IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-03603-WJM-STV

TRANSWEST EXPRESS LLC, a Delaware limited liability company,

Plaintiff,

and

PACIFICORP, an Oregon Corporation,

Plaintiff-Intervenor,

v.

SONNY PERDUE, Secretary of the United States Department of Agriculture,
KEVIN NORTON, Acting Chief of the Natural Resources Conservation Service, and
CLINT EVANS, State Conservationist for the Colorado State Office of the Natural Resources Conservation Service,

Defendants,

and

CROSS MOUNTAIN RANCH LIMITED PARTNERSHIP, a California Limited Partnership, and
COLORADO CATTLEMEN'S AGRICULTURAL LAND TRUST,

Defendant-Intervenors.

DEFENDANTS' CONSOLIDATED RESPONSE BRIEF ON THE MERITS

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Defendants Sonny Perdue, Kevin Norton,[1] and Clint Evans submit this consolidated response to Plaintiff-Intervenor PacifiCorp's Opening Brief and Plaintiff TransWest Express, LLC's Opening Brief.[2] ECF Nos. 103, 104.

INTRODUCTION

This case arises out of a conflict between a conservation easement (the "Easement") that restricts the development of some 16,000 acres of property owned by the Cross Mountain Ranch LLC ("CMR") in northwest Colorado (the "Property"), and the construction by Plaintiff TransWest Express, LLC ("TWE") of a power transmission line whose planned route crosses the Easement (the "TWE Project"). Intervenor-Plaintiff PacifiCorp plans to construct a power transmission line (the "PacifiCorp Project") over the same route. The Easement was acquired from CMR and recorded on December 24, 2014, by the Colorado Cattlemen's Association Land Trust ("CCALT"), as memorialized in a recorded easement deed (the "Deed"). *See* AR6685-6751. Half of the funds used to acquire the Easement were provided by the Natural Resources Conservation Service ("NRCS"), an agency of the United States Department of Agriculture ("USDA"), pursuant to the Farm and Ranch Lands Protection Program (the "FRPP").

[1] Plaintiff's complaint names Matthew Lohr, former Chief of the Natural Resources Conservation Service. This position is now held, on an acting basis, by Kevin Norton. Pursuant to Fed. R. Civ. P. 25(d), he is automatically substituted as Defendant. The case caption has been adjusted accordingly.

[2] PacifiCorp's brief incorporates by reference the arguments set forth in TWE's brief. ECF No. 103 at 4 n.1.

Pursuant to the Deed, NRCS, on behalf of the United States, received interests through the deed as a third-party beneficiary. Clause 25 of the Deed grants the United States "the right of enforcement in order to protect the public investment [in the Easement]." AR6707. Also under Clause 25, "the United States may exercise this right of enforcement under any authority available under State or Federal law if Grantee fails to enforce any of the terms of this Deed." *Id.* Pursuant to 7 C.F.R. §1491.22(d), the contingent right of enforcement granted by Clause 25 is a vested federal property right, and cannot be condemned under state law. *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). The Deed also provides in Clause 31 that, "because the United States has an interest in this Easement, the United States must consent to any termination, extinguishment, eminent domain, and/or condemnation action involving the Property." AR6710.

The Colorado Department of Natural Resources also contributed funding to purchase the Easement for the use and benefit of Colorado Parks and Wildlife ("CPW"). AR6685. Under Clause 24.B of the Deed, CPW, like NRCS, acquired a right of enforcement. CPW is not a party to this action. AR6707.

TWE and PacifiCorp (together, "Plaintiffs") contend that, by funding and approving acquisition of the Easement, Defendants violated the National Environmental Protection Act ("NEPA"), the provisions of the Agricultural Conservation Easement Program ("ACEP"), and regulations under the FRPP. ECF No. 40 ¶ 1; ECF No. 61 ¶ 4. They have brought identical claims pursuant to the Administrative Procedure Act ("APA"). ECF No. 40 at 18-23; ECF No. 61 at 19-23.

For the reasons set forth herein, Plaintiffs' claims fail.

STATUTORY AND REGULATORY FRAMEWORK

I. The FRPP and ACEP

In 1996, Congress authorized the Secretary of Agriculture to establish the Farmland Protection Program—later renamed the Farm and Ranch Land Protection Program. Pub. L. No. 104-127 § 388 (Apr. 4, 1996). The FRPP was reauthorized in 2002 by the Farm Security and Rural Investment Act, and again in 2008 by the Food, Conservation, and Energy Act. Pub. L. No. 107-171 (May 13, 2002); Pub. L. No. 110-234 (May 22, 2008). Under the FRPP, the Secretary of Agriculture, acting through NRCS, was authorized to facilitate and provide funding for the purposes of conservation easements and other interests in land. The purpose of the program was to protect the agricultural use and related conservation values of enrolled land by limiting its non-agricultural uses. 74 Fed. Reg. 2810 (Jan. 16, 2009); Pub. L. No. 110-234 § 12381(b). To implement the 2008 legislation, NRCS published an interim final rule for the FRPP on January 16, 2009. *Id.* at 2809. These regulations were finalized on January 24, 2011. 76 Fed. Reg. 4027.

In 2014, the FRPP was superseded, under the 2014 Farm Bill, by ACEP. Pub. L. No. 113-79, 128 Stat. 649 (2014). Among the purposes of ACEP was to combine the purposes and coordinate the functions of the FRPP with those of other, similar programs to conserve grassland and wetlands. Pub. L. No. 113-17 § 1265(b)(1). Another purpose—similar to that of the FRPP—was to "protect the agricultural use and

future viability, and related conservation values, of eligible land by limiting non-agricultural uses of that land." *Id*. § 1265(b)(3).

ACEP incorporated two sets of provisions to provide for the transition from the FRPP to ACEP. The first, Section 2704, was a grandfather clause for the FRPP. Under Section 2704, ACEP did "not affect the validity or terms of any agreement or easement entered into by the Secretary of Agriculture" under the FRPP. Pub. L. No. 113-17 § 2704(b)(1). Additionally, "any funds made available to carry out the farmland protection program … for fiscal years 2009 through 2013" were "made available to carry out agreements and easements … that were entered into prior to the date of enactment" of ACEP. *Id.* § 2704(b)(2)(A). Even if FRPP funds were not available, the Secretary was permitted to use funds made available to carry out ACEP "to continue to carry out [FRPP] agreements and easements … using the provisions of law and regulation applicable to such agreements and easements … on the day before the date of enactment of [ACEP]." *Id.* § 2704(b)(2)(B). In short, Section 2704 ensured that ACEP did not affect lands enrolled in the FRPP prior to February 7, 2014.

The second transitional provision, Section 2712, was a temporary administration provision for ACEP. *Id.* § 2712. This section directed that FRPP regulations (along with regulations for other ACEP predecessor programs) would be used to implement ACEP for 270 days after the enactment of the 2014 Farm Bill—*i.e*., through November 4, 2014. *Id.* § 2712(b),(d). After that date, ACEP would be implemented "in accordance with any final regulations that the Secretary consider[ed] necessary to carry out" the program.[3]

[3] Presumably, Congress expected that this would allow sufficient time for the

Id. § 2712(e). There is no language in Section 2712 to suggest that the expiration of the 270-day period for ACEP to be administered under FRPP regulations had any effect on the implementation of FRPP agreements and easements grandfathered under Section 2704.

II. NEPA

Under NEPA, an environmental impact statement ["EIS"] must be prepared for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). Under Title II of NEPA, the Council on Environmental Quality ("CEQ") in the Executive Office of the President was established. 42 U.S.C. § 4342. CEQ was then charged with issuing binding regulations for NEPA's implementation. Exec. Order 11991, 42 Fed. Reg. 26967 (May 24, 1977).

Because it may not be readily apparent whether the environment impacts of a federal action will be "significant," CEQ regulations establish the three classes of federal action, each associated with its own form of NEPA documentation. First, when it is known that the action will have a significant environmental impact, the agency must prepare an EIS. *See* 40 C.F.R. § 1502.3. Second, when the significance of environmental impacts is uncertain, the agency must prepare an Environmental Assessment, which determines whether an EIS is necessary. *See* 40 C.F.R. § 1501.5. If an EIS is necessary, the agency prepares one. If not, the agency issues a "finding of no significant impact" ("FONSI"). *See* 40 C.F.R. § 1501.6. Third, actions that normally

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promulgation of new ACEP regulations. In fact, NRCS published interim rules for ACEP one February 27, 2015. It published final rules on October 18, 2016.

do not have a significant environmental impact may be deemed "categorically excluded," by agency regulation. *See* 40 C.F.R. § 1501.4.

