IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-03603-WJM- NYW

TRANSWEST EXPRESS LLC, a Delaware limited liability company,

Plaintiff,

and

PACIFICORP, an Oregon Corporation,

Plaintiff-Intervenor,

v.

THOMAS VILSACK, Secretary of the United States Department of Agriculture, *et al*.,

Defendants,

and

CROSS MOUNTAIN RANCH LIMITED PARTNERSHIP, a California limited partnership; and COLORADO CATTLEMEN'S AGRICULTURAL LAND TRUST,

Defendant-Intervenors.

PLAINTIFF TRANSWEST EXPRESS LLC'S OPENING BRIEF

John F. Shepherd
Utsarga Bhattarai
HOLLAND & HART LLP
P.O. Box 8749
555 Seventeenth Street, Suite 3200
Denver, CO 80201-8749
Phone: (303) 295-8000
jshepherd@hollandhart.com
ubhattarai@hollandhart.com

Attorneys for Plaintiff TransWest Express LLC

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INTRODUCTION

In December 2014, defendant Natural Resources Conservation Service ("NRCS"), an agency within the U.S. Department of Agriculture, signed a conservation easement deed that prohibited transmission lines on 16,069 acres of private land in northwest Colorado. The conservation easement has blocked construction of two electric transmission projects that other federal agencies have routed across the same lands. The conservation easement is called the "Cross Mountain Lower Ranch Conservation Easement." The transmission projects that NRCS has blocked are Plaintiff's TransWest Express Transmission Project ("TWE Project" or "Project") and Plaintiff-Intervenor's Energy Gateway South Transmission Project.

When NRCS created the Conservation Easement and blocked the TWE Project, it ignored years of environmental analysis conducted by the Bureau of Land Management ("BLM") and Western Area Power Administration ("WAPA"), the two federal agencies responsible for siting the Project. NRCS declined to participate in BLM's and WAPA's environmental analysis pursuant to the National Environmental Policy Act, failed to perform any environmental analysis of its own, and ignored the Draft Environmental Impact Statement that BLM and WAPA published in July 2013, more than a year before NRCS created its Conservation Easement.

BLM's and WAPA's Draft EIS identified all possible transmission routes remaining under federal consideration. Yet when NRCS created the Conservation Easement in December 2014, it blocked *all* of these routes. In so doing, NRCS ignored not only its own NEPA obligations, but also the statutory and regulatory prohibitions against creating conservation

easements that would interfere with other agencies' infrastructure objectives, such as utility corridors.

TransWest filed this action challenging the legality of NRCS's decision on December 19, 2019. On June 22, 2020, NRCS informed the Court that it had "substantial and legitimate concerns" that its decision to create the Conservation Easement "may have been in error." ECF 69 at 10–12, 14. On March 12, 2021, the Court granted NRCS's motion to reconsider its decision. ECF 128. On June 17, 2021, NRCS informed the Court that, after completing the remand, it had decided to reaffirm its original decision. ECF 132 at 4.

Based on the administrative record as supplemented, the Court should hold that NRCS acted arbitrarily, capriciously, and contrary to law, both in 2014 when it first created the Conservation Easement, and again in 2021, when it reaffirmed that original unlawful decision.

WHAT IS AT STAKE

At stake is a critical renewable energy project that two administrations have identified as a national priority. The TWE Project is a 730-mile transmission line designed to deliver 3,000 megawatts of Wyoming-generated wind energy—enough renewable energy to power almost two million homes—to population centers in the desert southwest. In 2011, the Department of Agriculture and other federal agencies designated the Project as one of just seven transmission projects to be prioritized for accelerated federal permitting to modernize the nation's electric grid. AR 1647–48.[1]

[1] *See also* https://www.energy.gov/articles/obama-administration-announces-job-creating-grid-modernization-pilot-projects (last visited, July 29, 2021).

After more than a decade of development effort, TransWest has secured all major federal, state, and county permits across four states, as well as more than 99% of the private rights of way necessary for the Project. TransWest is currently in the process of allocating transmission capacity pursuant to an open solicitation process approved by the Federal Energy Regulatory Commission in December 2020, and it is procuring the necessary contracts to commence construction in early 2022, when, subject to a final resolution of the instant case, the BLM is expected to issue its "Notice to Proceed." In Wyoming, the Chokecherry and Sierra Madre Wind Energy Project, a wind energy project owned by a TransWest affiliate, is already under construction.

Blocking the Project means preventing or delaying the transition of nearly two million homes from carbon-based energy sources to renewable wind energy. And it means forcing two key transmission projects out of a federally-designated transmission corridor onto other more environmentally sensitive lands.

Also at stake is the integrity of the NEPA process. Collectively, BLM and WAPA dedicated more than a decade to analyzing the full range of environmental impacts associated with the Project, at substantial cost to both TransWest and the taxpayers. In testament to the meticulousness of these agencies' work, no litigant has challenged any aspect of their decision-making process. Although BLM repeatedly invited NRCS to participate in the NEPA analysis as a cooperating agency, NRCS not only rebuffed those invitations but now seeks to torpedo years of federal analysis by blocking the final transmission route selected by BLM and WAPA.

NRCS has done so to avoid transmission line easements across just three-tenths of one percent of the 16,069-acre Conservation Easement. The TWE Project will require fewer than 30

acres, while the Energy Gateway South Project, which will be located next to the TWE Project, will require a similar number of acres. And NRCS has done so despite the admission of its own Chief Conservationist in 2015 that "NRCS fully evaluated the transmission line and the easement purposes and determined that the [conservation] easement could achieve the purposes of the program" even if co-located with the transmission projects. AR 6369.

STATUTORY AND REGULATORY FRAMEWORK

National Environmental Policy Act

The National Environmental Policy Act ("NEPA") requires federal agencies, including NRCS, to assess the environmental effects of proposed actions before making decisions. *See* 42 U.S.C. § 4332(C). NEPA applies to agency decisions to provide federal funding to a nonfederal entity. *See Sw. Williamson Cnty. Cmty. Ass'n v. Slater*, 243 F.3d 270, 278–79 (6th Cir. 2001) ("[A] project is considered a major federal action when it is funded with federal money," including when a federal agency provides financial assistance for an activity carried out by a nonfederal entity); D. Mandelker, NEPA Law and Litig. 2d § 8:21 (2020).

To comply with NEPA, an agency must prepare an environmental impact statement ("EIS"), an environmental assessment ("EA"), or a categorical exclusion. *Front Range Nesting Bald Eagle Studies v. U.S. Fish & Wildlife Serv.*, 353 F.Supp.3d 1115, 1120 (D. Colo. 2018). NEPA requires an EIS for major federal actions significantly affecting the environment. If an agency is uncertain about whether the impacts may be significant, it prepares an EA, which leads either to an EIS or a finding of no significant impact. *Id.* Categorical exclusions are actions that an agency determines by regulation to be excluded from environmental review under NEPA.

NRCS has promulgated NEPA-implementing regulations that apply to the creation of conservation easements, and there is no applicable categorical exclusion.

Agricultural Conservation Easements

Before February 2014, NRCS administered an agricultural conservation easement program pursuant to the statutes and regulations of the Farm and Ranchlands Protection Program ("FRPP"), 16 U.S.C. § 3838i (repealed February 7, 2014), and 7 C.F.R. Part 1491. By statute, the purpose of the FRPP program was to "protect the agricultural use and related conservation values of eligible land by limiting nonagricultural uses of that land." 16 U.S.C. § 3838i(b) (repealed). By regulation, "eligible land" must "possess suitable onsite and offsite conditions which will allow the easement to be effective in achieving the purposes of the program." FRPP's land eligibility regulation expressly provided: "*Unsuitable conditions may include . . . utility corridors that are planned to pass through or immediately adjacent to the parcel*." 7 C.F.R. § 1491.4(g)(8) (emphasis added).

On February 7, 2014, Congress enacted the Agricultural Act of 2014 ("Act"). The Act repealed FRPP and replaced it with the Agricultural Conservation Easement Program ("ACEP"). *See* Pub. L. No. 113-79, 128 Stat. 649 (2014); 16 U.S.C. § 3865. FRPP and ACEP shared the same purpose (*see* 16 U.S.C § 3865(b)) and were similar in many other respects, but the Act elevated the land eligibility regulation to a statutory prohibition:

> INELIGIBLE LAND. -- The Secretary [of Agriculture] may not use program funds for the purposes of acquiring an easement on . . . lands where the purposes of the program would be undermined due to on-site or off-site conditions, such as . . . *proposed or existing rights of way, infrastructure development, or adjacent land uses*.

16 U.S.C. § 3865d(a)(4) (2014 version) (emphasis added).

The Act included transitional provisions that allowed NRCS to continue to process proposed conservation easements begun under the FRPP. *See* Transitional Provisions, Pub. L. No. 113-79, § 2704(b), 128 Stat. 649, 767–68 (2014). However, all conservation easements *closed* after February 7, 2014, had to comply with the new ACEP conditions, including the Act's statutory land eligibility restriction, and after 270 days, ACEP applied in full. *See* Temporary Administration Provisions, Pub. L. No. 113-79, §§ 2712(b)–(d), 128 Stat. 649, 771–72 (2014).

Cooperative Agreements

Both FRPP and ACEP relied on "eligible entities" to acquire and hold agricultural conservation easements pursuant to "cooperative agreements" with NRCS. 7 CFR § 1491.20; 16 U.S.C. § 3865a(3). In this case, the eligible entity was Defendant-Intervenor Colorado Cattlemen's Agricultural Land Trust ("CCALT"). NRCS and CCALT executed their cooperative agreement on June 20, 2011. This agreement served as the "authorizing document that obligates [federal] funds to acquire conservation easements" through September 30, 2015. AR 4438, 4447. Attachments to the cooperative agreement identified the specific properties being considered for acquisition, and amendments added or removed lands being considered.

Significantly, the cooperative agreement between NRCS and CCALT provided that (1) "nothing in this document obligates the United States or the Trust to purchase all or any of the conservation easement parcels listed in the attachment"; (2) NRCS must review and approve each conservation easement deed before CCALT could purchase any proposed conservation easement; (3) NRCS could require changes to the deed as a condition of approval; and (4) if a particular easement transaction did not close, "any remaining federal funds may be released from this obligation." AR 4437–39, 4447–48.

STATEMENT OF FACTS

A. BLM and WAPA Prepare an EIS for the TWE Project and Select the Best Route to Minimize Environmental Impacts.

1. The TWE Project will extend about 730 miles across Wyoming, Colorado, Utah, and Nevada. Draft EIS for TWE Project, SR 1667, 1669–70.[2] Because the Project would be located primarily on federal land managed by BLM, in 2008 TransWest applied to BLM for a right of way across affected BLM lands in the four states. TransWest's right of way application triggered a decade-long federal permitting process. As part of the permitting process, BLM and WAPA, acting as joint lead agencies, prepared an EIS for the Project. Draft EIS at 1-9, SR 1746. WAPA was involved because, as a power marketing agency with the U.S. Department of Energy, it was a development partner with a financial interest in the Project.

2. Recognizing the importance of the TWE Project, in October 2011 the federal interagency "Rapid Response Team for Transmission," which included the U.S. Department of Agriculture, selected the Project as one of seven priority electric transmission projects nationwide. AR 1647–48. The mission of this Rapid Response Team was to facilitate and coordinate permitting among federal and state agencies for the seven priority projects. Draft EIS at 1-8, SR 1745.

[2] References to the Draft and Final EIS are to the environmental study prepared for the TWE project. Both the Draft and Final EISs are part of NRCS's administrative record. Documents in the original record filed July 24, 2020 are cited as "AR" and the page number. Documents in a supplemental record filed September 8, 2021 are cited as "SR" and the page number. Documents NRCS filed August 2, 2021 concerning its decision on remand begin with "2NDSR."

3. BLM and WAPA began the EIS in January 2011, with a notice published in the Federal Register. 76 Fed. Reg. 379 (Jan. 4, 2011). The EIS took more than four years to complete. *See* 80 Fed. Reg. 24,962 (May 1, 2015) (notice of availability of Final EIS).

4. To complete the EIS, BLM and WAPA analyzed thousands of miles of alternative routes, with help from some 50 federal, state, and local cooperating agencies. Draft EIS at ES-3, SR 1674. Their objective was to identify a single route that would best minimize adverse environmental impacts for the Project as a whole. *See id*. ("determine the most appropriate location"); *id*. at ES-13, SR 1684 (avoid or minimize adverse impacts).

5. On July 3, 2013, after two and a half years of study, BLM and WAPA published an 1,870-page Draft EIS. SR 1667–3537; *see also* 78 Fed. Reg. 40,163 (July 3, 2013). For the Colorado segment, the Draft EIS identified three routes that would advance to further consideration in the Final EIS. These three "semi-finalist" routes were called "Tuttle Easement Micro-siting Options 1, 2, and 3." Draft EIS at 2-40, SR 1795. NRCS has admitted, in a motion filed on February 9, 2021, that the Conservation Easement blocked all three of the alternative transmission routes identified in the Draft EIS. ECF 124 at p. 2.

6. On May 1, 2015, after two more years of study, BLM and WAPA published a 5,629-page Final EIS. AR 5234, SR 3540–9169. The Final EIS identified three alterative transmission routes in this area of Colorado, including Tuttle Options 1 and 3 described in the Draft EIS, and a new Tuttle Option 4 in the same area. Final EIS at 2-53, SR 3706. Tuttle Option 2 was removed because it did not offer any benefits over the other options. *Id*. at 2-70, SR 3723. The Final EIS noted that "[a]ll alternatives would cross some portion of the Cross Mountain Ranch property." *Id*. at 2-53, SR 3706.

7. The Draft EIS and Final EIS both explain that BLM and WAPA had limited routing options in the area because of multiple environmental constraints. These included a pre-existing conservation easement that Colorado Parks and Wildlife ("CPW") and the U.S. Fish and Wildlife Service ("USFWS") had placed on lands located south of U.S. Highway 40 to protect higher quality sage-grouse habitat on the Tuttle Ranch, and specific concerns expressed by the National Park Service ("NPS") relating to nearby Dinosaur National Monument.

8. CPW and USFWS, the state and federal agencies with expertise over wildlife, argued that, from a wildlife perspective, the Project should be routed north of Highway 40. Final EIS, Appendix L at L-194, SR 8425 (CPW comment ID 685-1304) and at L-223, SR 8454 (USFWS comment ID 556-995).

9. NPS objected to routing the Project across the NPS-owned Deerlodge Road leading from Highway 40 to the Dinosaur National Monument, because the road is part of the National Monument. *Id*. at L-64, SR 8295 (NPS comment ID 613-760). NPS said it could support crossing the Deerlodge Road on the portion of the road owned by the State of Colorado, but not on NPS land. *Id*.

10. To reconcile the concerns of CPW, USFWS, and NPS, BLM added a new "Tuttle Micro-Siting Option 4." This option went on the north side of Highway 40 to avoid higher quality sage-grouse habitat, and crossed Deerlodge Road on state-owned lands. *Id*.; *see also* Final EIS at 2-53 to 2-54, SR 3706–07. However, like Tuttle Micro-Siting Options 1, 2, and 3, Option 4 crossed a small portion of the Cross Mountain Ranch lands.

