred (which would further violate ESA Section 9) and few, if any, options for minimizing or mitigating take remain available to the Service and NPPD.

This adaptive management scheme therefore violates the requirements for obtaining an ITP, and amending later to include the whooping crane would not be consistent with the

requirements of Section 10. Again, an applicant for an ITP must show that it has minimized and mitigated impacts to the maximum extent practicable. 16 U.S.C § 1539(a)(2)(B). Here, that would be utilizing the Central Route, which would go through fewer wetland areas cranes rely on and migrate through. Once constructed, it would not be possible to alter the route, and therefore there will be no way to take advantage of the Central Route to minimize impacts as required under Section 10. NPPD cannot avoid the need to implement measures necessary to minimize take of this imperiled species by applying a scheme that would allow them to build now and mitigate later. By deferring the decision about whether to include whooping cranes until after this project is built, the Service has arbitrarily avoided adopting alternative routes or other pre-construction measures that could eliminate or at least reduce take of whooping cranes, in violation of one of the key tenets of ESA Section 10. 50 C.F.R. § 17.22(b).

Furthermore, it is not even clear that an ITP would be available for this species if it is determined to be necessary after construction, since any additional incidental take above existing baseline threats could jeopardize the species. *See Id.* (requiring the applicant to ensure the taking will not appreciably reduce the likelihood of survival and recovery of the species). This is likely why NPPD is pushing for this farcical adaptive management scheme that would put off including the crane until after construction is complete. Since any level of take poses a risk of jeopardy, the Service very likely would not be able to amend the ITP to allow take of whooping cranes without violating ESA Sections 7 and 10.

In sum, this adaptive scheme puts whooping cranes at risk of jeopardy, in violation of ESA, and directly contradicts the regulatory requirements for incidental take. This species is hovering on the brink of extinction, and the Court must not allow the Service and NPPD to circumvent the requirements of the ESA.

B. The failure to include whooping cranes in the HCP is unlawful and contrary to the precautionary purpose of the ESA

Given the increased collision risk presented by the R-Project and the likelihood of take of endangered whooping cranes as set forth above, it is arbitrary and capricious for NPPD and the Service to forgo including the species in the HCP, even with the uncertainty surrounding the potential for adverse impacts. While there may be some uncertainty as to the amount of take that would occur, that does not excuse this unreasonable and grievous approach. Even if the risk is “low,” as NPPD claims, low risk is not the same as “no effect,” and pursuant to the Service’s own HCP Handbook *all* affected species must be included as covered species in the HCP/ITP when there is the potential for harm.¹³

Here, the Service has exploited the uncertainty inherent in risk assessment to avoid covering a species that not only is likely to be adversely affected, but which could be jeopardized by the project. As the Service itself has acknowledged, because of the uncertainty inherent in assessing the risk to cranes, “the decisions to be made will essentially be a risk tolerance policy decision, not a science-directed decision.” USFWS_12 ADD_915. In deciding not to cover the whooping crane and relying on the unlawful adaptive management scheme to avoid implementing measures to protect cranes, the Service has apparently ignored that courts have stated precisely how such a decision must be made when balancing the potential for harm to endangered species: The ESA incorporates the precautionary principle, and the Supreme Court has found that ESA-listed species are to be afforded the “highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978); 16 U.S.C. § 1536(a)(2). It is therefore directly contrary to the purpose and goals of the ESA, as well as the Service’s Section 7 duty to ensure against

¹³ See USFWS, *HCP Handbook*, at 7-2 (the “applicant *must* include ESA-listed animals *that are expected to be taken* by proposed covered activities as covered species in the HCP”) (emphasis added).

jeopardy to listed species, to allow NPPD to move forward with a project that poses this level of risk to whooping cranes, and where the species is not even covered by the ITP/HCP.

As set forth above, it is clear that whooping cranes will be adversely affected by the R-Project. Service staff even confirmed that take of whooping cranes is likely and that the proposed mitigation in the HCP is insufficient. USFWS_CORRESPONDENCE_2877-78. This directly undermines the ultimate decision not to include the species in the HCP.