When an EIS is required, it is typically completed in two stages. *See* 40 C.F.R. § 1502.9. First, a draft EIS is prepared. *Id.* § 1502.9(b). As BLM noted in the context of the TWE Project, a draft EIS is not a decision document. SR01670. Its purpose is to inform the public and interested parties of the relative impacts of the proposed action and alternatives, and to solicit comments from other agencies and the public. *Id.* A subsequent, final EIS generally responds to any participating agency comments and addresses any inadequacies in the draft EIS. 40 C.F.R. § 1502.9(c). A supplemental EIS may be required in some instances. *Id.* § 1502.9(d). Once the final EIS is approved and the agency decides to take action, the lead agency prepares a public record of decision ("ROD"). 40 C.F.R. § 1505.2. It is not until the ROD issues that an agency's action may proceed.

In some cases—for example, when an agency adopts a program or policy—an agency may take a "tiered" approach to NEPA review. *See* 40 C.F.R. § 1501.11. This approach entails preparation of a broadly focused EIS or EA. *Id.* This may then be followed by a more narrowly-focused, site-specific review for any subsequently implemented projects. *Id.*

After the FRPP was re-authorized and amended by the 2008 Food, Conservation, and Energy Act, NRCS took a tiered approach to NEPA review. In January 2009, it published a Programmatic Environmental Assessment for the FRPP (the "Programmatic EA"). AR0015-68. It used the Programmatic EA "to assist the

agency in determining whether promulgation of the proposed rule and implementation of FRPP [would] significantly affect the quality of the human environment. AR00018. The purpose was to "evaluate the broad impacts of the program and provide information for national rulemaking." *Id.* NRCS used the Programmatic EA to "determin[e] whether implementation of the FRPP [would] significantly affect the quality of the human environment, such that NRCS must prepare an EIS." *Id.* It compared the agency-preferred alternative—*i.e.*, implementation of the FRPP—to the "no action" alternative in the context of impacts to resources including soils, water, air quality, biological resources, cultural resources, and economic and social consideration. AR 0024-56. It also evaluated cumulative and indirect impacts of the FRPP. *Id.* On the basis of the Programmatic EA, the Chief of NRCS issued a FONSI. AR0065-68.

STATEMENT OF FACTS

Under the FRPP, NRCS was empowered to enter into "cooperative agreements" with entities who met statutory and regulatory requirements for eligibility. 7 CFR § 1491.20; Pub. L. § 1238I(b). Pursuant to these cooperative agreements, NRCS would partner with eligible entities to acquire conservation easements on farm and ranch land. 7 C.F.R. § 1491.4. NRCS would provide up to 50 percent of the funds for the easement purchase. *Id.* The eligible entity would agree to acquire, hold, manage, and enforce the easement. *Id.* In order to protect the government's investment, easement deeds were required to include a federal right of enforcement. *Id.*

On June 20, 2011, NRCS entered into a 14-page cooperative agreement with CCALT (the "Cooperative Agreement"). AR4437-AR4450. By its terms, the agreement

was effective through September 20, 2015. AR4447. It obligated funds for initial easement acquisitions, but also contemplated one or more amendments to obligate additional funds in Fiscal Years 2012 and 2013, provided that CCALT submitted parcels that ranked high enough to warrant it. AR4438.

I. 2012-14: CMR applies for FRPP enrollment, and NRCS determines that the Property is eligible.

On February 23, 2012, following a meeting between representatives of NRCS and CMR, CMR submitted its initial application for FRPP consideration in Fiscal Year 2012. AR0161-63; AR0192-214. NRCS began its eligibility evaluation soon thereafter. In July 2012, the agency surveyed the soils present on the Property, and prepared a scoring worksheet addressing the management and conservation values of the Property. AR0292-324; AR0291; SR10828. In September 2012, Dave Naugle of the University of Montana, Jeremy Maestas of NRCS in Oregon, and others conducted a site visit. Maestas provided a written summary of their observations to Phyllis Philipps, the State Conservationist with NRCS's Colorado office ("NRCS-CO"). AR0621-22. Maestas wrote:

> "Sage grouse is one of a multitude of values that help justify the Cross Mountain easement. While the ranch is not entirely located within the heart of core sage grouse habitat, portions of the ranch lie within priority habitat and CC[A]LT estimates 6% of all leks[4] in CO occur on or within 0.5 mile of the deeded lands….Clearly, easement acquisition on this ranch would be a win for wildlife and ranching in CO."

[4] A "lek" is an area where sage grouse congregate in the spring, where the courtship display of the males can be easily seen by females. Leks are usually found where there is less vegetation.

AR0621. Although NRCS-CO decided to fund the application, it discovered during the process that adequate funds were not available. AR0478-480.

The following year, on March 22, 2013, Erik Glenn of CCALT contacted NRCS to inquire about renewing CMR's FRPP application for funding in 2013. AR0737. CCALT promptly prepared and submitted updates to the CMR application package. *See* AR0738-67. Over the next two months, NRCS evaluated the eligibility of the Property and the desirability of funding acquisition of the Easement under the FRPP. On April 13, 2013, the NRCS District Conservationist in the Craig, Colorado Field Office completed a scoring worksheet to evaluate the management and conservation values of the Property. AR852-54. On May 8, 2013, the NRCS State Conservationist granted a soils requirement waiver in recognition of the nature of the Property's other considerable conservation values. AR0950. On May 23, 2013, NRCS ranked the CMR application according to the criteria established in FRPP regulations. AR0967-AR0973; 7 C.F.R. § 1491.6.

On June 10, 2013, NRCS sent CCALT a letter advising that the Property had been selected for funding. SR10907. On September 20, 2013, NRCS and CCALT amended their 2011 Cooperative Agreement to provide for the CMR acquisition. AR4451-53. This amendment obligated Fiscal Year 2013 funds for the purchase of lands comprising the Easement.[5] AR4451.

[5] Plaintiffs claim that the amendment "did not commit NRCS to any particular easement configuration." This is misleading. In fact, the obligation of funds was specific to the parcel that was described at length in CMR's application, and evaluated in depth by NRCS. *See* AR0740; SR10907; *see also* AR4270-71.

II. July 2013: The Draft EIS is published, proposing a range of route alternatives for the TWE transmission line.

On July 3, 2013, a little less than a month after NRCS selected the Property for FRPP funding, the Bureau of Land Management ("BLM") publicly issued its Draft EIS for the TWE Project. SR03636. The "major federal action" analyzed by the EIS was the potential decision to grant a BLM right of way, along with U.S. Forest Service special use permits, that would allow construction of the TWE Project over federal lands. SR01669. The decisions to be made were:

- Whether to grant, grant with modification, or deny a right of way for a transmission line *on public* lands;
- Whether one or more *BLM land use plans* should be amended to allow the proposed transmission line;
- To determine the most appropriate location for the transmission line *on public lands*; and
- To determine the terms and conditions for the transmission line *on public lands* that should be applied to any right of way grant.

SR1672-73 (emphasis added).

Notably, BLM's decisions to be made did not include determining the most appropriate location for the transmission line on private lands. *See id.* Under NEPA, BLM was charged with evaluating the *environmental effects* of its decision on both public and private lands, and the location of the federal right of way would constrain the options for locating the transmission line on private lands. Therefore, BLM considered the feasibility of the various route alternatives as they crossed private land. However,

BLM had no authority to dictate where the TWE Project (or the PacifiCorp Project) would be located on non-federal lands. That decision was necessarily left to TWE.

The Draft EIS was some 1,870 pages long, and comprised an analysis of route alternatives for the TWE Project over more than 700 miles in four states. SR1667-3537; SR1676. It broke the TWE project into four regions (I, II, III, and IV). SR1678. Region I comprised Northwest Colorado, where the Property lies. *Id*. Within Region I, four alternatives were identified. SR1679-80. One of these four alternatives would avoid the Easement entirely by routing the Project further south than the other alternatives. *See* SR01787, attached as Exhibit A.[6] For the other three alternatives, BLM identified three "micro-siting options"—*i.e*., slight variations in route, each of which was compatible with any of the three alternatives. SR1680. Of these three micro-siting options, one would avoid the Property. *See* SR01796, attached as Exhibit B. In short, a route that did not conflict with the proposed Easement was an option under all four of the Region I alternatives.