11. In December 2016, BLM issued a Record of Decision ("ROD") that approved the Project and selected Tuttle Option 4 as the route through northwest Colorado. BLM ROD at 18,

SR 10793. BLM explained that, "Tuttle Ranch Micro-siting Option 4 would avoid the Tuttle Ranch Conservation Easement and the NPS Deerlodge Road, and would cross the least amount of the Cross Mountain Ranch property." *Id.* On June 23, 2017, BLM granted the right of way to TransWest, conveying the rights needed to construct the Project along the route selected in the ROD. AR 6623. As shown by the map of Tuttle Option 4 at SR 3707, TransWest cannot utilize the BLM's right of way without crossing the Cross Mountain Conservation Easement.

B. NRCS Agrees to Consider a Conservation Easement for the Cross Mountain Ranch, Despite a Conflict with the Proposed Project Routes.

12. In March 2013, pursuant to the Cooperative Agreement described at page 6, CCALT applied to the Colorado Office of NRCS ("NRCS-CO") for an FRPP easement on about 26,000 acres within Cross Mountain Ranch. AR 738–67. The Ranch as a whole included more than 55,000 acres, and the proposed easement included 41 separate parcels located within 29 non-contiguous tracts scattered over more than 20 square miles. AR 3525, 5324.

13. On September 5, 2013, Audubon Rockies alerted David Colburn, Easement Coordinator for NRCS-CO, that BLM intended to route the TWE Project across the same land. AR 1094–98. Audubon explained that the Project had been "identified as a priority project by the federal administration," and that BLM had released its Draft EIS on July 3, 2013. *Id*. at 1094. Audubon attached relevant maps from the Draft EIS and noted that shape files available on the BLM website would show NRCS the specific locations of BLM's alternative routes. One of the maps Audubon attached contained a note, "looks like Option 2 and 3 might overlap the proposed Cross Mountain easement??" *Id*. at 1098. In fact, all three options overlapped the proposed easement. *See* Final EIS at 2-53 to 2-54, SR 3706–07.

14. On September 6, 2013, NRCS's Colburn forwarded Audubon's email to NRCS-CO Assistant State Conservationist Dawn Jackson and alerted her that, "[Audubon] mentioned these lines could go across the Cross Mountain Ranch!!" AR 1088. Further, Colburn alerted Jackson that the Gateway South Project, being developed by Plaintiff-Intervenor PacifiCorp, would follow the same route as the TWE Project, and "the right of way for both of them could easily become 600 [feet wide]." *Id*.

15. On September 9, 2013, Colburn asked Audubon for the data points on the routes so NRCS could "look at all possible routes to see if they conflict with any of our easements." AR 1110. Audubon responded within the hour and directed Colburn to BLM's link for the "shapefiles." *Id*.

16. On September 20, 2013, NRCS-CO and CCALT amended their Cooperative Agreement to add the Cross Mountain lands. *See* AR 4437–53. This amendment "obligated" (*i.e.*, reserved) $7.5 million in federal funds to enable NRCS to acquire the proposed Cross Mountain conservation easement, but did not commit NRCS to any particular easement configuration or any particular deed language, or, indeed, to purchase the easement at all. *Id*. at 4439.

C. Working with BLM, NRCS Determines That the Most Likely Route for the Project Will Cross the Proposed Easement.

17. On September 25, 2013, NRCS's Colburn acknowledged to Audubon that the proposed Cross Mountain Ranch easement "may have a conflict" with the TWE Project as well as with Plaintiff-Intervenor PacifiCorp's Gateway South Project. AR 1336.

18. On October 23, 2013, PacifiCorp's Rod Fisher alerted a BLM Senior Adviser, Lucas Lucero, that NRCS-CO might create a conservation easement that would conflict with

both the TWE Project and the Gateway South Project. PacifiCorp told BLM: "[W]e need help in Washington to prevent pending and potential easements from blocking preferred routes emerging from the EIS." AR 1465–66.

19. BLM immediately forwarded PacifiCorp's email to Patrick Holmes, a Special Assistant to USDA's Undersecretary for Natural Resources and Environment. AR 1465. By the next day, key NRCS officials (Chief Weller; Weller's Chief of Staff, Patty Lawrence; and the Colorado State Conservationist, Phyllis Philipps) had all received the PacifiCorp email. AR 1468, 1477. Philipps said she "was not aware" of the issue. AR 1482.

20. In early November 2013, Holmes organized a meeting among NRCS's "Easement Programs experts" in the NRCS Headquarters Office in Washington, D.C. ("NRCS-HQ") to discuss "coordination on transmission lines and NRCS easements." AR 1520–21. After that meeting, Kim Berns, Director of the NRCS's Easement Programs Division ("EPD"), identified two NRCS-HQ points of contact to help resolve any conflicts: Elizabeth Crane-Wexler on easement issues, and National Environmental Coordinator Andree DuVarney on NEPA compliance issues. AR 1588.

21. On December 12, 2013, NRCS employees exchanged emails with maps of the TWE Project transmission line routes. AR 1581–87. These maps showed that all of the routes would cross the Cross Mountain Ranch. *Id*. Crane-Wexler confirmed to Berns and Jeremy Stone, National FRPP Manager, that the Cross Mountain Ranch easement "is impacted by TransWest – BLM is between the draft and final EIS." AR 1588.

22. On the same day, one of the NRCS-CO employees (Eugene Backhouse) appeared to dismiss the significance of the conflict, informing DuVarney that "it looks like [the

transmission lines] could avoid all but one piece of the property easement very easily. In fact it wouldn't be that difficult to fully avoid the easement." AR 1579–80. But he admitted that he could not tell "what is selected because of the labels on their legend." *Id*. at 1579. The record contains no analysis by Backhouse or anyone else at NRCS that the transmission line route could avoid the Cross Mountain lands.

23. On December 16, 2013, Crane-Wexler reported to Berns, Stone, and others at NRCS-HQ that BLM would share relevant NEPA documents concerning the Project with DuVarney and that NRCS's NEPA role would occur at the national level; that the TWE Project, which "impacts Cross Mountain Ranch," will require a 250-foot wide alignment; and that NRCS and BLM would continue to coordinate with regard to the Cross Mountain easement, which was "not yet closed." AR 1604.

24. On December 23, 2013, Crane-Wexler informed BLM's Lucero that:

> Kim [Berns, the EPD Director], Jeremy Stone (FRPP Manager), and I met. *The NRCS State Office has been instructed to work with the Cooperating Entity to provide a conservation easement deed that will allow the transmission line. If they are unable to reach consensus on how that will be done, NRCS will back out of the deal*.

AR 1609–10 (emphasis added).

25. On January 10, 2014, Lucero thanked Crane-Wexler and DuVarney for their "commitment to accommodate routing" for the TWE Project and invited NRCS to become a formal cooperating agency in the ongoing NEPA process "to develop a strong FEIS and avoid any potential routing conflicts." AR 1635.

26. On January 13, 2014, Crane-Wexler told Jackson and Colburn of NRCS-CO that "BLM is engaged regarding the . . . 'Cross Mountain Ranch' easement. *We need to be sure in*

the final easement document that ample ROW is left for expansion of the transmission corridor." AR 1634–35 (emphasis added).

27. Also on January 13, 2014, DuVarney, the National Environmental Coordinator, reviewed NRCS's Circular No. 7, dated September 6, 2007 (the "Infrastructure Policy on Easements," *see infra* at 30). Based on that review, DuVarney determined that NRCS's Regional Conservationist should designate a State Conservationist to lead NRCS's involvement as a cooperating agency. AR 1636.

28. NRCS Circular No. 7 provided: "States shall document consideration of potential impacts by existing or proposed infrastructure projects when deciding whether to enroll conservation land in any NRCS easement program. *NRCS will not knowingly enroll potential easement areas in the potential rights-of-way of infrastructure projects*." AR 1640 (emphasis added). It also provided that, if any potential easement properties are affected by proposed infrastructure projects, NRCS may "request 'cooperating agency' status from the lead Federal permitting agency to participate in its environmental analysis. If there is no other lead Federal agency, *NRCS will initiate its own NEPA process*." AR 1641 (emphasis added).

29. On January 16, 2014, Colburn of NRCS-CO told BLM that NRCS "would like to avoid having any of the transmission line crossing the property." He added, "[j]ust to let you know, the easement has not closed yet." AR 1654–55.

30. On January 22, 2014, Colburn told DuVarney that he and Backhouse planned to attend a BLM meeting on the TWE Project, at which "[w]e are going to discuss the proposed routes and look at alternative routes that could by-pass the Cross Mountain Ranch or at least minimize the impact on that property that is proposed to be in the FRPP easement." AR 1682.

31. The meeting was held January 30, 2014, and Colburn attended in person. AR 2023–26. Colburn received several action items:

> 1. NRCS (Dave C.) to look into question of when the affects (sic) from T-line on the conservation easement would be considered baseline condition …, 4. NRCS (Dave C.) to propose the question related to assurance for BLM that the easement will not be finalized while the issues are being worked by the parties (TWE Project and Cross Mtn Easement), 5. NRCS (Dave C.) to propose the above-mentioned call [a call within two weeks between BLM Washington and NRCS Headquarters 'to determine path forward'] up the chain-of-command to NRCS Headquarters.

Id. at 2025–26.

32. On January 30, 2014, Colburn emailed State Conservationist Philipps the action items from the meeting and told her that, during the meeting, the parties discussed "optional routes," but "*this will be very difficult if not impossible just because of the size of the Cross Mountain Ranch proposal*." AR 2010 (emphasis added). His email also quoted NRCS-HQ's previous instructions to provide a conservation easement deed that will allow the transmission line and to ensure that ample ROW is left for expansion of the transmission corridor. *Id*.

33. On February 4, 2014, Philipps replied to Colburn's email: "*I want to support the landowner in this completely and I would oppose any transmission line in our easement . . . that the producer is concerned with*." AR 2048 (emphasis added).

34. On February 5, 2014, Colburn described to Philipps and Backhouse a phone conversation he had just had with Jeremy Stone, the National FRPP Program Manager. Colburn stated:

> I shared the email . . . that said '[State Office] has been instructed to work with the land trust (CCALT) on an easement that would allow the transmission line to go through, and if we are unable to reach a consensus on this, the NRCS will back out of the deal.' Jeremy was very alarmed by that and said that NO decision has been made at NHQ on this project.

> Jeremy said that he hasn't even seen any of the proposed routes for the transmission line. Jeremy sat in on a conference call with BLM in December and that was pretty much the first and last that he's been involved with any discussion on this project.

AR 2053. Colburn continued:

> If you recall, one of the action items from the meeting I attended last week was to have NRCS not close or move any faster than the transmission line project is moving so we don't have a closed easement before the final route is planned. Jeremy said that there is no reason to delay moving forward on the easement project, it's been selected for funding and this transmission line project is no reason to delay moving towards closing.

Id.

35. On February 5, 2014, at NRCS-HQ, Berns emailed Tony Kramer, Deputy Chief Conservationist for Programs. Berns told Kramer that the proposed conservation easement on Cross Mountain Ranch had "become an issue at the Interagency Infrastructure meetings" because the TWE Project is "one of the White House's identified 7 Transmission Lines that they are tracking," and that Holmes, the Special Assistant to the Undersecretary, had called her that day to ask that "NRCS move toward reaching a resolution." AR 2043. Berns told Kramer that she planned to meet with Holmes, and asked "if you are okay with us discussing the various constructs of our Easements in a general fashion for now." *Id.* Kramer responded, "Go and discuss. But no decisions until we can visit." *Id*. at 2044.

36. On February 6, 2014, Colburn emailed Stone two maps showing BLM's planned route for the TWE Project across Cross Mountain Ranch. AR 2063–66. One of the maps contained a hand-drawn "most current proposed route." *Id*. at 2066. This route was the one ultimately designated as Option 4 in the Final EIS, which BLM selected in the Record of Decision. *See* Final EIS at 2-53 to 2-54, SR 3706–07; BLM ROD at 18, SR 10793.

37. On February 7, 2014, Congress enacted the Agricultural Act of 2014, repealing FRPP and replacing it with ACEP.

38. On February 8, 2014, after talking with Patrick Holmes of the Undersecretary's Office, Berns told Stone and others at NRCS-HQ that:

> Patrick mentioned it would be good if NRCS came out with a solid position about the conservation values of the easement as well as the limitations of easements with regard to allowing uses such as transmission lines. He said that he participated in an interagency call again with the proponent for Transwest Express where they are elevating their concerns over NRCS easement on Cross Mtn Ranch.

Berns went on to state her own opinion: "I think we need to move forward to complete the Cross Mtn Ranch easement acquisition and move toward advising [TransWest] to select an alternate route. Right now – everyone is in a holding pattern waiting for NRCS." AR 2074.

39. On February 10, 2014, BLM again asked NRCS to become a cooperating agency in the TWE Project's EIS. AR 2120. (It had previously asked on January 10, 2014. AR 1635.) On February 11, 2014, DuVarney drafted a letter for Philipps' signature, declining BLM's invitation. AR 2258–59. DuVarney cautioned Philipps that "*[t]here really could be legitimate legal issues about whether NEPA should apply to our site specific action in this case*." *Id*. at 2259 (emphasis added). In the same email, DuVarney included a passage from NRCS's National Environmental Compliance Handbook:

> NRCS is considered the implementing agency for and has jurisdiction by law for activities affecting agricultural lands under the [FRPP] ….
>
> NRCS may . . . desire to [act as a cooperating agency] in another agency's NEPA process in order to ensure that NRCS's interests are addressed and to reduce duplication of analysis. In this case, NRCS could rely on the other agency to prepare the NEPA document, incorporating NRCS's needs, and NRCS could adopt the document. Thus, NRCS would not need to prepare a separate NRCS EA or EIS.

AR 2259.[3]

D. The Proposed Conservation Easement Is Divided into Two Phases.

40. On February 24, 2014, CCALT informed NRCS that, for financial reasons, it needed to divide the Cross Mountain easement into two phases. AR 2142–47. CCALT proposed a Phase I covering 16,000 acres, to be completed by the end of 2014, and a Phase II covering 9,000 acres to be completed by the end of 2015. *Id*. at 2142.

41. On March 14, 2014, NRCS told CCALT it could reduce the size of the proposed easement to 16,000 acres, but CCALT would have to file a future application for an easement on the other lands. AR 2245–46. NRCS cautioned that any future application would be subject to the new ACEP statute (enacted in February), including its prohibition against funding a conservation easement "if proposed or existing rights of way or infrastructure development would undermine the protection of the parcel." *Id.* at 2246. On March 16, 2014, CCALT elected to proceed with this phased acquisition of the easement. AR 2249.