This was a political and economic decision, which ignored the best available science standard of the ESA. The purpose of this “best available science” standard is to “prevent an agency from basing its action on speculation and surmise.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (citing *Bennet v. Spear*, 520 U.S. 154, 176 (1997)). Failure to rely on the best available science undermines the ESA’s purpose to protect listed species. *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (“FWS cannot ignore available biological information ... which may indicate potential conflicts between development and the preservation of protected species.... To hold otherwise would eviscerate Congress’ intent to ‘give the benefit of the doubt to the species’”) (citations omitted). Yet the Service clearly based its decision on unsupported assumptions, speculation, and surmise rather than on the best available science. The Service ignored the results of the Ecosystem Advisors’ expert risk assessment based on the whooping crane sighting and telemetry data as well as its own assessment indicating take is likely to occur; failed to implement the Region 6 Guidance; and failed to account for the limited effectiveness of bird flight diverters, as set forth above. And, it attempted to support its erroneous decision by fabricating an alternative adaptive management scheme to avoid dealing with the impacts to this highly imperiled species. That is the very

definition of arbitrary and capricious agency action, and undermines the conservation purpose and recovery goals of the ESA.

Simply put, the failure to include the whooping crane in an ITP/HCP for a power line project that will span the whooping crane migratory corridor, and where there is ample evidence in the record that power line collisions are likely to occur, is egregiously incongruous with the purpose and goals of the ESA. The ESA's purpose is "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." 16 U.S.C. § 1531(b). With the ESA, Congress intended endangered species to be afforded the highest of priorities, *Hill*, 437 U.S. at 174; consequently, where there is uncertainty regarding how an action may harm a listed species, the ESA requires that the Service give the "benefit of the doubt" to listed species. *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (citing *Hill*, 437 U.S. at 174 and H.R. Conf. Rep. No. 697, 96th Cong., 1st. Sess. 12 (1979)). It failed to do so here.

Courts have routinely found that the ESA is a precautionary statute, and the failure to follow the "institutionalized caution mandate" of the ESA is arbitrary and capricious agency action. See *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1031 (9th Cir. 2005) (recognizing the institutionalized caution mandate of the ESA); *Marsh*, 816 F.2d at 1389 ("Placing the burden on the acting agency to prove the action is non-jeopardizing is consistent with the purpose of the ESA and what we have termed its 'institutionalized caution mandate[.]'" (citing *Hill*, 437 U.S. at 194).

Indeed, in other cases where there were conflicting expert opinions as to the potential for harm to a listed species, courts have found that this "institutionalized caution" strikes the balance

in favor of protecting the species. For example, in *Greenpeace v. National Marine Fisheries Serv.*, 106 F. Supp. 2d 1066, 1080 (W.D. Wash. 2000), the court found that the opposing expert opinions raised material issues of fact regarding potential harm; however, while the court would not dictate what expert conclusions the agency should rely on for completing the consultation process, it held that where there is expert evidence indicating that listed species are being adversely affected, the Service may not ignore the issue and must address the potential for harm.

The same is true here. While there may be conflicting expert opinions in the record, the Service may not rely on the uncertainty inherent in risk assessment modeling to avoid covering a species where there is ample evidence that the project will not only result in take, but where any such take could jeopardize the species. And it may not rely on an unlawful adaptive management scheme that puts off coverage until after harm occurs, rendering it useless to implement the necessary mitigation. NPPD and the Service's failure to include the whooping crane in the HCP is a blatant attempt to ignore reality to reach a politically expedient decision, and in doing so they are risking catastrophic damage to an iconic species, in direct contravention of the institutionalized caution mandate of the ESA.

IV. CONCLUSION

For the foregoing reasons, the Court should find that the Service's approval of the HCP/ITP for the R-Project was arbitrary, capricious and not in accordance with the law, in violation of the ESA and APA.

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