The Draft EIS analyzed the micro-siting options in terms of their expected environmental impacts, particularly visual impacts for visitors to the nearby Dinosaur National Monument. SR03007-8. The analysis suggested that the micro-siting option that would avoid the Property would have the fewest impacts. *See id.*

[6] For ease of reference.

III. September 2013 to January 2014: NRCS, PacifiCorp, and TWE become aware of the potential for a conflict between the Easement and some of the proposed powerline routes.

The record reflects that NRCS first became aware of the potential for a conflict between the proposed Easement and certain Region I routes under consideration on September 5, 2013, nearly three months after NRCS selected the Property for funding. *See* AR 1094–98. The information came not from BLM, the lead agency for the EIS, but from Daly Edmunds, a Policy Coordinator at Audubon Rockies. *Id.* Edmunds advised that PacifiCorp's planned "Gateway South" transmission line was also implicated. *Id.*

PacifiCorp was aware of the potential conflict soon thereafter. AR1468-70. On October 23, 2013, Rod Fisher of PacifiCorp[7] emailed Lucas Lucero at BLM to express his concerns. *Id.* He noted that at that time, CCALT already had a $7.5 million commitment from NRCS, as well as a $1.25 million commitment from CPW and another $2 million from a private non-profit. *Id.* He complained not that the Easement would block the powerline, but that it might force PacifiCorp into exercising its right of eminent domain. *Id*.

TWE was aware of the potential conflict no later than January 17, 2014, when Sharon Knowlton—the BLM Project Manager for the TWE Project—forwarded maps from NRCS showing the proposed routes in relation to the Easement to Garry Miller, a TWE Vice President who had been actively involved in the development of the TWE project since 2008. AR1655-56; ECF No. 104-1.

[7] Fisher's email signature block reflects that he worked at the time for Rocky Mountain Power, a division of PacifiCorp.

IV. 2014: Various routes are under consideration while NRCS moves forward with acquisition of the Easement.

Throughout 2014, prior to the closing of the Easement transaction, BLM continued to evaluate several different routes for the Plaintiffs' transmission lines where they passed through Northern Colorado, and in fact developed additional routes. At no time did BLM make clear to NRCS-CO or to NRCS headquarters in Washington, DC ("NRCS-HQ") that there was an unavoidable conflict between the route and the Easement. On the contrary, BLM personnel emphasized that the route remained subject to change.

In a January 17, 2014, email to NRCS-CO, the BLM Project Manager for the TWE Project, Sharon Knowlton, offered to "provide a map that shows the location for the 'agency preferred location' that will appear in the FEIS when it is available." AR1660. But she emphasized that the location would be "by no means a final decision, it just shows the public where the BLM is likely to issue the decision." *Id.* In late January or early February, 2014, BLM communicated to NRCS-CO that its current, preferred route included a fourth micro-siting option not among the options published in the Draft EIS. AR2031. Then, on March 19, 2014, BLM shared with NRCS a map with a fifth micro-siting option that avoided the Property by way of a route to the north of the other options. AR2328, AR2332.

During the same period, NRCS repeatedly communicated to BLM that it was moving forward with acquisition of the Easement. A January 16, 2014, email from NRCS-HQ to BLM noted that NRCS was planning to contact BLM Project Manager Knowlton "to discuss specifically which route is most likely so that NRCS may proceed

with the easement." AR1652. On the same day, NRCS-CO sent Knowlton maps depicting the BLM-proposed routes in relation to the Property, remarking, "The ranch is great sage grouse property and if possible we would like to avoid having any of the transmission line crossing the property." AR1671. Knowlton responded that she would forward the maps to BLM and its contractor, "in order that everyone can weigh in on providing the 'least worst' location" for the TWE transmission line." AR1670. She then forwarded the maps to Garry Miller at TWE. AR1655. On April 8, 2014, NRCS-HQ advised BLM that it was on track for an Easement closing in August, 2014, and that NRCS was committed to keeping the acquisition on schedule. AR2405. An April 28, 2014, email recounts an April 17, 2014 call between BLM and NRCS-HQ, and advises that NRCS-HQ is willing to facilitate discussion between BLM and NRCS-CO to discuss "where the [transmission line] projects could be routed so as to avoid the easement boundary." AR2429.

After that, the record reflects no communications about a potential conflict until an October 16, 2014, email between BLM-HQ and Patrick Holmes in the USDA Office of the Secretary, in which the latter indicates that he had recently met with TWE. AR2863. The record reflects no follow-up or communications from Holms to NRCS officials.

Two contextual factors are evident from the record: First, NRCS was moving forward with the title work, appraisal, and deed approval processes necessary to close its acquisition of the Easement prior to the expiration of the purchase option agreement between CMR and CCALT. AR 2162. Second, there were delays in preparing the Final EIS. As of January 2014, BLM anticipated that it would issue the Final EIS in

September 2014, followed by the Record of Decision in late December 2014. AR1679. It did not meet these projected timelines.

V. December 2014: The Easement is purchased and the Deed is recorded.

On December 18, 2014, NRCS posted an advance payment for $3,275,500 in FRPP funds to purchase the Easement. AR4739. On December 24, 2014, the Deed was recorded. AR6685.

VI. 2015-2016: The Final EIS is published and the Record of Decision is issued.

Ultimately, BLM did not publish its Final EIS until May 1, 2015. SR03450. The ROD was issued more than a year and a half later, in December 2016. SR10762.

QUESTIONS PRESENTED

1. Whether, when it funded and approved the Easement, NRCS violated land eligibility restrictions for conservation easements under the FRPP or ACEP.

2. Whether NRCS violated NEPA when it relied on the Programmatic Environmental Assessment to fund and approve the Easement.

3. Whether NRCS acted arbitrarily and capriciously when it allegedly declined to consent to condemnation of the private interests in the Easement under Clause 31 of the Deed in December 2019.

STANDARD OF REVIEW

Challenges to an agency action filed in the district court are processed as appeals. *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1580 (10th Cir. 1994). A court's review of agency action under the APA, although "searching and careful," is "highly deferential." *Ecology Ctr. v. U.S. Forest Serv*., 451 F.3d 1183, 1188 (10th Cir.

2006) (quotation omitted); *see also Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1165 (10th Cir. 2012). A court may not set aside the agency's decision unless the court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Olenhouse*, 42 F.3d at 1574.

"An agency's action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious." *Hillsdale*, 702 F.3d at 1165. "An agency decision may be arbitrary and capricious if it fails to consider important relevant factors or if there is no rational connection between the facts found and the choice made." *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1485-86 (10th Cir. 1995) (internal quotations omitted). "The court's function is exhausted where a rational basis is found for the agency action taken." *Am. Colloid Co. v. Babbitt*, 145 F.3d 1152, 1154 (10th Cir. 1998) (internal quotation marks omitted). "Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EP*A, 540 U.S. 461, 496 (2004) (internal quotation marks omitted).

In reviewing an agency's interpretation of a statute that it is charged with administering, the Court first determines "whether Congress has directly spoken to the precise question at issue." *Aulston v. United States*, 915 F.2d 584, 588 (10th Cir. 1990) (*quoting Sullivan v. Everhart*, 494 U.S. 83 (1990)). If, in looking at "the particular statutory language at issue, as well as the language and design of the statute as a

whole," the Court determines that Congress has directly spoken on the precise question at issue, then the Court "must give effect to th[at] unambiguously expressed intent of Congress." *Id*. at 589. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute, that is, whether the agency's construction is rational and consistent with the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

ARGUMENT

I. NRCS complied with the FRPP in its determination that the Property was eligible for a conservation easement.

Plaintiffs' argument that NRCS acted contrary to law when it determined that the Property was eligible for a conservation easement is wrong. At all times relevant to acquisition of the Easement, the FRPP—not ACEP—applied. NRCS properly conducted a land eligibility determination of the Property, and properly concluded that the Property was eligible. And even if ACEP had applied, its terms would not have rendered the Property ineligible.

A. The FRPP, not ACEP, applied to NRCS's funding and approval of the Easement.

As set forth above, the FRPP was first established in 1996, and reauthorized in 2002 and 2008. Pub. L. 104-127 § 388 (Apr. 4, 1996); Pub. L. 107-171 § 2503 (May 13, 2002); Pub. L. 110-234 § [?] (May 22, 2008). On February 7, 2014, Congress repealed the FRPP and replaced it with ACEP. *See* Pub. L. No. 113-79 § 1265 *et seq.* (Feb. 7, 2014).