42. On March 17, 2014, Colburn wrote Berns, the EPD Director at NRCS-HQ, about the request to divide the easement into two phases, and sent a map showing the location of the proposed TWE Project route in relation to the Phase I and Phase II lands. AR 2248; map in SR 11031. (NRCS stipulates that the map in SR 11031 was the map attached to AR 2248.) Colburn stated:

> [State Conservationist] Phyllis [Philipps] asked me to send you a map of the Cross Mountain Ranch alternative structure request that shows Phase I and II in relation to the proposed transmission line route. Attached is the

[3] The Final EIS lists NRCS as a cooperating agency, SR 3640, but this is an error. The record contains no evidence that NRCS ever accepted BLM's invitation or otherwise acted as a cooperating agency in the EIS for the TWE Project.

> full request from CCALT along with a map I've drawn in the approximate location of the transmission line route. After attending a meeting *the route I've identified seems to be the most popular route for the line*. *As you can see, Phase I and Phase II will be affected by this proposed route*.

Id. (emphasis added).

43. The same day, Berns sidelined Andree DuVarney, the National Environmental Coordinator, and replaced her with Stone, the National FRPP Manager, as the new point of contact for the Cross Mountain easement. Forwarding Colburn's email confirming that both Phase I and Phase II would be affected by the Project, Berns told Stone: in light of "this info from CO – I would prefer you take the lead in discussing final alignment of TWE and this easement with BLM instead of Andree. I think the programs should drive the conversation not NRCS NEPA." AR 2250.

44. On March 18, 2014, State Conservationist Philipps confirmed to Berns, DuVarney, and Stone that Phase I would "have just a *small portion of interface with the proposed transmission line*." AR 2258 (emphasis added).

45. On April 1, 2014, DuVarney emailed NRCS environmental coordinators around the country about the need to coordinate with BLM about designated energy corridors. AR 2390. DuVarney noted:

> It's most important that our State Conservationists become aware of the importance of this effort because it is an Administration priority to facilitate energy projects through early federal agency coordination. The area this effort most impacts NRCS is with respect to our easement programs . . . . It is primarily through the NEPA process that inter-agency coordination occurs; that is why I am also engaged.

Id.

46. A recipient of DuVarney's email, Karen Fuller, forwarded the email broadly within NRCS, stating: "I have found it all too easy for NRCS to be working on easement acquisitions in the path of major energy corridors without knowing the problems they could eventually be dealing with." AR 2393.

47. Fuller's email made its way to Jackson, the Assistant State Conservationist at NRCS-CO. On April 2, 2014, in forwarding the email, Jackson commented to Backhouse:

> We do have easement applications where some transmission lines are proposed, and the landowners and land trusts are actually using our easements to help protect these areas for [sage grouse] and to keep these projects out. I am not advocating for coming out in opposition to these projects, but I would like for the voices of our state/local groups to be heard.

AR 2392.

E. NRCS Closes Phase I of the Conservation Easement and Prohibits Transmission Lines.

48. In the summer and fall of 2014, NRCS worked with CCALT to complete a conservation easement on the 16,069 acres in Phase I. In August 2014, CCALT provided a proposed easement deed to NRCS for review. AR 2627. The proposed deed prohibited transmission lines. AR 2643 (¶ 13.B).

49. On November 4, 2014, NRCS directed CCALT to make numerous changes to the deed. *See* AR 3367, 3396. NRCS did not comment on the fact that the proposed easement included land in the path of the TWE Project, or that it prohibited transmission lines.

50. On December 24, 2014, ten months after ACEP's enactment, NRCS-CO, CCALT, and Cross Mountain finalized and closed their Phase I transaction. AR 6685–6751. NRCS-CO signed and accepted a Conservation Easement Deed on 16,069 acres of Cross

Mountain Ranch, contributing approximately $3.3 million in federal funds for the acquisition. *Id*. at 4838, 6717. The Deed categorically prohibited transmission lines that do not serve the property (¶ 13.B); conveyed a property interest to NRCS in the form of a "federal right of enforcement" (¶ 25); required any amendments to the Deed to be signed by all parties (¶ 28); and provided that the property could be condemned only with the consent of the United States (¶ 31). *Id*. at 6702, 6707, 6709, 6710.

F. NRCS Removes Land from Phase II in Conflict with the TWE Project.

51. On May 12, 2015, after learning that NRCS-CO had created a conservation easement on Cross Mountain Ranch, BLM requested a meeting with Berns and other officials at NRCS-HQ. AR 5238–39.

52. On May 19, 2015, TransWest complained to Jason Weller, the Chief Conservationist of NRCS, that NRCS should not have created a conservation easement on the Phase I lands and should not repeat that mistake by creating another easement on the Phase II lands. AR 5250–54.

53. Later in May 2015, Chief Weller directed NRCS-CO to "work with CCALT on incorporating a clause in the [Phase II] deed language that will allow for the transmission line, and avoid having a portion of the easement condemned." AR 5303.

54. On June 2, 2015, Berns told the new Colorado State Conservationist, Clint Evans, that three alternatives existed with respect to the proposed Phase II easement: "1) CCALT could accept the TWE power line within their easement if the landowner is willing. 2) CCALT and the landowner could omit the impacted right of way from the easement. 3) The least desirable option – NRCS can withdraw our funding from the easement." AR 5332.

55. Chief Weller responded to TransWest's letter on June 23, 2015. AR 6367–71. Referring to the Phase I lands, Chief Weller stated: "Prior to funding Cross Mountain Ranch, NRCS CO fully evaluated the transmission line and the easement purposes, and determined that the easement could achieve the purposes of the program even if the proposed utility corridors [identified in the draft EIS] became planned utility corridors." *Id*. at 6369.

56. In early July 2015, Evans told BLM that NRCS would hold off completing Phase II of the conservation easement "until the Trans West power line route is finalized. Worst case scenario we will pull NRCS from the Phase II portion of the easement." AR 5398–99.

57. On August 28, 2015, NRCS-CO informed TransWest that Cross Mountain had agreed to revise the proposed Phase II easement to omit the parcel that lay in the path of the Project. AR 5403. NRCS and CCALT then amended their Cooperative Agreement to remove the Phase II lands in conflict with the TWE Project. SR 12421–22.

58. In the spring of 2016, Cross Mountain backed out of a Phase II easement. AR 5978. Once Phase II could not block the transmission lines, it appears that Cross Mountain lost interest in it. Colburn later complained that "we had to cancel almost 12,000 acres because of the TransWest transmission line." AR 6358.

G. The Conservation Easement Blocks the TWE Project.

59. Although NRCS removed land in conflict with the TWE Project from Phase II, the Deed that NRCS signed and funded on Phase I prevents TransWest from proceeding. To construct the Project, TransWest needs transmission easements across 30 acres of the 16,069-acre Phase I Conservation Easement. AR 6240–41; map at SR 3707. An overview map showing the TWE and Gateway South Projects, in relation to the Conservation Easement, is Exhibit A.

60. TransWest first tried to obtain the necessary transmission line easements across the Phase I land through negotiation with Cross Mountain and CCALT. Cross Mountain and CCALT refused to grant the easements. *See* ECF 66 at 8, ¶ 64. TransWest next tried to condemn the necessary easements in state court. That effort failed because the Deed requires the United States to consent to any condemnation action "involving the Property" and NRCS has not given that consent. Instead, NRCS removed the case to federal court and moved to dismiss the case for lack of a waiver of sovereign immunity. *See TransWest Express LLC v. Cross Mountain Ranch LP,* U.S. Dist. Colo. Case No. 19-cv-02643-CMA-GPG.

61. On October 28, 2019, TransWest asked NRCS to consent to condemnation of a transmission easement on lands within the Conservation Easement. AR 7002. On December 19, 2019, NRCS declined to consent, asserting that its consent was not necessary to condemn the interests of Cross Mountain and CCALT, even though the Deed expressly requires the consent of the United States for any condemnation action "involving the Property." AR 7090–91. NRCS also stated that its regulations required it to obtain concurrence from Cross Mountain and CCALT before consenting to "modification or termination of Easement prohibitions," and those parties refused to concur. *Id.* (citing 7 C.F.R. § 1468.6(c), now codified at § 1468.6(a)(6)).

62. The Deed's provisions, as well as NRCS's regulations governing changes to the Deed, effectively give Cross Mountain and CCALT a private veto power over one of the seven highest priority electric transmission projects nationwide.

63. A veto power is what Cross Mountain apparently wanted in seeking a conservation easement from NRCS. In April 2019, Cross Mountain (through its principal, Matt Boeddeker) told NRCS: "[We] agreed to permanently restrict . . . a very large part of one of the

largest private ranches in Colorado *in exchange for the govts part in full protection against power lines . . . . With you leading and not allowing condemnation this power line will not occur. . . . It's very very simple*." AR 6752 (emphasis added). In reviewing the matter in August 2019, NRCS observed, "There is information that would appear to indicate that the landowner specifically enrolled the easement in order to prevent the transmission line route." AR 6972.

STANDARD OF REVIEW

The Court reviews NRCS's actions under the Administrative Procedure Act ("APA"), 5 U.S.C. sections 706(2)(A) and 706(2)(C), to determine whether those actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority or limitations . . . ." *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009). An agency's decision is arbitrary and capricious if the agency (1) failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment. *Id.* Agency action that is contrary to statute or regulation is, of course, "not in accordance with law."

Although an agency's decision is entitled to a presumption of regularity, "that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (internal citation omitted). In reviewing an agency's factual determinations, courts ask whether the agency took a "hard look" at information relevant to the decision. *Richardson*, 565 F.3d at 704. Courts

consider only the agency's reasoning at the time of decision-making, excluding any "post-hoc rationalization concocted by counsel in briefs." *Id.*

ARGUMENT

When NRCS created the Conservation Easement in 2014, it violated two sets of statutory and regulatory requirements. First, NRCS violated the environmental review requirements of NEPA, including its own NEPA-implementing regulations. Second, NRCS violated the land eligibility provisions of the Agricultural Act of 2014 and its own FRPP regulations. NRCS's decision in 2021 to reaffirm the Conservation Easement suffers from the same legal defects and is likewise arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

I. NRCS Violated NEPA.

A. TransWest Has Standing to Pursue Its NEPA Claim.

To establish Article III standing to challenge NRCS's decision to create the Conservation Easement, TransWest must demonstrate: (1) an injury in fact that is both concrete and particularized and actual or imminent, (2) traceable to the defendant's conduct complained of, and (3) redressable by a favorable court decision. *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Petrella v. Brownback*, 697 F.3d 1285, 1293–95 (10th Cir. 2012). TransWest meets this test.

First, TransWest's injury is concrete and imminent. The Conservation Easement has blocked the TWE Project because it overlaps the Project's route and prohibits transmission lines.

Second, TransWest's injury is traceable to NRCS's conduct. In 2014, NRCS approved, signed, and funded a Conservation Easement Deed that purported to give two private parties, Cross Mountain and CCALT, a right to block transmission projects. AR 6702 at ¶ 13.B; AR 6709 at ¶ 28; AR 6710 at ¶ 31. In June 2021, NRCS reaffirmed that same decision. NRCS

claims to be powerless to address the problem it has caused, except under an implausible and highly speculative scenario that depends on TransWest's successful pursuit of novel litigation in state court, followed by TransWest's application to NRCS for an easement modification that NRCS emphasizes it has complete discretion to deny. *See infra* at 47–48.

Third, a court decision vacating the Conservation Easement would redress TransWest's injury, because it would remove application of the Deed's prohibitions and NRCS's regulations.

To establish Article III standing for a "procedural" injury under NEPA, a plaintiff need not show that a court decision "would" prevent the feared injury, only that it "could" do so. *Oregon-California Trails Ass'n v. Walsh*, 467 F. Supp. 3d 1007, 1045 (D. Colo. 2020). The plaintiff must simply show that "a better-informed agency might reach a different conclusion." *Id*. at 1061 n.26. The *Oregon-California Trails* test is satisfied here, because if NRCS had conducted the required NEPA analysis, it might have accommodated the Project within the Conservation Easement, or if necessary, declined to consummate the easement. NRCS itself recognized that "*[i]t is primarily through the NEPA process that inter-agency coordination occurs [regarding conflicts between energy projects and conservation easements]*." AR 2390.

To seek review under the APA, TransWest also must identify a "final agency action" and establish prudential standing by demonstrating that its claims fall within the zone of interests protected by the statute forming the basis of its claims. *Catron Cnty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996). NRCS's signature on the deed, its acceptance of the federal enforcement interest, and its payment of federal funds to acquire the Conservation Easement in 2014 constitute "final agency action." So does its filing, in 2021, of a Decision Memorandum that reaffirms its 2014 decision. *See Bennett*, 520 U.S. at

177–78 (a final agency action marks the consummation of the agency's decision-making process, and from which legal consequences will flow (internal citations omitted)); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1236 (10th Cir. 2000) (same).[4]

Prudential standing exists if the interest sought to be protected is "*arguably*" within the zone of interests to be protected by the statute, regardless of whether the statute in question "indicate[s] that Congress intended to benefit the plaintiff's interest." *Wyoming ex rel. Crank v. U.S.*, 539 F.3d 1236, 1243 (10th Cir. 2008) (emphasis in original). The test is not "especially demanding." *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1452 (10th Cir. 1994) (quotation omitted). It only denies standing "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id*.

TransWest has prudential standing. TransWest's NEPA claims concern two NEPA processes: first, the NEPA process completed by BLM and WAPA that resulted in a federal determination of the Project's route based on years of comprehensive environmental analysis, and second, the NEPA process that NRCS should have, but did not, perform before eliminating the very routes that BLM's analysis had identified as environmentally preferable. In the context of these two NEPA processes, TransWest's prudential standing rests on its interest in routing the TWE Project along the environmentally preferred route identified by BLM and WAPA through their comprehensive NEPA process.

[4] An exception to judicial review under the APA exists if there is an adequate alternative to APA review. *U.S. Army Corps of Eng'rs v. Hawkes Co*., 136 S. Ct. 1807, 1815–16 (2016). There is no adequate alternative here. As discussed at pages 47–48, the NRCS's "solution" would, at a minimum, lead to long, expensive, and uncertain litigation with Cross Mountain and CCALT. Under *Hawkes*, that would not be an "adequate alternative" to APA review.

TransWest submits the Declaration of Garry Miller as Exhibit B to demonstrate its standing to assert the NEPA claim. As Mr. Miller explains, the primary purposes of the TWE Project include the environmental objective of providing access to renewable energy sources, and doing so in an environmentally responsible manner. In conjunction with that objective, TransWest has a strong interest in ensuring that its Project avoids or minimizes adverse environmental impacts; otherwise, the environmental objectives of the Project will be undermined, as environmental groups noted in commenting on the Draft EIS. *See* Exhibit B at ¶ 7. NRCS's decision to create a conservation easement that blocks the environmentally-preferred route and could thereby force a re-route onto more environmentally-sensitive lands—with no consideration at all of the environmental impacts of doing so—threatens TransWest's interests.

TransWest's environmental interests create prudential standing for its NEPA claim. The mere fact that TransWest also has an economic stake in the Project does not vitiate its prudential standing. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155–56 (2010) (alfalfa farmers had standing to assert NEPA claim where injury to their crops had both environmental and economic components); *Nat'l Helium Corp. v. Morton*, 455 F.2d 650, 655 (10th Cir. 1971) (private companies challenging Secretary of Interior's cancellation of their helium purchase contracts had prudential standing based on companies' assertion of an environmental interest in capturing helium that would otherwise vent into the atmosphere, even though they were also motivated by economic interests).

B. NEPA Applies to NRCS's Decision to Approve the Conservation Easement.

NEPA's purpose is to "require[] federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives." *Richardson*, 565 F.3d at 703. It "ensures that a federal agency makes informed, carefully calculated decisions." *Catron County*, 75 F.3d at 1437. Actions that are partly financed or assisted with federal money are subject to NEPA's environmental review requirements. *See Sw. Williamson Cty.,* 243 F.3d at 278; 40 C.F.R. § 1508.18(a) (2019).

NRCS provided the majority of the funding for the Conservation Easement (about $3.3 million), but it did far more than that. NRCS also approved and signed the Deed, including its legal description that included land within the Project's planned route, its prohibition against transmission lines, its requirement that any amendments be signed by all parties, and its requirement that NRCS must consent to condemnation actions involving the Property. NRCS's approval and execution of the Deed also triggered application of its regulations limiting termination or modification of the Conservation Easement. Thus, NRCS is directly responsible for giving Cross Mountain and CCALT a veto power over the Project.

NRCS has long acknowledged its obligation to comply with NEPA when creating conservation easements. It has adopted its own NEPA-implementing regulations that apply to "all NRCS-assisted programs." 7 C.F.R. §§ 650.1(d), 650.2. The regulations confirm that actions carried out largely on private land "with technical and/or financial assistance provided by NRCS" are subject to NEPA. *Id*. at § 650.4(d). NRCS-funded conservation easements fall within this definition.

Consistent with its NEPA-implementing regulations, NRCS adopted a National Environmental Compliance Handbook and an "Infrastructure Policy on Easements" (Circular No. 7 dated September 7, 2007) ("Infrastructure Policy"). Both of these documents explained how NRCS would comply with NEPA before approving a conservation easement in the path of a proposed transmission project like the TWE Project.

The Environmental Compliance Handbook stated that NRCS must either act as a cooperating agency in another agency's NEPA process, or prepare its own NEPA analysis. *See* AR 2259; NRCS Environmental Compliance Handbook, § 610.61.[5] If NRCS declines to participate as a cooperating agency, "NRCS must respond in writing, stating why NRCS cannot be a cooperating agency." *Id.*; Environmental Compliance Handbook, § 610.61(H).

The Infrastructure Policy addressed NRCS's environmental review obligations in the context of conflicts between infrastructure projects and conservation easements. It provided that NRCS State Offices "*shall* document consideration of potential impacts by existing or proposed infrastructure projects when deciding whether to enroll conservation land in any NRCS easement program. *NRCS will not knowingly enroll potential easement areas in the potential rights-of-way of infrastructure projects*." 2NDSR002372 (emphasis added). The Infrastructure Policy also provided that, if any potential easement properties are affected by proposed infrastructure projects, "NRCS may request 'cooperating agency' status from the lead Federal permitting agency to participate in its environmental analysis." 2NDSR002373. "If

[5] Available online at https://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=29769 (last visited July 29, 2021).

there is no other lead Federal agency, *NRCS will initiate its own NEPA process*." *Id.* (emphasis added).

NRCS has not created any categorical exclusions that apply with respect to conservation easements. *See* 7 C.F.R. § 650.6 (NRCS's list of categorical exclusions).)

C. NRCS Did No Environmental Analysis.

In this case, NRCS did not prepare either an EA or an EIS for the Conservation Easement, and no categorical exclusion excused it from this requirement. Nor did NRCS comply with its National Environmental Compliance Handbook or its Infrastructure Policy, both of which required NRCS to either act as a cooperating agency in BLM's and WAPA's NEPA analysis or complete its own NEPA analysis before creating the Conservation Easement. Instead, NRCS declined BLM's invitation to serve as a cooperating agency without responding to BLM as required by its Handbook, and did not prepare any environmental analysis of its own.

To comply with NEPA, NRCS should have followed the guidance provided by the Council on Environmental Quality ("CEQ"), whose regulations define the scope of federal agencies' NEPA analysis. *See* 40 C.F.R. § 1508.25 (2019).[6] For decades, CEQ's regulations have required agencies to consider the direct, indirect, and cumulative impacts of proposed actions. *Id*. at §§ 1508.8, 1508.7; *see also Oregon-California Trails,* 467 F. Supp. 3d at 1045 (discussing CEQ regulations). Direct effects "occur at the same time and place." 40 C.F.R.

[6]The Council on Environmental Quality published revised NEPA regulations on July 16, 2020, effective September 14, 2020. 85 Fed. Reg. 43,304. Because these regulations were not in effect when NRCS created the conservation easement, TransWest cites to the regulations in effect between 1978 and 2020. However, NRCS's actions would still be subject to NEPA even if the new regulations applied. *See id*. at 43,375 (new 40 C.F.R. § 1508.1(q) (defining major federal action)).

§ 1508.8. "Indirect" effects occur later in time or are farther removed in distance, but are still reasonably foreseeable. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1172, 1174, 1177, 1180 (10th Cir. 2002) (EIS on highway project held inadequate where study of indirect wildlife impacts limited to 1,000 feet on either side of highway). Cumulative impacts are the reasonably foreseeable collective impacts of an agency's action. *See Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 853 (10th Cir. 2019) (in approving drilling permits, BLM failed to consider cumulative impacts of 3,960 other wells identified as "reasonably foreseeable").[7]

To comply with NEPA, NRCS should have evaluated (1) the direct effects of funding a conservation easement and accepting a deed that would block all of the proposed routes for the TWE Project; (2) the reasonably foreseeable indirect effects on sage grouse and other wildlife from forcing BLM and WAPA to attempt to re-route the Project (assuming a re-route were possible); and (3) the reasonably foreseeable cumulative impacts of forcing TransWest to abandon the TWE Project if a re-route were not available, including the effect of depriving consumers of access to renewable energy sources, which "contribute to meeting national, regional, and state energy and environmental policies, including state-mandated renewable energy portfolio and greenhouse gas reduction targets." *See* Final EIS at 1-8, SR 3641.

Indeed, even if NRCS had believed that there were no clear detrimental environmental effects from creating a conservation easement, it should have evaluated these effects to ensure sound decision-making. *See Catron County*, 75 F.3d at 1437 ("[T]o interpret NEPA as merely

[7] CEQ's new regulations remove the terms "indirect" and "cumulative" impacts, but still require "reasonably foreseeable" impacts to be studied, consistent with the cases cited. *See* 85 Fed. Reg. at 43,375 (July 16, 2020) (new 40 C.F.R. § 1508.1(g)).

requiring an assessment of detrimental impacts upon the environment would significantly diminish the act's fundamental purpose—to 'help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.'").

NRCS should also have analyzed alternatives to approving and funding a conservation easement with terms that would block the TWE Project on the environmentally-preferred route. *See W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1274 (10th Cir. 2013) (both EAs and EISs must incorporate a range of reasonable alternatives); *Dine Citizens v. Klein,* 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010) (obligation to consider alternatives is at the heart of NEPA process; in formulating an EA, an agency must "study, develop, and describe appropriate alternatives to recommended courses of action" (internal citation omitted)).

Alternatives NRCS should have considered, but did not, are (1) "no action," an alternative in all NEPA documents, 40 C.F.R. § 1502.14(c); (2) removing the small portion of land in conflict with the route that NRCS knew in March 2014 was the "most popular route for the line," AR 2248; map in SR 11031; (3) deleting the provision prohibiting transmission lines; and (4) simply including a provision in the deed allowing the TWE Project and Gateway South Project to go through the lands, as the NRCS HQ had instructed. AR 1609–10. These were essentially the alternatives NRCS identified for the Phase II easement in July 2015, after which NRCS removed the lands in conflict with the TWE Project. *See* AR 5332.

D. NRCS Did Not Even Complete Its "Environmental Evaluation" Form.

NRCS's regulations require NRCS to prepare a site-specific environmental evaluation ("EE") form to determine whether to prepare an EA or an EIS. 7 C.F.R. §§ 650.4(c). An EE

form is required for "all assistance provided by NRCS." *Id*. at § 650.5(a). *See also* NRCS Environmental Compliance Handbook, § 610.11.

The EE is "a concurrent part of the planning process in which the potential long-term and short-term impacts of an action on people, their physical surroundings, and nature are evaluated and alternative actions explored." Environmental Compliance Handbook, § 610.16(A)(1). "NRCS is required to conduct an EE on *all* planning and *financial assistance* to determine if there is a need for an EA, an EIS, or whether a categorical exclusion may be invoked." *Id.* § 610.16(A)(1) (Note) (emphasis added).

In completing the EE form, NRCS would have been required to assess the environmental impacts of funding the conservation easement on the proposed route for the TWE Project to determine whether it needed to prepare an EA or an EIS. It also would have been required to address questions such as "Does the preferred alternative establish a precedent for future actions with significant impacts or represent a decision in principle about a future consideration?" *See* Exhibit C (NRCS-CPA-52 worksheet at 4). Based on the language in the deed that prohibits transmission lines, NRCS would have had to answer that question "Yes." That would have triggered consideration of a site-specific NEPA analysis. *See id.*

But NRCS did not fill out the EE form, ignoring its own regulations and guidelines. As noted above, it is axiomatic that an agency must adhere to its own regulations. This rule applies regardless of the reasons for adopting the rules in the first place. Here, however, the NRCS emails in the record, pointing out that NRCS had been processing proposed easements without knowledge of conflicting energy infrastructure projects, and that landowners had been using (or abusing) the easement program to prevent transmission lines from crossing their lands, provide

compelling reasons for NRCS to follow NEPA and study the likely effects of granting a proposed conservation easement. *See* AR 2390–93.

E. The 2009 Programmatic EA Does Not Cover Site-Specific Actions.

The only NRCS NEPA document in the record is a 2009 Programmatic EA, which addresses the FRPP program generally. AR 0015–68. The Programmatic EA specifically defers consideration of site-specific impacts to subsequent decisions that implement the program, such as a decision to approve and fund a conservation easement. *See id.* at 0019, 0025. Despite assurances in the 2009 Programmatic EA that NRCS would address site-specific impacts when actions are later taken to implement the FRPP, and despite DuVarney's caution to Philipps that "[t]here really could be legitimate legal issues about whether NEPA should apply to our site specific action in this case" (AR 2259), NRCS did not do so here.

II. NRCS Violated the Land Eligibility Restrictions for Conservation Easements.

A. TransWest Has Standing to Pursue its Land Eligibility Claims.

For the same reasons described above (pages 25–26), TransWest has Article III standing to pursue its land eligibility claims. TransWest also has prudential standing because TransWest's interests fall within the zone of interests protected by the land eligibility restrictions of the Act and NRCS's regulations. Those provisions are intended to prevent NRCS from creating conservation easements that block planned infrastructure projects, such as the TWE Project. *See* 16 U.S.C. § 3865d(a)(4)(2014 version); 7 C.F.R. § 1491.4(g)(8). If TransWest did not have prudential standing to bring a claim for violation of these land eligibility restrictions, then no one could bring such a claim and NRCS could ignore the provisions with impunity.

B. NRCS Violated the FRPP Land Eligibility Restriction.

NRCS contends that when it created the Conservation Easement in December 2014, it did so subject to the requirements of the FRPP. AR 7090 (fn. 2). Since 2009, the FRPP regulations have included the following land eligibility restriction:

> [Eligible land] [m]ust possess suitable onsite and offsite conditions which will allow the easement to be effective in achieving the purposes of the program. *Unsuitable conditions may include, but are not limited to . . . highway or utility corridors that are planned to pass through or immediately adjacent to the parcel*.

7 C.F.R. § 1491.4(g)(8) (emphasis added); *see also* 74 Fed. Reg. 2814 (Jan. 16, 2009) (italicized language was added "to describe the on-site and off-site conditions that are not compatible with the program's purposes").

Since at least 2007, NRCS has instructed its state offices to avoid creating conservation easements that interfere with potential infrastructure development. Specifically, in 2007, NRCS issued its Infrastructure Policy to provide "policy and procedural guidance to NRCS State Offices when an infrastructure project is being considered." AR. 1640. By its express terms, the Infrastructure Policy applied to FRPP easements. *Id*. The Infrastructure Policy stated:

> State Offices must seek to avoid impacts to NRCS easements from proposed infrastructure projects such as . . . transmission lines . . . by remaining aware of existing and proposed infrastructure projects. States shall document consideration of potential impacts by existing or proposed infrastructure projects when deciding whether to enroll conservation land in any NRCS easement program. *NRCS will not knowingly enroll potential easement areas in the potential rights-of-way of infrastructure projects.*

Id. (emphasis added).

In 2009, NRCS adopted its FRPP regulation identifying "planned" utility corridors as one example of lands unsuitable for a conservation easement. NRCS admits in its June 17, 2021

Decision Memorandum that the FRPP land eligibility restriction was "implicated," but argues that the FRPP restriction was irrelevant in this instance because when NRCS created the Conservation Easement, the federal transmission corridor was merely "proposed" and not "planned." 2NDSR000024–25.

But neither the FRPP regulation nor the NRCS Infrastructure Policy supports NRCS's proposed distinction between "proposed" and "planned" projects. The purpose of the FRPP land eligibility restriction was to ensure that NRCS created conservation easements only on "suitable" lands. In assessing suitability, the regulation required NRCS to identify and consider relevant conditions that "*may include, but are not limited to* . . . utility corridors that are planned to pass through or immediately adjacent to the parcel." 7 C.F.R. § 1491.4(g)(8) (emphasis added). This regulation required NRCS to make a rational, fact-based determination of "suitability" that included, but was not limited to, consideration of "planned" utility corridors. Nothing in the expansive language of the regulation suggests that the reference to "planned" utility corridors was meant to exclude "proposed" utility corridors.

Even if the FRPP regulation itself were unclear, which it is not, the language of the Infrastructure Policy should have eliminated confusion. The Infrastructure Policy provided that "NRCS will not knowingly enroll *potential* easement areas in the *potential* rights-of-way of infrastructure projects." AR 1640 (emphasis added). NRCS does not and cannot deny that it knew its Easement blocked the "potential" rights of way of infrastructure projects.

NRCS also argues that when it filled out a simple "ranking tool" on May 23, 2013 (AR 967–972), it fully and finally assessed land suitability. *See* 2NDSR000022–23, 26. But neither the regulatory language nor the Infrastructure Policy supports NRCS's argument that assessing

land suitability required nothing more than completing a generic screening worksheet at some point in the process (in this case, one and one-half years before granting the Easement).

C. NRCS Violated the ACEP Land Eligibility Restriction.

NRCS also should have complied with the statutory ACEP land eligibility restriction, which Congress enacted on February 7, 2014, as part of the Agricultural Act of 2014. Focusing on the actions of "funding" and "acquiring" easements, the ACEP restriction provided:

> INELIGIBLE LAND.--The Secretary [of Agriculture] may not *use program funds* for the purposes of *acquiring* an easement on . . . lands where the purposes of the program would be undermined due to on-site or off-site conditions, such as . . . *proposed or existing rights of way, infrastructure development, or adjacent land uses*.