However, ACEP legislation included Section 2704, a grandfather clause allowing NRCS to continue to process proposed conservation easements begun under the FRPP. Pub. L. No. 113-79, § 2704(b). Specifically, where NRCS had entered into a cooperative agreement to acquire a conservation easement under FRPP authority, the provisions of the FRPP continued to apply. *Id.* ("The amendment made by this section shall not affect the validity or terms of any contract, agreement, or easement entered into by the Secretary of Agriculture under [the FRPP].")[8] In other words, ACEP did not affect pending FRPP easement transactions.

Here, NRCS had "entered into an agreement" for acquisition of the Easement under the FRPP, well prior to the enactment of ACEP. Specifically, the September 30, 2013 Cooperative Agreement obligated Fiscal Year 2013 FRPP funds for the purchase. AR4438. Under Section 2704, the "validity and terms" of the Cooperative Agreement were unaffected by the new ACEP legislation.

Plaintiffs nevertheless argue that conservation easements enrolled under the FRPP but *closed* after November 4, 2014 "had to comply with the new ACEP conditions, including [its] land eligibility restrictions" because at that point, "ACEP applied in full." ECF No. 104 at 6, 27-28 (*citing* Pub. L. No. 113-79, §§ 2712(b)–(d)). They rely for this argument on language in Section 2712 that provides for the transitional administration of ACEP. Specifically, § 2712(b) states that "with respect to

[8] Even in the event that ACEP funds were needed, the transitional language authorized NRCS to continue to carry out FRPP agreements and easements "using the provisions of law and regulation applicable to such agreements and easements as in existaence on the day before the date of" ACEP's enactment. Pub. L. No. 113-79, § 2704(b)(2)(B).

the implementation of [ACEP] … the Secretary shall use the regulations in existence as of the day before the date of the enactment of this Act that are applicable to [*inter alia*] … the farmland protection program … to the extent that … such regulations are consistent with … the provisions of ACEP." Under § 2712(d), this transitional authority "terminate[s] on the date that is 270 days after the date of enactment of" ACEP—*i.e.*, November 4, 2014. On this basis, Plaintiffs claim that NRCS was allowed "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." ECF No. 104 at 31 (*citing* Pub. L. No. 113-79 §§ 2712(b)-(d)).

This is not persuasive, because it has no support in the statutory text. There is nothing in that text to suggest, as Plaintiffs would have it, that expiration of NRCS's Section 2712 authority to administer ACEP under FRPP regulations had any bearing on FRPP agreements expressly grandfathered under Section 2704. Section 2712 is about the temporary administration of ACEP, not the completion of funding FRPP projects during the transitional period. Nothing in Section 2712 countermands NRCS's express authorization, under Section 2704, "to carry out agreements and easements … that were entered into prior to the date of [ACEP's] enactment." Pub. L. 113-79 § 2704(b)(2)(A).

Nor is it reasonable to suppose that Congress intended that NRCS—after conducting an extensive eligibility review of the Property, issuing a funding decision letter, entering into a cooperative agreement, obligating FRPP funds, and completing a

due diligence review—should start over on November 5, 2014. And that was not how NRCS interpreted the law at the time. For example, on November 3, 2014, Leonard Jordan, Associate Chief for Conservation, issued a memorandum to the states, advising that the expiration of ACEP temporary administration authority did not affect implementation of existing, unclosed FRPP enrollments.[9] To the extent that there is any ambiguity in the statute, this interpretation is entitled to deference. *Chevron*, 467 U.S. at 844.

B. NRCS conducted a thorough eligibility review of the Property consistent with FRPP requirements.

The FRPP provided funding for the purchase of conservation easements only on eligible land. 7 C.R.R. § 1491.4(a). "Eligible land" is defined to mean land on a farm or ranch that "(i) has prime, unique, or other productive soil; (ii) contains historical or archaeological resources; or (iii) the protection of which will further a State or local policy consistent with the purposes of the program." Pub. L. 110-234 § 2401(a)(2)(A). FRPP regulations established additional conditions for eligibility. *See* 7 C.F.R.

[9] The was the last of several guidance documents to the same effect. In March 2014, NB 300-14-24 issued to States, providing that active FRPP enrollments would be managed using FRPP policy until those enrollments closed. In May 2014 NB 300-14-37 issued to States, provided guidance on handling new applications under ACEP, but also noted that ACEP authorized that the continued implementation of FRPP contracts, agreements, and easements entered into prior to enactment and reiterated that the new legislation did not affect the validity or terms and conditions of any contract, agreement, or easement entered into prior to enactment. NB 300-14-24 and NB 300-14-37 expired on September 30, 2014, but on October 27, 2014, NB 300-15-4 issued to States, directing them to follow guidance previously issued in NB 300-14-37. Attachment E of NB 300-15-4 directed that "States will continue the acquisition, restoration, and management of easements enrolled under the … Farm and Ranch Lands Protection Program (FRPP)."

§1491.4(g). Plaintiffs assert that in this case, "[n]ot a single document in the administrative record suggests that NRCS ever considered the [Property's] eligibility under ACEP or its FRPP regulation." ECF No. 104 at 32. This is false.

NRCS makes a land eligibility determination by the time it "ranks" an application for FRPP enrollment. *See* 7 C.F.R. § 1491.6(a) ("Before the State Conservationist can score and rank the parcels for funding, the eligibility of the landowner and the land must be assessed."). In this case, NRCS's land eligibility determination documentation included: (1) the contents of the application package (AR0192-AR0214; AR0738-AR0767); (2) the 2012 site visit, as documented on the field office scoring worksheet and updates thereto (AR0291; SR10828; AR0853-AR0854); and (3) the July 19, 2012, soils evaluation (AR0292- AR0324), along with the approved soils waiver granted by the State Conservationist on May 8, 2013, (AR0950). *See* Declaration of David Colburn, attached as Exhibit C, at ¶ 3-4. The subsequent step of ranking the Property—as reflected in the Fiscal Year 2013 FRPP ranking tool—was completed on May 23, 2013. AR0967-973; *id.*

In short, contrary to Plaintiffs' contention, NRCS evaluated the land eligibility of the Property consistent with the applicable regulations, and amply documented its process in doing so.

C. There was no "utility corridor … planned to pass through or immediately adjacent to" the Easement at any time before it closed on December 24, 2014.

Among FRPP's conditions for land eligibility is the requirement that the 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 … utility corridors that are *planned* to pass through or immediately adjacent to the parcel." 7 C.F.R. §1491.4(g)(8) (emphasis added). "Planned" is not defined by regulation. However, ordinary usage suggests that a utility corridor is not "planned to pass through or immediately adjacent to" a given parcel of land until there is certainty about its route. In the context of a project subject to NEPA review, there is no such certainty until the ROD issues.

In this matter, the administrative record confirms that the route for Plaintiffs' transmission lines was subject to change—*i.e.*, not "planned"—until December 16, 2016, when BLM published the ROD for the TWE Project. Even after the Draft EIS was published, several facts emerge from the record: the agency preferred-route through Region I was not necessarily the selected option; the available options were not limited to those in the Draft EIS; and even the Final EIS did not definitely establish the route that BLM would ultimately approve. Specifically:

- On July 3, 2013, when the Draft EIS was published, it identified an "agency preferred route." However, like other routes identified in the Draft EIS, the agency-preferred route was compatible with any of three micro-siting options, one of which would avoid the Property. SR1680. The Draft EIS did not identify an agency-preferred micro-siting option.
- On January 17, 2014, in an email to David Colburn at NRCS-CO, Sharon Knowlton (BLM project manager for the TWE Project) offered to "provide a map that shows the location for the 'agency preferred location' that will

appear in the [Final EIS] when it is available if you like. *That is by no means a final decision*, it just shows the public where the BLM is likely to issue the decision." AR1660 (emphasis added).

- A February 4, 2014, email attaches a map that includes a fourth, hand-drawn micro-siting option not included among the options published in the Draft EIS. AR2031.[10]
- On March 19, 2014, BLM shared a map with a total of five micro-siting options, including a new "Option 5" that passed well to the north of the Property. AR2328, AR2332.