16 U.S.C. § 3865d(a)(4) (2014 version) (emphasis added).

Citing to an internal policy document, NRCS Bulletin NB 300-14-37, NRCS argues that, even though it "funded" and "acquired" the Easement ten months after Congress enacted ACEP, it did not have to comply with ACEP's statutory restriction. *See* 2NDSR000017, 18. NRCS argues the Easement was exempt from ACEP because NRCS had "enrolled" the lands (*i.e.*, obligated funds to acquire a potential future easement) in 2013. *See id.*; AR 7090 (fn. 2). But ACEP prohibits "using" federal funds to "acquire" an easement on ineligible lands, a final agency action that is independent of the preliminary administrative step of obligating funds.

The Agricultural Act included Transitional Provisions ("TP"), Pub. L. No. 113-79, section 2704(b), 128 Stat. 649, 767–68 (2014), and Temporary Administration Provisions ("TAP"), Pub. L. No. 113-79, sections 2712(b)–(d), 128 Stat. 649, 771–72 (2014) to guide NRCS in its transition from FRPP to ACEP. In the TP, Congress made clear that NRCS could continue to use previously-appropriated FRPP funds "to carry out agreements and easements . . .

entered into prior to the date of enactment" of the Act. Simultaneously, in the TAP, Congress allowed NRCS to continue to use its existing FRPP regulations, but only for a period of 270 days, and only to the extent that the terms and conditions of new easements conformed to the terms and conditions of the new ACEP program. The 270-day transitional period ended on November 4, 2014, more than six weeks before NRCS signed the Conservation Easement Deed.

Thus, regardless of the date on which it obligated funds, NRCS was obliged to comply with the ACEP land eligibility restriction when, on December 24, 2014, it used federal funds to acquire the Easement. Instead, NRCS violated the ACEP restriction by funding an Easement that it knew would block a federal transmission corridor.

D. NRCS's Disregard of the Land Eligibility Restrictions Was Arbitrary, Capricious, and Not in Accordance with Law.

Not a single document in the administrative record suggests that NRCS ever considered whether or how the proposed transmission corridor affected the eligibility of lands included in the Conservation Easement. To the contrary, the record shows that NRCS knew the Easement would conflict with the proposed routes for the Project but chose to ignore the conflict. As stated by State Conservationist Philipps on February 4, 2014: "*I want to support the landowner in this completely and I would oppose any transmission line in our easement . . . that the producer is concerned with*." AR 2048 (emphasis added). At National Headquarters, FRPP Manager Jeremy Stone told David Colburn on February 5, 2014: "*[T]here is no reason to delay moving forward on the easement project, it's been selected for funding and this transmission line project is no reason to delay moving towards closing.*" AR 2053 (emphasis added).

By failing to consider the land's eligibility, and by violating the land eligibility restrictions established by statute, regulation, and the agency's own internal policies, NRCS

acted arbitrarily, capriciously, and contrary to law. It is well-established that "[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986).

NRCS knew how to comply with the land eligibility restrictions: it did so in 2015 regarding Phase II of the proposed easement. As Kim Berns told Clint Evans with respect to Phase II on June 2, 2015, there were three simple alternatives: "1) CCALT could accept the TWE power line within their easement if the landowner is willing. 2) CCALT and the landowner could omit the impacted right of way from the easement. 3) The least desirable option – NRCS can withdraw our funding from the easement." AR 5332. The same three options should have governed NRCS's decision with respect to the Phase I lands. No legally sufficient rationale exists for NRCS to have treated these lands differently. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1198 (10th Cir. 2014) ("an agency may not treat like cases differently" (citation omitted)).

In its letter to TransWest on June 23, 2015, the NRCS Chief defended NRCS's decision to proceed with completing Phase I of the Conservation Easement. Chief Weller stated:

> Prior to funding Cross Mountain Ranch, NRCS CO fully evaluated the transmission line and the easement purposes, and determined that the easement could achieve the purposes of the program even if the proposed utility corridors became planned utility corridors.

AR 5387. But if NRCS had determined that the easement "could achieve the purposes of the program even if the proposed utility corridors became planned utility corridors," there could be no justification for approving a deed that prohibited transmission lines. NRCS could easily have

required deed language to accommodate the Project (as the NRCS Headquarters had instructed in December 2013, AR 1609–10), but it did not do so.

III. NRCS's Decision on Remand Fails to Justify the Conservation Easement.

On remand, NRCS "reaffirmed" its decision to create the Conservation Easement without providing any legally valid support or justification for the decision, and without adding any new facts to the existing factual record. *See* 2NDSR000003.

A. In Reaffirming the Easement, NRCS Ignores NEPA.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of their intended actions *before* acting, and NRCS's own Environmental Compliance Handbook gave NRCS two ways to do so: NRCS could either act as a cooperating agency in another agency's NEPA process, or it could conduct its own NEPA analysis. *See supra* at 30. NRCS's post-remand Decision Memorandum only confirms that NRCS failed to follow either option, choosing instead to ignore the problem altogether—in 2014 and again in 2021.

In the Decision Memorandum, NRCS admits that it learned of the contents of BLM's and WAPA's Draft EIS and "the potential for the transmission line route to traverse the [proposed Conservation Easement]" *before* it obligated funds to acquire the Easement. 2NDSR000019. NRCS also admits that it "did not possess a comprehensive knowledge and understanding of the legal and technical feasibility of locating the TWE and Gateway transmission lines to avoid the Easement, nor of the environmental effects of constructing the transmission lines on any such alternative routes," when it decided to create a conservation easement that would block *all* of the

alternative routes. 2NDSR000021.[8] Yet, despite knowing of the conflict, NRCS admits that it nevertheless failed to inform itself about the environmental effects of blocking the Draft EIS transmission routes because "NRCS was not a lead or cooperating agency in the development of an Environmental Evaluation for the siting of the transmission lines or in the decision of where to allow their construction" (*id.*) and "the [Conservation Easement] Deed would be recorded first in time." 2NDSR000021, 23.

NEPA's purpose is to "ensure[] that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 371 (1989). Given NRCS's admitted failure to inform itself about the environmental consequences of blocking all of the identified route alternatives, NRCS's decision to "reaffirm" the Easement that blocks those routes was arbitrary, capricious, and contrary to law.

B. In Reaffirming the Easement, NRCS Mischaracterizes and Ignores the Applicable Land Eligibility Requirements.

In its post-remand Decision Memorandum, NRCS concedes that the FRPP land eligibility restriction was at least "implicated." 2NDSR000024. The purpose of the FRPP regulation was to ensure that NRCS created conservation easements only on "suitable" lands, and the regulation required NRCS to assess suitability by identifying and considering relevant conditions that "may include, but are not limited to . . . utility corridors that are planned to pass through or immediately adjacent to the parcel." 7 C.F.R. § 1491.4(g)(8).

[8] NRCS's decision on remand refers to a possible route called "Option 5" that would have bypassed the Cross Mountain Ranch. *See* 2NDSR000010. This route was not among the alternatives studied in either the Draft or Final EIS for the TWE Project. BLM briefly considered this possible route, but eliminated it "due to the increased area of greenfield disturbance required and the crossing of the NPS Deerlodge Road." *See* SR 8361 (BLM response to TransWest comment ID 264-1391). It was never a viable option.

NRCS has known, since publication of the Draft EIS in 2013, that BLM and WAPA intended to create a transmission corridor traversing the Cross Mountain lands. In its post-remand Decision Memorandum, NRCS concedes that it never considered whether co-location with the transmission corridor might affect the land's suitability for a conservation easement. Instead, in the absence of any timely consideration of the transmission corridor's impacts on land suitability for the Easement, NRCS now seeks to substitute post-hoc rationalization in the form of a Talmudic distinction between the words "planned" and "proposed."

In its Decision Memorandum, NRCS argues that a "proposed" project does not become a "planned" project until it receives final regulatory approval (in the case of the TWE Project, this did not occur until WAPA issued its Record of Decision on the EIS in April 2017). 2NDSR000025. Further, NRCS argues that, until the moment an infrastructure project receives final approval, the project is irrelevant to NRCS's land suitability assessment. *See id.*

In proposing this new interpretation of the FRPP regulation, NRCS ignores the regulation's plain language, which identifies "planned" utility corridors as only one example of an unsuitable condition, not as the *sine qua non* of land unsuitability. *See* 7 C.F.R. § 1491.4(g)(8). NRCS also ignores its Infrastructure Policy (NRCS state offices must "document consideration of *potential* impacts by existing or *proposed* infrastructure projects when deciding whether to enroll conservation land in any NRCS easement program" (AR 1640)); the ordinary meaning of the word "plan" (the *Merriam-Webster* dictionary defines "plan" as "something that one hopes or intends to accomplish"[9]); and the nonsensical implications of its own new interpretation. NRCS's new interpretation would mean that NRCS is free to

[9] Available at https://www.merriam-webster.com/thesaurus/plan (last visited, July 29, 2021).

unilaterally derail infrastructure projects designated as high priority by several federal agencies (including its own Department of Agriculture) at any time during a multi-year EIS process, as long as it finalizes its conservation easement before the last agency responsible for permitting the federal project issues its final record of decision. NRCS's interpretation would render the whole NEPA analysis a colossal waste of time, money, and federal resources.

In February 2015, just two months after it created the Conservation Easement, NRCS published an interim ACEP rule providing that NRCS "would not knowingly interfere with the infrastructure project objectives of another agency by funding an easement that would block a known infrastructure *proposal* . . . ." 2NDSR000025 (emphasis added). NRCS discounts the interim ACEP rule as a "a change in existing policy" and asserts that ACEP rules did not apply to this Conservation Easement because the Easement was funded under FRPP. 2NDSR000025. But the ACEP rule was not a change in policy: it simply restated the same policy that NRCS's Infrastructure Policy had stated for years. No doubt for this reason, NRCS argues that the Court should disregard the Infrastructure Policy as a policy statement that technically expired at the end of FY 2008. 2NDSR000031–32, n.8. But NRCS never claims that the Infrastructure Policy was erroneous, and it never explains why its employees who were responsible for NEPA compliance were still relying on the Infrastructure Policy in 2014.

In its post-remand Decision Memorandum, NRCS acknowledges that it could have required deed language that would have accommodated the Project. Specifically, NRCS acknowledges that "this could have been achieved by identifying in the Deed that NRCS would subordinate its rights to the proposed transmission lines . . . ." 2NDSR000034. NRCS offers numerous excuses for its failure to do so, including:

- If NRCS had subordinated its rights to accommodate the transmission lines, that would have "potentially affected the valuation that NRCS could provide to the transaction." 2NDSR000034.

- It was CCALT's responsibility to propose deed terms, and "CCALT never proposed deed terms that included considerations for the transmission line." 2NDSR000035.

- There was "no guarantee that either [Cross Mountain] or CCALT would agree" to such deed terms even if NRCS had proposed them. *Id.*

- NRCS had "ample reason to believe," based on its positive experience with other landowners, that "it could successfully work with [Cross Mountain and CCALT]" to modify the Easement if in fact the transmission lines needed to cross the Easement. 2NDSR000024.

- Subordinating its rights would have "created a blanket encumbrance upon the entire Easement Area." 2NDSR000034.

- The proposed transmission corridor would not affect the purposes of the Easement, and therefore the Easement did not need to accommodate the transmission corridor, "because the [Conservation Easement] Deed would be recorded first in time." 2NDSR000023.

None of these excuses justifies NRCS's violation of the applicable land eligibility restrictions. First, there is nothing in the administrative record, even as supplemented on August 2, 2021, indicating that NRCS ever considered any of these excuses in 2014. They are just an improper post-hoc rationalization. *See Sorenson Commc'ns. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009) ("court must rely upon the *reasoning* set forth *in the administrative record* and disregard post hoc rationalizations" (emphasis added)).

Second, none of these excuses provides a rational basis for NRCS's actions:

NRCS's desire to maximize "valuation" did not make otherwise "unsuitable" land suitable.

Even if CCALT were responsible for drafting deed terms, NRCS had the "right to require additional specific language to protect the interests of the United States . . . ." 2NDSR000034.

If NRCS was concerned that Cross Mountain and CCALT would reject a deed that accommodated the transmission projects, why would NRCS expect Cross Mountain and CCALT to agree to a subsequent modification to the deed in order to accommodate those same transmission projects? And why would NRCS expect its positive experience with other landowners to be in any way predictive of the future behavior of Cross Mountain and CCALT? Nothing in the record supports any notion that Cross Mountain and CCALT would agree to a modification of the Conservation Easement to allow transmission lines. All of the evidence in the record is to the contrary. *See* AR 2048 ("I want to support the landowner in this completely and I would oppose any transmission line in our easement . . . that the producer is concerned with."); AR 5308 ("we object to these lines crossing our property"); AR 5310 ("landowner is opposed to a transmission line crossing the property"); AR 6752.

Subordinating NRCS's rights to accommodate the Project would not have "created a blanket encumbrance" on the entire 16,069-acre easement. All of the route alternatives described in the Draft EIS were located close together, and they crossed only a small portion of the Easement, as NRCS recognized. *See* AR 2258. Deed language could easily have been crafted to describe the affected area.

But NRCS's final excuse—that the Conservation Easement Deed would be recorded first in time—may be most revealing. *See* 2NDSR000023. The record in this case leaves little doubt that, despite NRCS's statutory and regulatory obligations to coordinate with its sister agencies to avoid interfering with federal infrastructure objectives, NRCS felt free to disregard those obligations when it came to Cross Mountain Ranch. In its remand decision, NRCS seems to suggest that, by signing the Conservation Easement Deed *before* BLM approved the final TWE

Project route, it obtained superior land rights that somehow exempted it from its obligations to coordinate under NEPA or to even consider the Project's impacts on land suitability.

NRCS's excuses make a mockery of both NEPA and the land eligibility restrictions. The reason for not creating a conservation easement in the path of a "proposed" or "planned" transmission project is because the easement could very well block an important project. It is not an answer to say that issuing the deed and blocking the project prevents the conflict.

C. NRCS's Proposed "Solution" Is No Solution at All.

NRCS concludes its remand decision with a gratuitous suggestion for a "solution" to the problem it has created: "NRCS has determined that it can best address the interests of all parties through confirmation of its original Deed decision and the availability for an appropriately submitted request for EAA [*i.e.*, its ACEP "easement administration authorities"]." 2NDSR000035. NRCS concedes, however, that any effort to "address the interests of all parties" under the EAA would be subject to multiple contingencies and requirements. *Id*.

To implement NRCS's proposed solution, TransWest would have to engage in state court litigation to condemn the interests of Cross Mountain and CCALT, but without disturbing the federal property interest claimed by NRCS. *Id.* The litigation would be complicated by jurisdictional issues relating to NRCS's property interest in the Easement as well as inevitable arguments by Cross Mountain and CCALT that Clause 31 of the Deed requires consent of the United States to any condemnation "involving the property," that Clause 28 of the Deed requires written consent of all parties to amend the terms, and that NRCS is a necessary party that cannot be joined because Congress has not waived sovereign immunity for condemnation actions

against the United States. *See* ECF 20 at 4–6; ECF 70 at 3; ECF 85 at 18–20, 30–31 at ¶ 102; ECF 115 at 33–39.