Based on this correspondence, prior to the December 24, 2014, closing on the Easement, there was no reason for NRCS to conclude that a conflict between the Easement and Plaintiffs' transmission lines was inevitable or even likely. In fact, even after the Easement closed, BLM continued to explore routes that would have avoided it. On May 1, 2015, when BLM published the Final EIS, it identified a different route as its agency-preferred alternative, and that route "ha[d] been reconfigured from the alternative disclosed in the Draft EIS." SR03556. An addendum to the Final EIS, moreover, noted that the BLM "also may consider micro-siting variations … to avoid crossing portions of the Cross Mountain Ranch conservation easement." SR03580. Only when the ROD issued—in December 2016—did it become clear that the selected

[10] The handwriting appears to be Dave Colburn's, and the hand-drawn route likely reflects discussions during a January 28, 2014 meeting among the various stakeholders. *See* AR1885; *cf.* AR1679-81.

alternative would align the federal right of way in a location consistent with a route across the Easement.[11] *See* SR10792-93.

Plaintiff have made much of correspondence from Elizabeth Crane-Wexler at NRCS-HQ to Lucas Lucero at BLM, in which Crane-Wexler stated that NRCS-CO "has been instructed to work with [CCALT] 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." ECF No. 103 at 8; ECF No. 104 at 11, 34. There are at least two reasons why this correspondence is not material. First, Crane-Wexler was on the Easement Programs Team as the Natural Resources Specialist for the National Grassland Reserve Program. Declaration of Martha Joseph, attached as Exhibit D, at ¶ 4.[12] She did not have the delegated authority to direct NRCS-CO how to administer FRPP, nor direct them on how to move forward with respect to the proposed Easement. *Id.* at ¶ 6. Second, any purported instruction was soon countermanded by the FRPP National Program Manager at NRCS-HQ, Jeremy Stone, who did have the

[11] As explained previously, BLM was making a decision about where to locate and authorize a transmission line and energy corridor on federal lands, and appropriately gave consideration to how its decision may impact intervening non-federal property. But BLM has no authority to decide where to locate transmission lines on private property.

[12] Defendants offer the attached declarations of Martha Joseph and David Colburn as extra-record evidence for context, on the basis "that the agency action is not adequately explained and cannot be reviewed properly without considering" these materials. *Am. Min. Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985)

authority to provide NRCS-CO with FRPP policy interpretation and guidance.[13,14] *Id.* at ¶ 7.

In summary, NRCS determined that the Property was eligible no later than May 23, 2013—more than a month before the publication of the Draft EIS, and more than three months before it became aware of the proposed routes for Plaintiffs' transmission lines. It entered into the Cooperative Agreement with CCALT on September 20, 2013, when alternative routes included several options that would easily have allowed TWE to avoid the Property, and new alternatives were still being developed. It approved the Deed and posted payment on December 17 and 18, respectively, more than four months before the Final EIS was published. The Deed was recorded on December 24, 2014. The route of Plaintiffs' transmission lines was not "planned" until the ROD issued in December 2016, some two years later.

D. NRCS Circular 7 was inoperative at all times relevant to this case.

Plaintiffs argue that the Property was ineligible for a conservation easement under the FRPP pursuant to NRCS's 2007 Circular No. 7 ("Infrastructure Policy on

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[13] A February 5, 2014, email exchange between Tony Kramer, Deputy Chiefs for Programs, and Kim Berns, NRCS Director of the Environmental Programs Division, further confirms that Crane-Wexler's email was not the final word. *See* AR2044-45. In the email, Berns explains that she would be meeting with Patrick Holmes from the Office of the Secretary of the USDA that week on the issue of the transmission line and the Easement. *Id.* Kramer responds saying to "[g]o ahead and discuss, [b]ut no decisions until we can visit." *Id.* Kramer was multiple management levels above Crane-Wexler. Exhibit D at ¶ 4.

[14] Moreover, the fact that there was a disagreement or misunderstanding among NRCS personnel about the administration of FRPP does not render the decision to fund and approve the Easement arbitrary and capricious. Nor does it make the authorized personnel who approved the decision "rogue" employees, as PacifiCorp suggests. ECF No. 103 at 12.

Easements").[15] ECF No. 104 at 38 (citing AR1640). But Plaintiffs' argument is wrong, because even when CMR first applied for enrollment in the FRPP in March 2012, Circular 7 had long since been superseded.

Circular 7 was issued in on September 6, 2007. As set forth in NRCS's National Directions Management Manual, a circular is a

> type of directive … used by NHQ [NRCS National Headquarters] and State-level offices to change manuals, handbooks, and national instructions when there is insufficient time or information available to issue a complete revision. It is considered an interim measure, used to get critical changes in place while the permanent directive in place is being revised.

Exhibit D at ¶ 9 (*quoting* the NRCS Directives Management Handbook).

In this case, "the permanent directive" modified by Circular 7 was the Conservation Programs Manual. *See* AR1640. In 2008, after the enactment of the 2008 Farm Bill, all relevant parts of the NRCS program manuals were revised and re-issued. Circular 7 was superseded when the FRPP Manual was completely revised in 2010. Exhibit D at ¶ 10; *see also* Conservation Programs Manual Title 440 Part 519, Farm and Ranch Lands Protection Program.[16] Thus, by the time the Property was enrolled in the FRPP, Circular 7 had been superseded.

Email communications in early 2014 reflect that Circular 7 was discussed with respect to the TWE project, and a copy of Circular 7 was sent to NRCS-CO by NRCS-

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[15] Circular 7 provided, *inter alia*, that, "States shall document consideration of potential impacts by existing or proposed infrastructure projects when deciding whether to enroll conservation land….NRCS will not knowingly enroll potential easement areas in the potential right of way of infrastructure projects." AR1640.

[16] *Available at* https://directives.sc.egov.usda.gov/default.aspx?l=179 (last visited Nov. 16, 2020).

HQ. AR1622; AR1646; AR2336. However, the discussion did not concern whether it was proper to enroll, fund, or approve the Easement. *See id.* Rather, it appears NRCS staff were reviewing Circular 7 for guidance on how to pursue cooperator status on the Draft EIS. *See id.*

In short, Circular 7 was not in effect at any relevant time, and NRCS did not review Circular 7 for guidance on whether to enroll the Property.

E. Even if ACEP had applied, it would not have prohibited NRCS's approval of the Easement.

Plaintiffs contend that under ACEP, the Property would have been ineligible. They rely on Section 1265D(a)(4) of the statute, which lists four categories of ineligible lands—*i.e.*, lands on which NRCS "may not use *program funds* for the purposes of acquiring an easement." Pub. L. 113-79 § 1265D(a) (emphasis added). Among these categories is "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 [or] infrastructure development." (emphasis added). *Id.* § 1265D(a)(1). Plaintiffs' contention misapprehends the significance of the cited provision. Even if ACEP had applied to NRCS's funding and approval of the Easement, it would not have rendered the Property ineligible.

Section 1265D simply does not say what Plaintiffs want it say, for at least three reasons. First, it states that "program funds" may not be used for the purposes of acquiring an easement over ineligible lands. But "program" is expressly defined by ACEP as "the agricultural conservation easement program *established by [ACEP].*" By definition, FRPP funds—including the Fiscal Year 2013 funds obligated for purchase of

the Easement—are not program funds. Consequently, the NRCS's funding and approval of the Easement was not governed by the ACEP land eligibility provision on which Plaintiffs' argument rests.

Second, ACEP was not designed to protect infrastructure development. It was designed to protect conservation values associated with agricultural lands. Thus, Section 1265D does not say that ACEP funds cannot be used to purchase conservation easements that might block infrastructure development. It says that ACEP funds cannot be used to purchase conservation easements *whose conservation purposes* "*would be undermined by*" such development. By definition, a conservation easement that blocks infrastructure development cannot be undermined by such development. If, as Plaintiffs contend, the Easement has the effect of "forcing the Project[s] to go a different route," then funding or approving the easement could not have violated Section 1265D. ECF No. 104 at 35.

Third, the statute leaves the determination whether "the purposes of the [ACEP] program would be undermined" by proposed infrastructure development to the agency's discretion. Here, NRCS reasonably exercised that discretion to conclude that Plaintiffs' proposed transmission lines would *not* undermine the purposes of the program. This was not, as Plaintiffs contend, a "post-hoc interpretation of events" by NRCS Chief Weller. ECF No. 104 at 34 (citing AR5387). In a March 11, 2014 email to an NRCS colleague, Phyllis Philipps, the NRCS-CO State Conservationist, noted that the Easement, "as proposed, would not be significantly impacted by the transmission line." AR6653. Plaintiffs concede as much in their briefing, when they acknowledge that their

Projects would "go through less than a mile of land on the periphery of the conservation easement—a total of 27 acres in the 16,000-acre easement," and would therefore impact only "one third of one percent (0.35%)" of the Easement. ECF No. 104 at 5; ECF No. 103 at 9.[17]

II. NRCS complied with NEPA when it funded and approved the Easement.

NEPA requires the preparation of an environmental impact statement for by "major Federal actions significantly affecting the quality of the human environment." Contrary to Plaintiffs' claims, NRCS complied with NEPA when it funded and approved the Easement.