If, despite the Deed's express language, TransWest eventually prevailed in state court at both the trial court and appellate levels, then, NRCS suggests, TransWest could "submit [a request for] modification of the prohibitions in the Easement to the NRCS State Conservationist for Colorado." 2NDSR000035. TransWest would have to support its request with "sufficient documentation to demonstrate how the statutory and regulatory criteria for approval of the modification of the Easement by NRCS would be met." *Id.* Once TransWest had submitted a request acceptable to NRCS, then NRCS would "process" the request pursuant to whatever regulatory structure might be in place at that time, and decide, in the exercise of its discretion, whether to allow TransWest to construct its transmission line. *Id.* NRCS emphasizes that its decision is "completely vested" in the agency. 2NDSR000003. In other words, NRCS reserves complete power to reject it.

This "solution" is so complicated, time-consuming, expensive, and uncertain as to be no solution at all, and only underscores the intractability of the problem that NRCS has created. The problem is that, in December 2014, NRCS unlawfully created a Conservation Easement that blocks a federal transmission corridor, and in June 2021, NRCS reaffirmed that same unlawful decision. NRCS's "solution" does not avoid NRCS's failure to comply with the law.

Because NRCS violated federal law when it created the Conservation Easement, the Easement has been invalid since inception. And since the Easement has been invalid since inception, no party ever acquired valid rights under the Easement. There is no reason to derail this APA litigation at this late stage to force TransWest to engage in a protracted and uncertain

condemnation process, or to force TransWest to pursue an unnecessary and uncertain administrative process with NRCS to modify the invalid terms of an invalid Easement.

IV. The Court Should Vacate the Conservation Easement.

When a federal agency acts in violation of federal law, the standard remedy is for the court to vacate that action. As provided in the APA, the reviewing court "shall . . . set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). It shall also set aside agency action in excess of statutory authority or limitations. *Id*. at § 706(2)(C). Cases in this Circuit vacating agency action include *Dine Citizens*, 923 F.3d at 859 (vacating oil and gas drilling permits issued in violation of NEPA); *Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1240 (D. Colo. 2011) (J. Kane) ("when a rule has been found to be legally invalid, the ordinary result is vacatur"); *Front Range Nesting*, 353 F. Supp. 3d at 1137 (vacating incidental take permit); and *WildEarth Guardians v. Bernhardt*, 423 F. Supp. 3d 1083, 1105 (D. Colo. 2019) (vacatur appropriate remedy to avoid the "bureaucratic steamroller" on remand).

This Court has noted that, in some cases, equitable factors might support a different remedy than vacatur of the agency's decision. *Oregon-California Trails,* 467 F. Supp. 3d at 1074. This is not such a case. NRCS conducted *no* analysis of the environmental impacts of its decision and it disregarded the land eligibility restrictions of both ACEP and its own FRPP regulations. These deficiencies go to the heart of NEPA and the conservation easement program. The Court should therefore set aside the Conservation Easement Deed that NRCS unlawfully approved and funded, or at least the portion of it blocking the TWE Project.

Normally, where agency action is arbitrary, capricious, or otherwise not in accordance with the law, the proper remedy is to remand for further proceedings. Here, however, for the portion of the Conservation Easement in conflict with the approved transmission line route, a remand would serve no purpose. That portion of the easement is in violation of statutory and regulatory authority because NRCS failed to perform any NEPA analysis and the lands were ineligible for a conservation easement. The only purpose of a remand would be for NRCS to reconsider the Conservation Easement on the remainder of the lands.

Moreover, NRCS already obtained a voluntary remand and reaffirmed its decision. Because NRCS has already conducted additional deliberations and identified the documents that "complete the [administrative] record" and "assist this Court in adjudicating this matter" (ECF 136 at 4, 6), another remand would accomplish nothing. *See*, *e.g.*, *Hodges v. Life Ins. Co. of N. Am.*, No. 14-cv-00958-WYD-NYW, 2018 U.S. Dist. LEXIS 96369, at *28 (D. Colo. June 7, 2018) (remand not necessary where "no additional factfinding needs to occur and the case can be resolved on the record"); *N. L. R. B. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (courts need not "convert judicial review of agency action into a ping-pong game" and there is no need to remand if it "would be an idle and useless formality").

CONCLUSION

Under 5 U.S.C. § 706, the Court should vacate the Conservation Easement, or at least the part of it covering lands needed for the TWE Project's federally-approved route.

Dated: August 2, 2021.

Respectfully submitted,

/s/ John F. Shepherd
John F. Shepherd
Utsarga Bhattarai
HOLLAND & HART LLP
Attorneys for Plaintiff TransWest Express LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2021, I filed the foregoing electronically with the Clerk of the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Katherine A. Ross
Assistant United States Attorney
1801 California Street, Suite 1600
Denver, CO 80202
katherine.ross@usdoj.gov
Attorneys for the Federal Defendants

Patricia C. Campbell
Darrell G. Waas
WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP
1350 17th Street, Suite 450
Denver, CO 80202
campbell@wcrlegal.com
waas@wcrlegal.com
Attorneys for Defendant-Intervenors Cross Mountain Ranch Limited Partnership and Colorado Cattlemen's Agricultural Land Trust

Donald M. Ostrander
Steven Louis-Prescott
Hamre, Rodriguez, Ostrander & Dingess PC
3900 S. Yosemite St., Suite 500
Denver, CO 80237
mail@hrodlaw.com
Attorneys for Plaintiff-Intervenor PacifiCorp

s/ John F. Shepherd
John F. Shepherd

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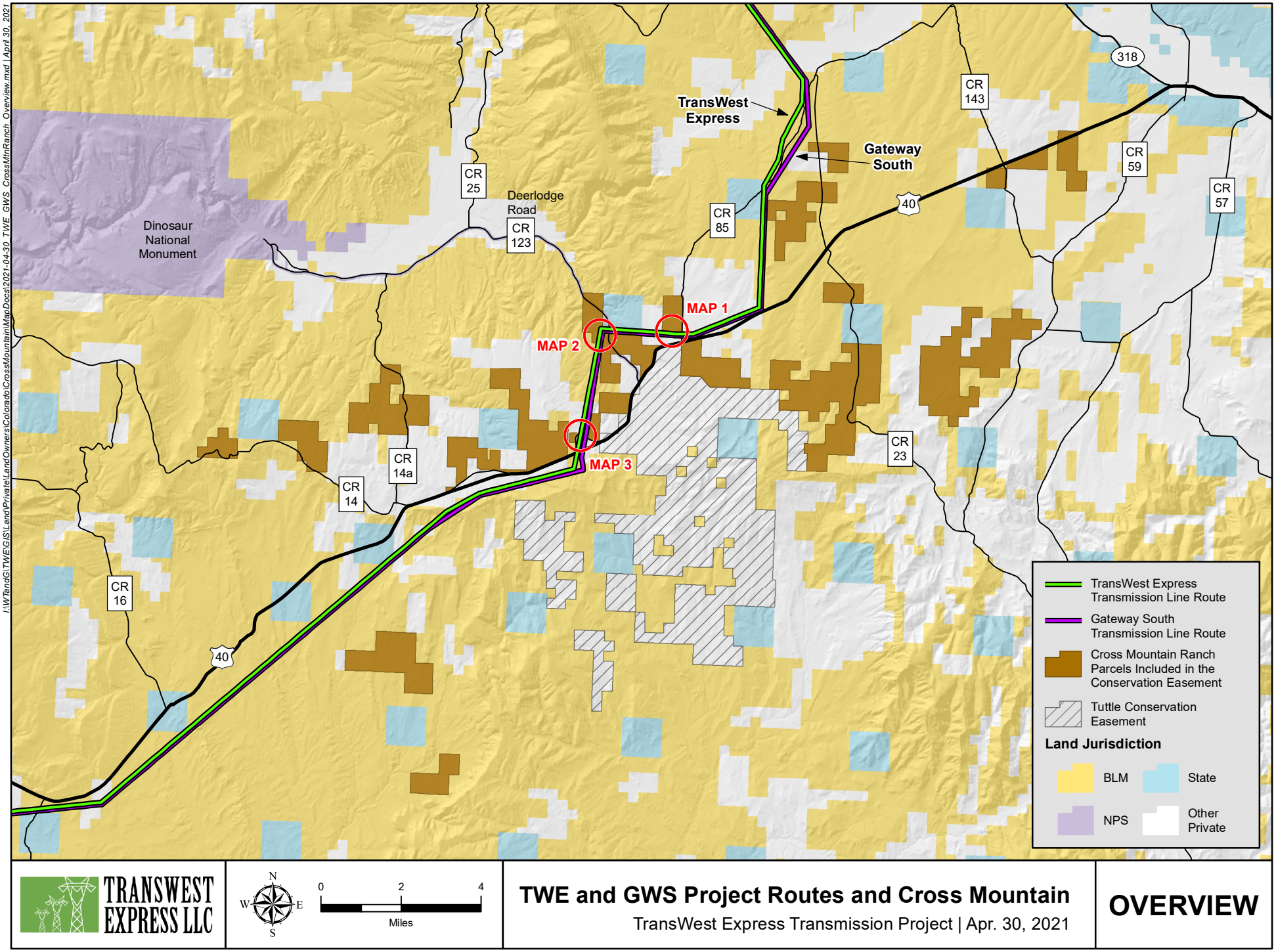
EXHIBIT A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TransWest Express
Gateway South
Dinosaur National Monument
Deerlodge Road
CR 25
CR 123
CR 85
CR 143
CR 59
CR 57
CR 23
CR 14a
CR 14
CR 16
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MAP 1
MAP 2
MAP 3
TransWest Express Transmission Line Route
Gateway South Transmission Line Route
Cross Mountain Ranch Parcels Included in the Conservation Easement
Tuttle Conservation Easement
Land Jurisdiction
BLM
State
NPS
Other Private
TRANSWEST EXPRESS LLC
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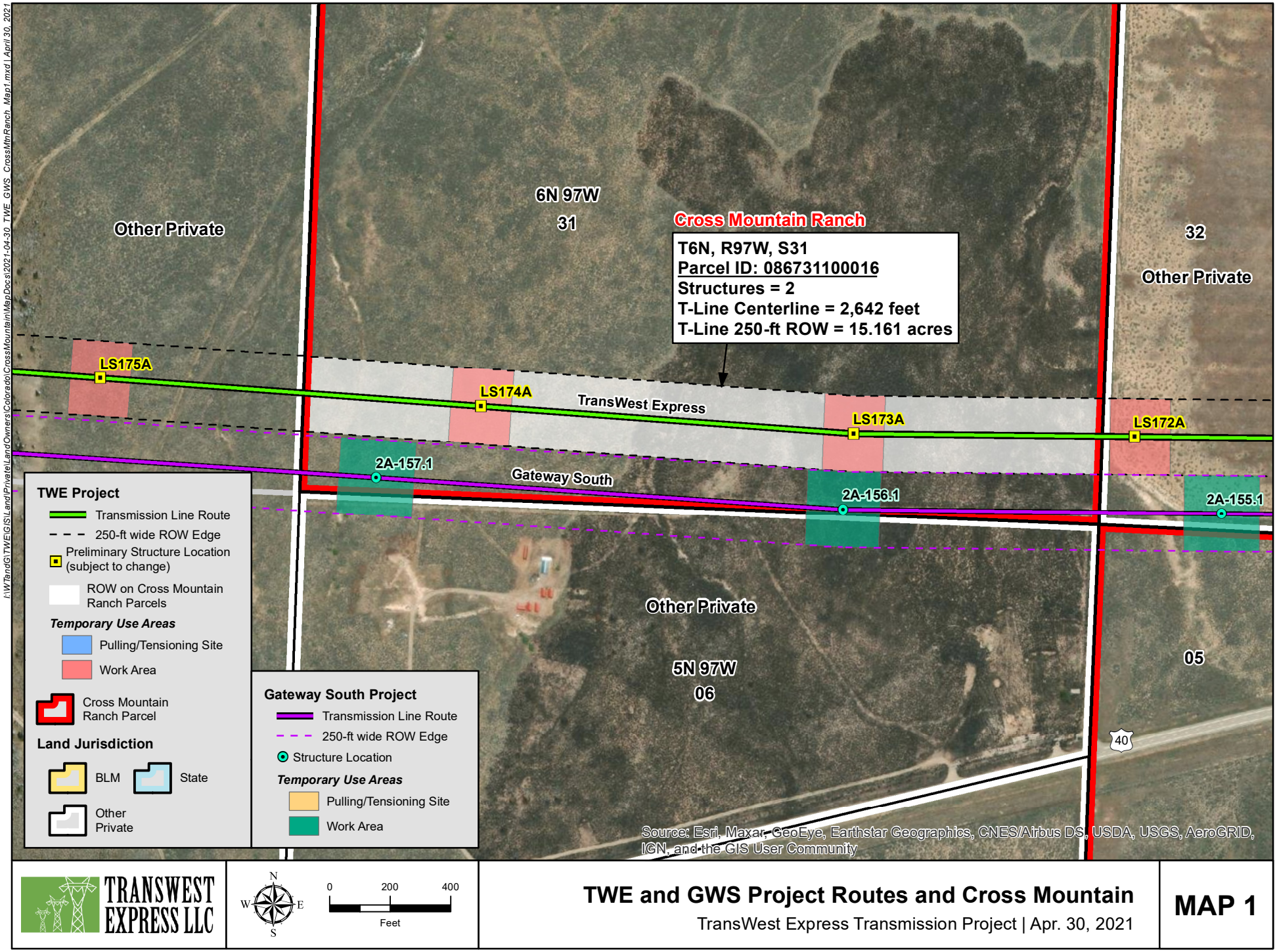
TWE and GWS Project Routes and Cross Mountain
TransWest Express Transmission Project | Apr. 30, 2021
OVERVIEW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Other Private
6N 97W
31
Cross Mountain Ranch
T6N, R97W, S31
Parcel ID: 086731100016
Structures = 2
T-Line Centerline = 2,642 feet
T-Line 250-ft ROW = 15.161 acres
32
Other Private
LS175A
LS174A
TransWest Express
LS173A
LS172A
2A-157.1
Gateway South
2A-156.1
2A-155.1
Other Private
5N 97W
06
05
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TWE Project
Transmission Line Route
250-ft wide ROW Edge
Preliminary Structure Location (subject to change)
ROW on Cross Mountain Ranch Parcels
Temporary Use Areas
Pulling/Tensioning Site
Work Area
Cross Mountain Ranch Parcel
Land Jurisdiction
BLM
State
Other Private
Gateway South Project
Transmission Line Route
250-ft wide ROW Edge
Structure Location
Temporary Use Areas
Pulling/Tensioning Site
Work Area
Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community
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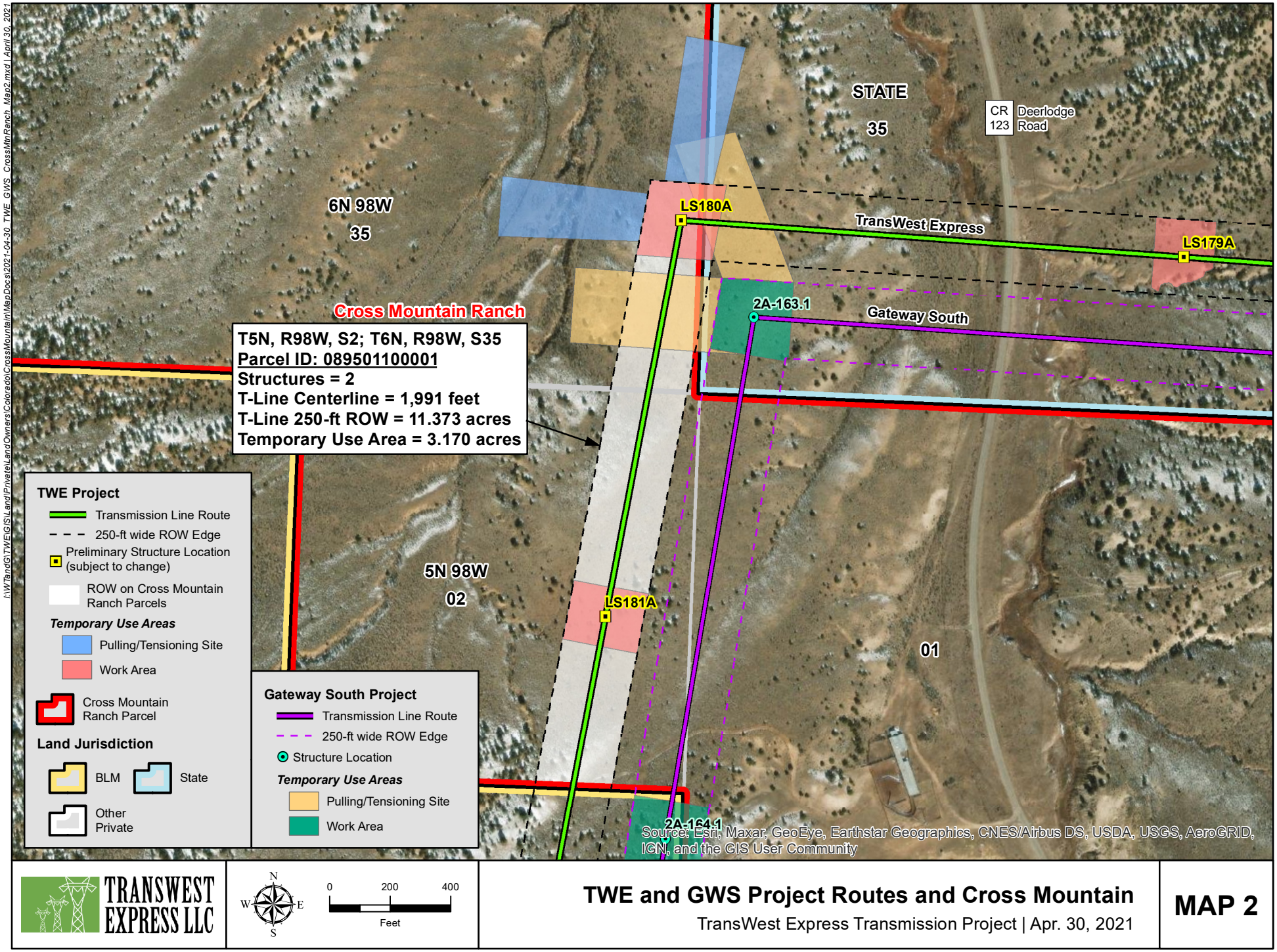
Feet
TWE and GWS Project Routes and Cross Mountain
TransWest Express Transmission Project | Apr. 30, 2021
MAP 1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STATE
35
CR 123 Deerlodge Road
6N 98W
35
LS180A
TransWest Express
LS179A
2A-163.1
Gateway South
Cross Mountain Ranch
T5N, R98W, S2; T6N, R98W, S35
Parcel ID: 089501100001
Structures = 2
T-Line Centerline = 1,991 feet
T-Line 250-ft ROW = 11.373 acres
Temporary Use Area = 3.170 acres
5N 98W
02
LS181A
01
2A-164.1
TWE Project
Transmission Line Route
250-ft wide ROW Edge
Preliminary Structure Location (subject to change)
ROW on Cross Mountain Ranch Parcels
Temporary Use Areas
Pulling/Tensioning Site
Work Area
Cross Mountain Ranch Parcel
Land Jurisdiction
BLM
State
Other Private
Gateway South Project
Transmission Line Route
250-ft wide ROW Edge
Structure Location
Temporary Use Areas
Pulling/Tensioning Site
Work Area
Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community
TRANSWEST EXPRESS LLC
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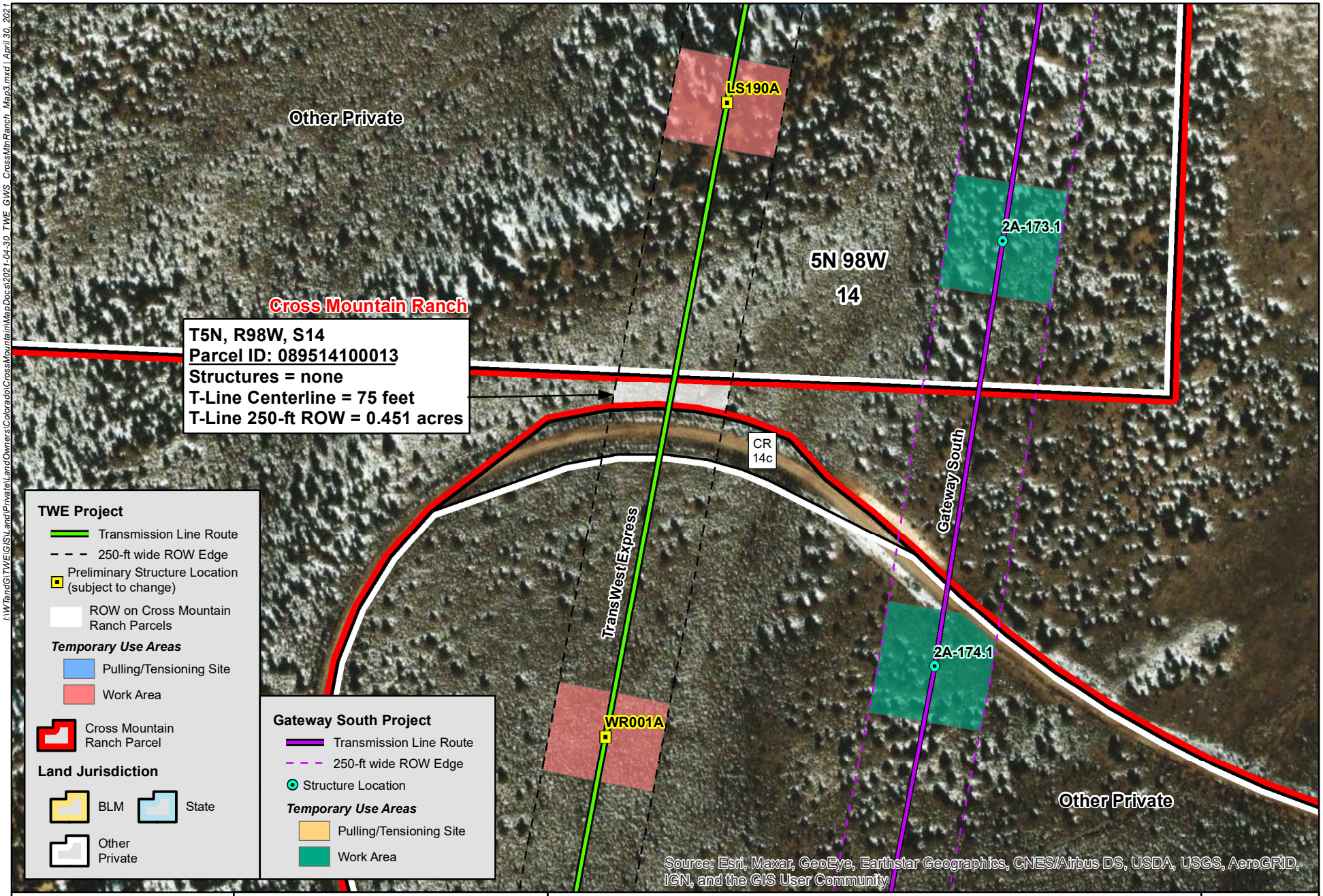
Feet
TWE and GWS Project Routes and Cross Mountain
TransWest Express Transmission Project | Apr. 30, 2021
MAP 2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Other Private
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2A-173.1
5N 98W
14
Cross Mountain Ranch
T5N, R98W, S14
Parcel ID: 089514100013
Structures = none
T-Line Centerline = 75 feet
T-Line 250-ft ROW = 0.451 acres
CR 14c
TransWest Express
Gateway South
2A-174.1
WR001A
Other Private
TWE Project
Transmission Line Route
250-ft wide ROW Edge
Preliminary Structure Location (subject to change)
ROW on Cross Mountain Ranch Parcels
Temporary Use Areas
Pulling/Tensioning Site
Work Area
Cross Mountain Ranch Parcel
Land Jurisdiction
BLM
State
Other Private
Gateway South Project
Transmission Line Route
250-ft wide ROW Edge
Structure Location
Temporary Use Areas
Pulling/Tensioning Site
Work Area
Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community
TRANSWEST EXPRESS LLC
N
W
E
S
0
200
400
Feet
TWE and GWS Project Routes and Cross Mountain
TransWest Express Transmission Project | Apr. 30, 2021
MAP 3