A. Consistent with NEPA and its interpretation by the federal courts, NRCS prepared the Programmatic EA in 2009.

Courts have held that when a federal action merely maintains the status quo, it is generally *not* an "action significantly affecting the environment," and therefore does not require preparation of an Environmental Impact Statement under NEPA. For example, in *Sabine River Authority v. U.S. Dep't of Interior*, the Fifth Circuit considered whether,

[17] Plaintiffs further argue that even if it were true that the purposes of ACEP were not undermined by their proposed transmission lines, "it only confirms that NRCS's actions were arbitrary and capricious," because then "there could be no justification for approving a deed that prohibited transmission lines." ECF No. 105 at 34. But "[t]he purposes of [ACEP] are to … protect the agricultural use and future viability, and related conservation values, of eligible land by limiting nonagricultural uses of that land." 16 U.S.C. 3865(b)(3). *That* is the "justification" for approving deeds that prohibit transmission lines. Plaintiffs cite no authority for the proposition that NRCS is under any obligation to accommodate transmission line projects. Nor do Plaintiffs contend with the fact that, as discussed *infra*, the ACEP statute and regulations provide for various easement administration actions, including easement modification, that can allow for projects such as Plaintiffs' where appropriate.

when the U.S. Fish & Wildlife Service accepted a "non-development easement" on 3800 acres of wetland and wildlife habitat in East Texas, it was required to prepare an EIS in connection with its acquisition. 951 F.2d 669, 671 (5th Cir. 1992). The plaintiffs—the Sabine River Authority and the Texas Water Conservation Association—"were less than pleased to learn of the donation," because they "had given serious consideration to using that land" to construct a reservoir. *Id.* at 673. The *Sabine* plaintiffs had obtained none of the necessary state or federal permits necessary to execute their plan. *Id.* However, they alleged that the easement was interfering with their plans to take the property by eminent domain, construct the reservoir, and thereby secure the state's water supply. *Id.*

The Fifth Circuit affirmed the district court's dismissal of the plaintiffs' NEPA claims. It concluded that, "the acquisition of a negative easement which by its terms prohibits any change in the status quo does not amount to 'major Federal action[] significantly affecting the quality of the human environment.'" *Id.* at 679. Thus, no EIS was required. *Id.*

The Ninth Circuit reached a similar conclusion in *Douglas Cty. v. Babbit*, where the plaintiff challenged a decision by the U.S. Fish and Wildlife Service to designate certain federal land as critical habitat pursuant to the Endangered Species Act. 48 F.3d 1495, 1497 (9th Cir. 1995). In that case, the court held that, "an EIS is not necessary for federal actions that conserve the environment." *Id.* at 1505.[18]

[18] In *Catron County*, the Tenth Circuit rejected the Ninth Circuit's conclusion that "no actual impact flows from the critical habitat designation." *Catron Cty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996).

Consistent with the rule of law set forth in these cases, the NRCS's Programmatic EA for the FRPP concluded that "[t]here are no direct environmental impacts to the quality of the human environment from the purchase of easements for the FRPP program." AR0027. Pursuant to the Programmatic EA, NRCS issued a FONSI. AR0065-68.

B. NRCS took a "tiered" approach to NEPA review of the FRPP.

Plaintiffs correctly observe that the Programmatic EA was not the final word on all FRPP easements. Rather, it was the first step in NRCS's "tiered" NEPA review of FRPP implementation. ECF No. 104 at 42-3. In other words, the Programmatic EA addressed the FRPP generally, and deferred consideration of site-specific impacts to subsequent decisions that implemented the program. AR0025. The question, then, is what action by NRCS triggered—or will trigger—a requirement to conduct a site-specific NEPA review in connection with the Easement.

NEPA requires that the evaluation of a project's environmental consequences take place at an early stage in the project's planning process. 40 C.F.R. § 1501.2. This requirement is tempered, though, "by the preference to defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project's probable

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However, the facts of *Catron County* are distinguishable, both from those in *Douglas County* and those in the case at bar. In *Catron County*, lands owned by the County fell within the critical habitat designation affected, and "would prevent the diversion and impoundment of water …, thereby causing flood damage to county-owned property, such as the fairgrounds, roads and bridges." *Id.* at 1433. Here, the Easement does not affect lands in which Plaintiffs had any vested property interest, does not have any direct environmental impacts, and, as discussed *infra*, is subject to modification that would prevent any indirect environmental impacts.

environmental consequences." *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (*citing Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976). *See id*. at 402. In any event, a NEPA review must address an agency's proposed actions involving "any irreversible and irretrievable commitments of resources." 42 U.S.C. § 4332(2)(C)(v).

Therefore, as the Tenth Circuit has framed it, "Looking to the standards set out by regulation and by statute, assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 716–18 (10th Cir. 2009) (*citing*, *inter alia*, 42 U.S.C. § 4332(2)(C)(v)). The Tenth Circuit has applied a highly deferential standard of review of an agency's determination whether the time is ripe for application of NEPA to a particular project. *Colorado River Water Conservation Dist. v. United States*, 593 F.2d 907, 909 (10th Cir.1977) (applying "rational basis" review of agency's determination of when to undertake NEPA review of a project).

C. NRCS's action will be ripe for site-specific NEPA review if and when it makes a decision as to modification of the Easement.

When NRCS funded and approved the Easements, the time was not ripe for application of NEPA. Like the negative easement acquisition in *Sabine*, NRCS's acquisition of the Easement "prohibit[ed] any change in the status quo," and its direct effects did not include significant environmental impacts. 951 F.2d at 679. Plaintiffs have argued that its *indirect* effects did cause such impacts, because their Projects had to be routed around the Easement. But, as explained *supra*, ACEP provides a mechanism to modify the Easement to address a compelling public need of the type

that Plaintiffs allege exists here. As such, the time for site-specific NEPA review of the Easement will be when NRCS is preparing to decide whether to consent to easement modification (or some other easement administration action) to accommodate Plaintiffs' transmission line projects. Until then, NRCS has made no "irretrievable commitment of resources" that could cause significant environmental impacts.

It would have been impracticable for NRS to conduct an earlier review of the reasonably foreseeable indirect environmental impacts of the Easement on the transmission lines' route, for several reasons. First, in December 2014, it was not clear whether the Easement *would* be in the route of Plaintiffs' transmission lines. Second, it was not clear what route the transmission lines would take if they did traverse the Easement. Third, it was not clear what route the transmission lines would or could take if it NRCS did not modify the Easement to accommodate them. In the absence of a "concrete development proposal" for the transmission lines, NRCS had a rational basis to defer a site-specific EA or EIS. *Block*, 690 F.2d at 761. Under the *Colorado River* decision, that is sufficient to defeat Plaintiffs' APA challenge. 593 F.2d at 909.

D. Plaintiffs' arguments regarding the scope of NEPA review lack merit.

Plaintiffs make several arguments about what specific impacts NRCS should have evaluated in order to comply with NEPA. None of these arguments have merit.

First, Plaintiffs argue that NRCS should have evaluated "the direct effects of funding a conservation easement and accepting a deed that would block all of the proposed routes for the TWE Project." ECF No. 104 at 40. But the decision to fund and approve the Easement did *not* "block all of the proposed routes for the TWE [or

Pacificorp] Project." As discussed above, when the Easement closed in December 2014, proposed routes included several alternatives that would allow TWE to avoid the Easement. Whatever direct effects the NRCS decision to fund and approve the Easement may have had, none of them were direct effects on "the quality of the human environment," as required to trigger NEPA.

Second, Plaintiffs argue that NRCS should have evaluated "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." ECF No. 104 at 40. But no such cumulative impacts *were* reasonably foreseeable. Again, the Draft EIS identified multiple routes that did not conflict with the Easement, and BLM developed at least one more in the months before the Easement closed.[19] Given the number of alternative routes under consideration, it is not plausible to suggest that abandonment of the TWE Project was a reasonably foreseeable consequence of funding or approving the Easement.