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-03603-WJM-NYW

TRANSWEST EXPRESS LLC, a Delaware limited liability company,

Plaintiff,

and

PACIFICORP, an Oregon Corporation,

Plaintiff-Intervenor,

v.

THOMAS VILSACK, Secretary of the United States Department of Agriculture; et al.,

Defendants,

and

CROSS MOUNTAIN RANCH LIMITED PARTNERSHIP, a California limited partnership; and COLORADO CATTLEMEN'S AGRICULTURAL LAND TRUST,

Defendants-Intervenors.

DECLARATION OF GARRY L. MILLER

I, Garry L. Miller, declare:

1. I have been employed by TransWest Express LLC ("TransWest") and have been actively involved in the development of the TransWest Express Transmission Project ("TWE Project" or "Project") since 2008. At all relevant times, I held the position of Vice President, Land and Environmental Affairs. I retired from this position on March 15, 2021 but continue to work part-time for TransWest on land and environmental projects. I have personal knowledge of the facts set forth below, and if called as a witness, I could and would testify competently thereto.

2. The purpose of this declaration is to explain TransWest's interest in making sure that the route selected for the TWE Project is the most environmentally sound route and minimizes adverse impacts. Protecting this interest necessarily includes challenging a decision by the Natural Resources Conservation Service ("NRCS") to create a conservation easement on the Cross Mountain Ranch. That conservation easement is blocking the most environmentally sound route as determined by the Bureau of Land Management ("BLM") and other federal agencies in an Environmental Impact Statement ("EIS"). NRCS made the decision to create the conservation easement, and to prohibit transmission lines on the easement, without conducting any environmental analysis of the consequences of that decision, and without participating in the EIS for the TWE Project.

3. The TWE Project is a high voltage electric transmission system that will extend about 730 miles across Wyoming, Colorado, Utah, and Nevada. The northern terminal of the TWE Project will be co-located with the 3,000-megawatt Chokecherry and Sierra Madre Wind Energy Project ("CCSM Project"). The CCSM Project is being developed by a TransWest affiliate and is now under construction near Sinclair, Wyoming. The CCSM Project is one of the largest wind energy projects in North America.

4. The TWE Project will provide the transmission infrastructure and capacity necessary to reliably and cost-effectively deliver 3,000 megawatts, or approximately 20,000 gigawatt hours per year, of renewable wind energy generated in Wyoming to markets in the southwestern United States. By interconnecting in both Utah and Nevada with the electrical grid serving the western United States, the Project will make Wyoming wind energy available throughout the west. At the same time, the Project will facilitate region-wide access to excess solar energy generated in the Desert Southwest that currently is being "curtailed" (i.e., wasted).

5. Numerous studies have identified wind energy and solar energy as the most economic large-scale renewable energy resources that can be used to meet public demand for renewable energy. However, developable solar and wind resources are typically found in remote areas located far from the urban centers where the demand is the greatest. Thus, renewable energy development that will meet both the public's demand for energy and the environmental policy objectives of western states necessarily requires new transmission infrastructure.

6. About two-thirds of the TWE Project will be located on federal land managed by the BLM. Another federal agency, the Western Area Power Administration ("WAPA"), a power marketing agency within the U.S. Department of Energy, is a financial partner in the Project. Accordingly, the Project's route and many other aspects of its development have been determined by these two federal agencies, whose specific decisions have been based on a comprehensive EIS they completed pursuant to the National Environmental Policy Act ("NEPA") following almost five years of environmental analysis.

7. From the Project's inception, the primary purposes of the Project have included the environmental objective of replacing fossil fuels with renewable energy sources and doing so in an environmentally responsible manner. As stated by several environmental groups who commented on the EIS for the TWE Project, "Generation and transmission of well-designed renewable energy solutions are needed for transitioning away from the dirty sources of energy that are altering our climate and threatening wildlands, wildlife, water, public and economic health, and our national security. *It is also critically important that the development of those renewable energy solutions do not unnecessarily damage the natural resources we are simultaneously working to conserve*." AR 1341, 1348 (emphasis added). TransWest shares these same interests with environmental groups.

8. TransWest's claim that the NRCS did not comply with NEPA in creating the conservation easement is based on the fact that, unless the conservation easement is vacated or changed so as to allow the TWE Project to go through the Cross Mountain Ranch lands on the route approved by BLM, TransWest will be forced to attempt to re-route the Project on other lands with more adverse impacts to the environment – if a re-route is even possible. If a re-route is not possible, then the conservation easement threatens the viability of a project that was designated in 2011 as one of seven high priority projects for the country. It makes no sense that NRCS can make a decision blocking the route selected by the expert land management agencies after many years of study, without having conducted any environmental study of its own.

9. In 2008, when TransWest applied to the BLM for a right-of-way across federal lands, it described the purpose and expected benefits of the Project in BLM's Standard Form 299 - Application for Transportation, Utility Systems, Telecommunications and Facilities on Federal Lands and Property. TransWest stated: "The purpose of the TWE Project is to provide the transmission infrastructure and capacity necessary to reliably and cost-effectively deliver approximately 20,000 GWh/yr of electric power generated in Wyoming to the [Desert Southwest Region]." TransWest explained that the TWE Project is "designed to meet the overall electricity power needs *in an environmentally responsible manner*," and "will be constructed and maintained in accordance with the applicable managing agencies' best management practices (BMPs) *to minimize or reduce environmental effects*."

10. In 2016, in its Plan of Development attached as Appendix D to the Final EIS, TransWest again stated that its objectives for the Project included "allow[ing] consumers access to renewable energy sources and contribut[ing] to meeting national, regional, and state energy and environmental policies, including state-mandated renewable energy portfolio and greenhouse gas reduction targets." SR 9255.

11. As an attachment to the Plan of Development, TransWest provided an Avian Protection Plan (Appendix B) that explained: "[T]he company guides its operations under environmental programs and principles led by a dedicated environmental team with over 50 years of experience in the energy development, generation and transmission industries. TransWest also retained independent consultants, ecologists and biologists to help the firm develop a comprehensive wildlife conservation strategy. Designed to avoid and minimize potential impacts on wildlife in general and avian species in particular, the strategy is based on science and best practices…." SR 6421.

12. TransWest's commitment to developing the Project has been publicly recognized by both the environmental community and the business press. For example, in 2013, following BLM's publication of its Draft EIS, Erin Lieberman, Defenders of Wildlife's Western policy adviser for renewable energy and wildlife in Sacramento, California was quoted in E&E News as saying of TransWest: "I would say that the developer reached out early to the conservation community and has maintained a willingness to work with us to look at resource impacts and to have conversations about how to avoid impacts. We are very appreciative of that." https://subscriber.politicopro.com/article/eenews/1059983876 (Accessed 7/30/21).

13. In the same vein, Business Wire reported in 2016 that "TransWest has committed to hundreds of project-specific mitigation measures, best management practices and conservation actions designed to avoid, minimize and mitigate potential impacts of this infrastructure project to the environment." https://www.businesswire.com/news/home/20161213006211/en/Interior-Department-Approves-Record-Decision-TransWest-Express (Accessed 7/30/21).

14. TransWest's own website emphasizes that its objectives are both to benefit the environment, and to develop the Project in the most environmentally-sound manner possible. The website states:

> The TWE Project will deliver enough clean, sustainable energy to power more than 1.8 million homes in densely populated areas of the country, thereby reducing the need for these regions to depend on fossil-fuel electric generating sources. Among the environmental benefits of the TWE Project and the wind electricity it will carry: Reduce greenhouse-gas emissions equivalent to taking 1.5 million cars from the road. Reduce greenhouse-gas emissions equivalent to shutting down 1,062 MW of coal generation.

http://www.transwestexpress.net/about/benefits.shtml (Accessed 7/30/21)

15. TransWest's website also states:

> The TWE Project not only will ensure delivery of a vital renewable wind-energy resource for a growing America but also will … support environmental protection…. When TransWest Express LLC acquired the development rights to the Project … it also took on the responsibility of developing the 700- to 800-mile transmission line in a sensible, balanced and sustainable way.

http://www.transwestexpress.net/stewardship/index.shtml (Accessed 7/30/21)

16. During the course of the EIS process, TransWest worked with BLM and other agencies in identifying possible transmission line routes through the area near U.S. Highway 40 in Moffat County, Colorado, where the Cross Mountain Ranch is located. As explained in the Draft and Final EISs, all of the routes studied in the EIS had to go through some portion of the Cross Mountain Ranch. That was a function of the extensive land holdings of the Ranch. There was simply no feasible way to avoid crossing some portion of the Ranch.

17. For some time, TransWest preferred a route that went on the south side of U.S. Highway 40, where the Cross Mountain Ranch and the Tuttle Ranch own adjoining lands. But

after learning of the views of Colorado Parks and Wildlife and the U.S. Fish and Wildlife Service – both of which objected to the route on the south side of the highway because of greater impacts to wildlife, including sage-grouse – TransWest ultimately supported the alternative routes on the north side of the highway. The BLM and other agencies involved in the EIS, including the National Park Service, concluded that the most environmentally sound route for the Project was "Tuttle Option 4," which goes through a small portion of the Cross Mountain Ranch (less than one mile on the edge of the Ranch boundaries). TransWest agreed with and supported the agencies' conclusion that this was the best route overall to minimize environmental impacts.

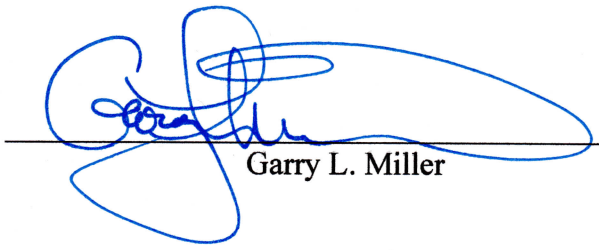
18. TransWest has agreed to follow hundreds of conditions to ensure protection of environmental resources on the route selected. TransWest worked with BLM in developing these conditions to protect the environment and minimize environmental impacts, because the goal of the Project is to provide renewable energy while avoiding or minimizing adverse impacts. These environmental conditions are set forth primarily in Appendix F to BLM's Record of Decision. SR 10606.

19. As testament to the thoroughness and care of BLM's NEPA process, and the comprehensive set of environmental commitments made by TransWest, no one ever filed any legal challenge to any aspect of BLM's decision-making process, and the statute of limitations has now expired for any potential challenge to BLM's Final EIS, ROD, or ROW Grant.

20. In summary, for the past 13 years, TransWest has dedicated itself to developing a project that directly supports critical environmental objectives including the reduction of greenhouse gases, and to ensuring that the Project itself is routed, built, and operated in the most environmentally-sound manner. Because of its demonstrated commitment to these

objectives, TransWest has a direct interest in ensuring that BLM's NEPA process, and the decisions resulting from that process, are not undermined by a conservation easement issued by NRCS without any environmental study under NEPA.

I declare under penalty of perjury under the laws of the United States and the State of Colorado that the foregoing is true and correct, and that this Declaration was executed on August 1, 2021, in Denver, Colorado.



Garry L. Miller

EXHIBIT C

U.S. Department of Agriculture Natural Resources Conservation Service NRCS-CPA-52 4/2013 **ENVIRONMENTAL EVALUATION WORKSHEET**	**A. Client Name:** **B. Conservation Plan ID #** (as applicable)**:** **Program Authority** (optional)**:**
D. Client's Objective(s) (purpose):	**C. Identification #** (farm, tract, field #, etc as required)**:**

E. Need for Action:	**H. Alternatives**		
	No Action √ if RMS ☐	***Alternative 1*** √ if RMS ☐	***Alternative 2*** √ if RMS ☐

Resource Concerns

In Section "F" below, analyze, record, and address concerns identified through the Resources Inventory process. (See FOTG Section III - Resource Planning Criteria for guidance).

F. Resource Concerns and Existing/ Benchmark Conditions (Analyze and record the existing/benchmark conditions for each identified concern)	**I. Effects of Alternatives**					
	No Action		***Alternative 1***		***Alternative 2***	
	Amount, Status, Description *(Document both short and long term impacts)*	**√ if does NOT meet PC**	**Amount, Status, Description** *(Document both short and long term impacts)*	**√ if does NOT meet PC**	**Amount, Status, Description** *(Document both short and long term impacts)*	**√ if does NOT meet PC**
SOIL: *EROSION*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
SOIL: *SOIL QUALITY DEGRADATION*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
WATER: *EXCESS / INSUFFICIENT WATER*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
WATER: *WATER QUALITY DEGRADATION*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC

F. Resource Concerns and Existing/ Benchmark Conditions (Analyze and record the existing/benchmark conditions for each identified concern)	I. (continued)					
	No Action		*Alternative 1*		*Alternative 2*	
	Amount, Status, Description *(Document both short and long term impacts)*	**√ if does NOT meet PC**	**Amount, Status, Description** *(Document both short and long term impacts)*	**√ if does NOT meet PC**	**Amount, Status, Description** *(Document both short and long term impacts)*	**√ if does NOT meet PC**
AIR: *AIR QUALITY IMPACTS*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
PLANTS: *DEGRADED PLANT CONDITION*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
ANIMALS: *INADEQUATE HABITAT FOR FISH AND WILDLIFE*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
ANIMALS: *LIVESTOCK PRODUCTION LIMITATION*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
ENERGY: *INEFFICIENT ENERGY USE*						
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
		☐ NOT meet PC		☐ NOT meet PC		☐ NOT meet PC
HUMAN: *ECONOMIC AND SOCIAL CONSIDERATIONS*						

Special Environmental Concerns: Environmental Laws, Executive Orders, policies, etc.

In Section "G" complete and attach Environmental Procedures Guide Sheets for documentation as applicable. Items with a "●" may require a federal permit or consultation/coordination between the lead agency and another government agency. In these cases, effects may need to be determined in consultation with another agency. Planning and practice implementation may proceed for practices not involved in consultation.

G. Special Environmental Concerns (Document existing/ benchmark conditions)	J. Impacts to Special Environmental Concerns					
	No Action		*Alternative 1*		*Alternative 2*	
	Document all impacts (Attach Guide Sheets as applicable)	√ if needs further action	Document all impacts (Attach Guide Sheets as applicable)	√ if needs further action	Document all impacts (Attach Guide Sheets as applicable)	√ if needs further action
●Clean Air Act *Guide Sheet FS1 FS-2*		☐		☐		☐
●Clean Water Act / Waters of the U.S. *Guide Sheet Fact Sheet*		☐		☐		☐
●Coastal Zone Management *Guide Sheet Fact Sheet*		☐		☐		☐
Coral Reefs *Guide Sheet Fact Sheet*		☐		☐		☐
●Cultural Resources / Historic Properties *Guide Sheet Fact Sheet*		☐		☐		☐
●Endangered and Threatened Species *Guide Sheet Fact Sheet*		☐		☐		☐
Environmental Justice *Guide Sheet Fact Sheet*		☐		☐		☐
●Essential Fish Habitat *Guide Sheet Fact Sheet*		☐		☐		☐
Floodplain Management *Guide Sheet Fact Sheet*		☐		☐		☐
Invasive Species *Guide Sheet Fact Sheet*		☐		☐		☐
●Migratory Birds/Bald and Golden Eagle Protection Act *Guide Sheet Fact Sheet*		☐		☐		☐
Natural Areas *Guide Sheet Fact Sheet*		☐		☐		☐
Prime and Unique Farmlands *Guide Sheet Fact Sheet*		☐		☐		☐
Riparian Area *Guide Sheet Fact Sheet*		☐		☐		☐
Scenic Beauty *Guide Sheet Fact Sheet*		☐		☐		☐

•Wetlands *Guide Sheet* *Fact Sheet*	☐	☐	☐
•Wild and Scenic Rivers *Guide Sheet* *Fact Sheet*	☐	☐	☐

K. Other Agencies and Broad Public Concerns	***No Action***	***Alternative 1***	***Alternative 2***
Easements, Permissions, Public Review, or Permits Required and Agencies Consulted.			
Cumulative Effects Narrative (Describe the cumulative impacts considered, including past, present and known future actions regardless of who performed the actions)			
L. Mitigation (Record actions to aviod, minimize, and compensate)			
M. Preferred Alternative √ preferred alternative	☐	☐	☐
Supporting reason			

N. Context (Record context of alternatives analysis)

The significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.

O. Determination of Significance or Extraordinary Circumstances

Intensity: Refers to the severity of impact. Impacts may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

If you answer ANY of the below questions "yes" then contact the State Environmental Liaison as there may be extraordinary circumstances and significance issues to consider and a site specific NEPA analysis may be required.

Yes	No	
☐	☐	• Is the preferred alternative expected to cause significant effects on public health or safety?
☐	☐	• Is the preferred alternative expected to significantly affect unique 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?
☐	☐	• Are the effects of the preferred alternative on the quality of the human environment likely to be highly controversial?
☐	☐	• Does the preferred alternative have highly uncertain effects or involve unique or unknown risks on the human environment?
☐	☐	• Does the preferred alternative establish a precedent for future actions with significant impacts or represent a decision in principle about a future consideration?
☐	☐	• Is the preferred alternative known or reasonably expected to have potentially significant environment impacts to the quality of the human environment either individually or cumulatively over time?
☐	☐	• Will the preferred alternative likely have a significant adverse effect on ANY of the special environmental concerns? Use the Evaluation Procedure Guide Sheets to assist in this determination. This includes, but is not limited to, concerns such as cultural or historical resources, endangered and threatened species, environmental justice, wetlands, floodplains, coastal zones, coral reefs, essential fish habitat, wild and scenic rivers, clean air, riparian areas, natural areas, and invasive species.
☐	☐	• Will the preferred alternative threaten a violation of Federal, State, or local law or requirements for the protection of the environment?

P. To the best of my knowledge, the data shown on this form is accurate and complete:

In the case where a non-NRCS person (e.g. a TSP) assists with planning they are to sign the first signature block and then NRCS is to sign the second block to verify the informations accuracy.

Signature (TSP if applicable)	Title	Date
Signature (NRCS)	**Title**	**Date**

If preferred alternative is not a federal action where NRCS has control or responsibility and this NRCS-CPA-52 is shared with someone other than the client then indicate to whom this is being provided.

The following sections are to be completed by the Responsible Federal Official (RFO)

NRCS is the RFO if the action is subject to NRCS control and responsibility (e.g.,actions financed, funded, assisted, conducted, regulated, or approved by NRCS). These actions do not include situations in which NRCS is only providing technical assistance because NRCS cannot control what the client ultimately does with that assistance and situations where NRCS is making a technical determination (such as Farm Bill HEL or wetland determinations) not associated with the planning process.

Q. NEPA Compliance Finding (check one)

The preferred alternative:		**Action required**
☐	1) is **not a federal action** where the agency has control or responsibility.	Document in "R.1" below. No additional analysis is required
☐	2) is a federal action **ALL** of which is **categorically excluded** from further environmental analysis **AND** there are **no extraordinary circumstances as identifed in Section "O".**	Document in "R.2" below. No additional analysis is required
☐	3) is a federal action that has been **sufficiently analyzed** in an existing Agency state, regional, or national NEPA document **and** there are no predicted significant adverse environmental effects or extraordinary circumstances.	Document in "R.1" below. No additional analysis is required.
☐	4) is a federal action that has been sufficiently analyzed in another Federal agency's NEPA document (EA or EIS) that addresses the proposed NRCS action and its' effects **and has been formally adopted by NRCS**. NRCS is required to prepare and publish its own Finding of No Significant Impact for an EA or Record of Decision for an EIS when adopting another agency's EA or EIS document. (**Note: This box is not applicable to FSA)**	Contact the State Environmental Liaison for list of NEPA documents formally adopted and available for tiering. Document in "R.1" below. No additional analysis is required
☐	5) is a federal action that has **NOT** been sufficiently analyzed or may involve predicted significant adverse environmental effects or extraordinary circumstances and may require an EA or EIS.	Contact the State Environmental Liaison. Further NEPA analysis required.

R. Rationale Supporting the Finding

R.1 Findings Documentation	
R.2 Applicable Categorical Exclusion(s) **(more than one may apply)**	
7 CFR Part 650 *Compliance With NEPA* , subpart 650.6 *Categorical Exclusions* states prior to determining that a proposed action is categorically excluded under paragraph (d) of this section, the proposed action must meet six sideboard criteria. See NECH 610.116.	

I have considered the effects of the alternatives on the Resource Concerns, Economic and Social Considerations, Special Environmental Concerns, and Extraordinary Circumstances as defined by Agency regulation and policy and based on that made the finding indicated above.

S. Signature of Responsible Federal Official:

Signature	**Title**	**Date**

Additional notes