Finally, Plaintiffs argue that NRCS should have considered "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)." But until the ROD issued in December 2016, it was far from certain that Plaintiffs' transmission line would cross the Property. Moreover, when it approved the Deed, NRCS had

[19] And while the TWE Project was designed to distribute renewable energy, the PacifiCorp project merely had the potential to do so.

statutory authority under ACEP to subordinate, modify, or terminate its interest in the Easement. Section 1265D(c).[20]

In short, NRCS's decisions to fund and approve the easement did not cause any reasonably foreseeable direct or indirect environmental effects, and thus NEPA review was not required at that time.[21]

III. NRCS has not consented to condemnation of the Easement, because its consent is not required for condemnation of the private interests, and the federal interests are not subject to condemnation.

In addition to incorporating by reference the arguments made in TWE's opening brief, PacifiCorp makes two arguments of its own: first, that NRCS effectively consented to PacifiCorp's Project when it signed the Deed; and second, that NRCS

[20] At the time, this easement administration authority was not subject to approval by the landowner or easement holder. That requirement was created by ACEP regulations pursuant to the 2014 Farm Bill. Those regulations were first issued, as interim rules, on February 27, 2015—two months after the Deed was recorded. *See* 80 Fed. Reg. 11053 (Feb. 27, 2015). And in any event, as set forth *infra*, the rule does not in fact give landowners or easement holders a veto over easement modification, because their interests are subject to condemnation.

[21] Plaintiffs also complain that NRCS "did not even complete its 'environmental evaluation' [EE] form," which they claim was required by regulation. ECF No. 104 at 41. In fact, the applicable regulation defines an EE as "the part of planning that inventories and estimates the potential effects on the human environment of alternative solutions to resource problems, and to determine the need for an environmental assessment (EA) or environmental impact statement (EIS)," and contemplates its use in the context of "the planning, installation, and operation of NRCS-assisted projects. 7 CFR §§ 650.4(c), 650.5(a). As explained in the programmatic EA, NRCS addresses site-specific environmental impacts through the NRCS conservation planning natural resources problem-solving and management process. AR00025. This process does not apply to the purchase of conservation easements unless "highly erodible lands are present, [and] a site-specific conservation plan and associated conservation practices are required." AR00026. Examples of such conservation practices are provided in Table 1 and include actions with effects on the physical environment such as contour farming and prescribed grazing. AR00027.

consent is not required or must be compelled in this case. These arguments are not cognizable under the APA, which is the sole cause of action in this case. Even if they were cognizable, PacifiCorp's arguments would fail, for at least three reasons: (1) they rely on a mischaracterization of NRCS's position; (2) they assume, incorrectly, that executive branch officials can impliedly consent to the disposal of federal property interests; and (3) they are premised on an insupportable interpretation of Clause 31 of the Deed.

A. PacifiCorp's arguments are not cognizable under the APA.

In its brief, PacifiCorp recites the standards under which a reviewing court may compel or set aside agency action pursuant to the APA. ECF No. 103 at 11 (*quoting* 5 U.S.C. § 706). But it fails to identify which of these standards it alleges that NRCS violated, and thereafter makes no reference to any of them. Apart from incorporating, by reference, arguments made in TWE's brief, PacifiCorp cites no substantive statutory basis for its claims. *See* ECF No. 103 at 13-16. Instead, it makes what are essentially equitable arguments. *Id.* First, PacifiCorp contends that because NRCS was aware of Plaintiffs' transmission line projects, and acknowledged that the Easement could co-exist with these projects, its approval of the Deed constituted consent to condemnation. *Id.* at 13-15. In the alternative, it contends that because the transmission line projects would not undermine the purposes of the Easement, there is "no threat to the public investment," and NRCS should therefore be compelled to consent to condemnation. *Id.* at 15-16. Such equitable arguments are not cognizable under the APA, which requires

a plaintiff to establish agency conduct that is arbitrary and capricious and/or contrary to law. *See* 5 U.S.C. § 706.

B. PacifiCorp's brief mischaracterizes and NRCS's position.

PacifiCorp's arguments also rely on the repeated assertion that NRCS has taken the position that, under Clause 31 of the Deed, the agency's consent is required for condemnation of the Easement, and that its consent to condemnation requires the consent of CMR and CCALT. *See* ECF No. 103 at 5 ("The NRCS and the Landowners claim that condemnation is unavailable without their collective consent under the terms of the [Deed]."); at 13 ("The NRCS claims its consent to condemnation is required, which it cannot provide without the Landowners' consent.") In particular, its brief avers that in a December 19, 2019, letter to PacifiCorp, "NRCS indicated its intent to comply with the requirement in the Deed that PacifiCorp obtain its consent prior to condemnation." ECF No. 103 at 15 (citing AR7088); *see also id.* at 13 ("When PacifiCorp advised the NRCS the Project would be constructed pursuant to the BLM's approved route through the Conservation Easement in October, 2019 … the NRCS responded that its consent is required under the terms of the Deed."). This is incorrect.

In fact, NRCS has repeatedly made clear that it does *not* believe that Clause 31 of the Deed requires its consent to condemnation of the private interests in the Easement. In the referenced December 2019 letter to PacifiCorp, as well as in a similar letter to TWE, NRCS stated that, "NRCS consent is not required for Pacifi[C]orp to seek condemnation of the rights of the private parties." AR7088; AR7090. NRCS has reiterated this in at least one filing in this matter, explaining that, "NRCS has advised

TWE and PacifiCorp that they may acquire the necessary property interests from CMR and CCALT by purchase or condemnation." ECF No. 69 at 6.

PacifiCorp further claims that, "[a]ccording to the NRCS and the Landowners, the Project will 'terminate' the Conservation Easement, which grants to the Landowners a power to veto PacifiCorp's condemnation authority on the lands necessary for its Project." ECF No. 103 at 5. It provides no citation for this claim, which—at least as it relates to NRCS—is false. *Intervenors* have suggested that condemnation of their interests in the Easement constitutes "easement termination"—which, along with modification, subordination and exchange—is a type of easement administration action available under the regulations. ECF No. 20 at 6 n.2.; ECF No. 85 at 10 ¶¶ 74, 75, 2; ECF No. 101 at 15.; 7 C.F.R. § 1468.6. NRCS has specifically rejected this interpretation. ECF No. 93 at 15; ECF No. 109 at 10.

C. There can be no implied consent to dispose of a federal interest in property.

PacifiCorp argues that NRCS's consent to condemnation of the Easement can be express or implied, and that in fact NRCS has already given its implied consent. ECF No. 103 at 13. It reasons that, "prior to signing the Deed, the NRCS was aware of the Projects and acknowledged that the Easement could co-exist with the Projects. Accordingly, by signing the Deed, the NRCS consented to the Projects and no further consent is required." *Id.* at 13-14. In support of its contention, PacifiCorp cites two factually dissimilar cases, neither of which involves the disposal of federal property. *See id.* (*citing United States v. Warren*, 578 F.2d 1058, 1067 (5th Cir. 1978); *In re Adoption of A.J.B*, 797 A.2d 264 (Pa. Super. Ct. 2002)).

PacifiCorp's argument fails, because it does not take into account a well-established rule: the Property Clause of the Constitution vests in Congress exclusive control over federal property. U.S. Const. Art. IV., Sec. 3, cl. 2. Consequently, no implied—or even express—consent to the disposal of federal property by an executive branch official is legally cognizable unless it is authorized by statute. As the Supreme Court explained in *United States v. California*, "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." 332 U.S. 19, 39 (1947); *see also Haworth v. United States*, 461 F. App'x 739, 748 (10th Cir. 2012) (Forest Service employee who wrote letter to abandon federal easements was not shown to have been authorized by Congress to do so); *Sweeten v. U.S. Dep't of Agric. Forest Serv*., 684 F.2d 679, 682 (10th Cir. 1982) (in addition to establishing the traditional elements of estoppel, the appellants must also show affirmative misconduct by the government or its agents to establish estoppel against the government in an action concerning boundaries of land granted in a federal land patent).

D. Clause 31 of the Easement Deed does not require the United States' consent for condemnation of the non-federal interests in the Property.

Clause 31 of the Deed includes the following language: "… because the United States has an interest in this Easement, the United States must consent to any termination, extinguishment, eminent domain and/or condemnation action involving the Property." Although NRCS approved the Deed, its regulations did not require inclusion of this language. Moreover, while NRCS was a third-party beneficiary of the Deed, it

was not a party to it. As explained above, NRCS has consistently taken the position that the consent of the United States is not required for condemnation of CMR's interest in the Property or CCALT's interest in the Easement. To the extent that Clause 31 can be read to suggest otherwise, it is void as against public policy.

The language of Clause 31 is objectively ambiguous. "Property" is defined in the Deed as the property encumbered by the Easement. It is not clear, however, what the term "involving" means, nor is it clear what a "termination or extinguishment" "involving the Property" would entail. While the terms "eminent domain" or "condemnation" of the Property are readily understood, it is not clear what would constitute eminent domain or condemnation "involving the Property." What *is* clear is that Clause 31's requirement of "consent to any … condemnation action involving the Property" is not required to protect the federal government's property interest, because federal property interests are not subject to condemnation under state law.

There are no statutory or regulatory provisions specifically requiring inclusion of the consent to condemnation language found in Clause 31 as there are for Deed language that pertains to the right of enforcement. The consent to condemnation language was included in the Deed by CCALT, and though the Deed was approved by NRCS, the language was not required by NRCS.

The intent of this language, therefore, appears to be to create a restrictive covenant prohibiting condemnation of the private interests in the Property without the consent of the United States—consent that Intervenors now claim cannot be granted without *their* consent. ECF No. 20 at 6 n.2; ECF No. 101 at 15. In short, Intervenors

have taken the position that Clause 31 extends the sovereign immunity of the United States to *their* interests in the Property, and furthermore renders their property interests immune to condemnation without their consent. PacifiCorp erroneously attributes this position to NRCS, and it is on this basis, in part, that it asks the Court declare that NRCS either has consented, need not consent, or is compelled to consent. ECF No. 103 at 16.

However, to the extent that Clause 31 is amenable to such an interpretation, it is of no effect. This is because covenants and restrictions that attempt to prohibit the exercise of the sovereign power of eminent domain are void as against public policy. In *Smith v. Clifton Sanitation District*, for example, the Colorado Supreme Court held that a scheme of granting restrictive covenants to impede a known future condemnation proposal to be "contrary to sound public policy and invalid as against the constitutional and statutory rights of the condemner."[22] 300 P.2d 548, 549 (Colo. 1956). As the Tenth Circuit has acknowledged, quoting *Smith*, "Parties may not by contract between

[22] Courts around the country have long agreed. *See, e.g., United States v. Certain Lands in Town of Jamestown, R.I.*, 112 F. 622, 629 (C.C.D.R.I. 1899), aff'd sub nom. Wharton v. United States, 153 F. 876 (1st Cir. 1907) ("Each landowner holds his estate subject to the public necessity for the exercise of the right of eminent domain for public purposes. He cannot evade this by any agreement."); *Doan v. Cleveland Short Line Ry. Co.*, 112 N.E. 505, 507 (Ohio 1915) ("The right of eminent domain rests upon public necessity, and a contract or covenant … which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void."); *State ex rel. Wells v. City of Dunbar*, 95 S.E.2d 457, 460 (W.Va. 1956) ("Whenever the Legislature by statute-law has authorized any person or corporation to condemn the lands of others in order to carry on its business, the courts will regard this as a legislative declaration … the courts must hold it as contrary to public policy to permit any restriction of it by private contract.").

themselves restrict the exercise of the power of eminent domain." *Direct Mail Servs., Inc. v. Best*, 729 F.2d 672, 676 (10th Cir. 1984) (*quoting* 300 P.2d 548 at 550).

Therefore, as a matter of law, Clause 31 of the Easement Deed cannot require the United States' consent for condemnation of the non-federal interests in the Property.

IV. The appropriate remedy, if any, is remand to the Agency.

Plaintiffs ask this Court to "vacate the Conservation Easement, or at least the part of it covering lands needed for" their transmission line projects. As explained herein, Plaintiffs are not entitled to any relief, because they have not carried their burden to establish an APA violation. But even if Plaintiffs were entitled to relief, the appropriate remedy in this case is limited to remand of the decisions at issue to NRCS for further review.

A. Vacatur of the Easement, in full or in part, would be unjust and contrary to law.

Plaintiffs have provided no authority for the proposition that federal courts are authorized to void a property transaction under these circumstances. Defendants respectfully submit that the Court is without jurisdiction to divest the United States of the conservation easement, both because the Constitution vests in the legislative branch the exclusive authority to dispose of property belonging to the United States, and because Congress has waived sovereign immunity regarding issues of title to real property only under the Quiet Title Act, which is not implicated here.

Although the Ninth Circuit has held that federal courts are authorized to void a property transaction where necessary to remedy a violation of the APA, it has also held that the exercise of this authority is discretionary, and its decision is controlled by

principles of equity. *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1342-43 (9th Cir. 1995). In doing so, the court must weigh "the competing claims of injury ... and the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). In a case involving a property transaction, competing claims of injury include factors such as the time that has elapsed since the transfer of title, the good faith or innocence of other parties, and the effect of rescinding title on the expectations of future property buyers. *Espy*, 45 F.3d at 1343. "A federal court will not lightly employ the power of equity to disrupt" title. *Id*.

Here, each of these factors counsels against vacatur of the Easement, whether in whole or in part. Despite being aware in 2013 of the enrollment of the Property in FRPP, Plaintiffs did not file suit until almost five years after the Easement was recorded. It has now been nearly six years.

The Easement was funded by, and operated to vest property interests in, several parties in addition to the United States, which affect 16,000 acres of land. Vacating the easement in its entirety is clearly not necessary to redress the injury alleged by plaintiffs. Moreover, all of those parties are innocent of any of the alleged wrongs of which Plaintiffs complain. Intervenors CMR and CCALT, as landowner and easement holder, invested considerable time, effort, and capital into the transaction, with the reasonable expectation that the conservation values of the property would be preserved by the conservation easement in accordance with applicable laws. The transaction was funded not only by FRPP funds, but also by $1,074,500 from New Venture, a charitable non-profit; $1,250,000 from the state through CPW and value of $951,000 in property

value donated by CMR. Notably, the Deed grants CPW a contingent right of enforcement similar to that of NRCS, as well as other rights—*e.g.*, to approve boundary line adjustments. CPW is not a party to this action, and has had no opportunity to be heard. The effect of vacatur on these innocent parties counsels strongly against disruption of the Easement.

Finally, the effect of rescinding the Deed on the expectations of future property buyers would be considerable. The FRPP—now consolidated under ACEP—is a nationwide program implemented in coordination with eligible entities such as CCALT. At least half of the funds for ACEP easements must, by statute, be provided by the eligible entity, and the eligible entity must take title to the conservation easements. Consequently, ACEP relies on the development and maintenance of partnerships, both with conservation organizations and with donors. The trust and confidence necessary to these partnerships would be substantially undermined by a decision to vacate the Easement, even in part.

Thus, equitable principles strongly disfavor vacatur as a remedy for Plaintiffs' alleged injuries.

B. Should the Court grant any relief, the appropriate remedy is remand.

Should the Court determine that Plaintiffs are entitled to relief under the APA, the Court has the discretion to remand the matter to NRCS, without vacatur, for further review consistent with law. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). For reasons set forth in Defendants' Motion for Voluntary Remand, remand in this case would be the most equitable and efficient

remedy. *See* ECF No. 69 at 9-15. In that motion (which is fully briefed and pending), Defendants acknowledged—without confessing error—that the basis for its decisions to approve the Deed and accept an interest in the Easement on behalf of the United States may have been inadequately documented in the administrative record. *Id.* at 10.

Both the claims raised by Plaintiffs and the concerns expressed by Defendants can be addressed by remand without vacatur. Plaintiffs' APA claim pursuant to NEPA is procedural, and if the Court finds that there were procedural deficiencies, the most tailored and appropriate cure is additional procedure. As to Plaintiffs' claim that the Property was ineligible for enrollment under ACEP, remand would give NRCS the opportunity to revisit its acceptance of interests in the property on behalf of the United States, and, if necessary, cure any error.[23] Finally, remand would allow NRCS to develop a more robust record, which could then aid the Court in any further review that may be needed.

CONCLUSION

For the reasons set forth herein, Defendants respectfully request the Court reject Plaintiffs' APA challenges under NEPA and ACEP, and that it deny their requested relief.

Respectfully submitted November 16, 2020.

JASON R. DUNN

[23] *See* ECF No. 69 at 15 n.4 (noting that under 7 U.S.C. § 2253 the Secretary of Agriculture may quitclaim interests in property where title or color of title was acquired by mistake, misunderstanding, error, or inadvertence).

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on November 16, 2020, a true and correct copy of the above DEFENDANTS' CONSOLIDATED RESPONSE BRIEF ON THE MERITS was served via CM/ECF on:

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