

Nos. 22-1347; 22-1709; 22-1737

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

—————
National Wildlife Refuge Association, et al.,
Plaintiff-Appellees,

v.

American Transmission Company LLC, et al.,
Intervenor-Defendant-Appellants.

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**On Appeal from the United States District Court
for the Western District of Wisconsin,
Case Nos. 21-cv-0096 and 21-0306
The Honorable William M. Conley, Judge**

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**AMENDED JURISDICTIONAL STATEMENT OF
INTERVENOR-DEFENDANT-APPELLANTS-CROSS APPELLEES
AMERICAN TRANSMISSION COMPANY LLC, ITC MIDWEST LLC,
AND DAIRYLAND POWER COOPERATIVE**

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Pursuant to this Court's August 18, 2022 Order (Doc. 78¹), Intervenor-Defendants-Appellants-Cross Appellees American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative (the Co-owners) submit this amended jurisdictional statement. Plaintiff-Appellees-Cross-Appellants' (Plaintiffs) jurisdictional statement incorrectly asserts that the district court had jurisdiction over their claims (*see* Doc. 60-1, at 1) for the following reasons:

- **First**, the district court lacked jurisdiction over Plaintiffs' Refuge Act claim challenging the U.S. Fish and Wildlife Service's (FWS) December 2019 Compatibility Determination because FWS's revocation of that action rendered Plaintiffs' claim moot, and no exception applied. *See* Doc. 18, at 38–41; Doc. 73, at 11–15.
- **Second**, the district court lacked jurisdiction to review Plaintiffs' unpled Refuge Act claim regarding a future land exchange decision because that potential future action is both unripe under Article III of the U.S. Constitution and because there no final agency action as required for review under the Administrative Procedure Act. *See* Doc. 18, at 28–31; Doc. 73, at 6–11.

¹ Docket cites (Doc. __) are to Case No. 22-1347. Docket cites (ECF No. __) are to the lower court docket in Case No. 21-cv-00096.

- **Third**, the district court lacked jurisdiction over Plaintiffs’ NEPA claim against the Rural Utilities Service (RUS) because Plaintiffs did not show that a potential “no fund” decision by RUS would redress Plaintiffs’ alleged harm from construction of the Cardinal-Hickory Creek Project (Project), which is currently ongoing and will occur regardless of whether Co-owner Dairyland Power Company submits a loan application to RUS. Doc. 18, at 41–45; Doc. 73, at 15–22.
- **Fourth**, the Court lacked jurisdiction over Plaintiffs’ NEPA claim against the U.S. Army Corps of Engineers (Corps) because Plaintiffs never challenged the only Corps action that relied on the analysis in the Environmental Impact Statement—the right-of-way grant by the real estate division of the Corps’ Rock Island District. Doc. 18, at 42; Doc. 73, at 15–16.

This Court has jurisdiction over the legal issue in Plaintiffs’ cross-appeal because it is an appeal from a final judgment. *See* 28 U.S.C. § 1291. However, because the district court implicitly (and properly) concluded that it lacked authority to enjoin construction along the entire Project route, the district court did not balance the equities (as the court must do before granting permanent injunctive relief), and there are thus no factual determinations for this Court to review.

Plaintiffs' sole claim for relief in their cross-appeal is that the district court erred by denying Plaintiffs' request for permanent injunctive relief against construction of the Project in areas outside the Upper Mississippi River National Wildlife and Fish Refuge. The district court declined to order such relief even after Plaintiffs sought it in their remedy brief. ECF No. 178. Earlier in the litigation, when the district court temporarily (and partially) granted Plaintiffs' motion for preliminary injunctive relief, the district court expressly recognized that it lacked authority to enjoin private activity by private parties. ECF No. 160 at 6 (injunction against activity that did not require Corps' Clean Water Act permitting "is outside the jurisdiction of this court"). The district court reiterated this position in its ruling on Plaintiffs' motion for an injunction pending appeal, stating that "for private land . . . plaintiffs have not persuasively argued this federal court has jurisdiction *at all*." ECF No. 245, at 5. Thus, the district court's denial of injunctive relief should be understood to rest upon a conclusion that it lacked the authority to grant such relief. Even if the district court did have the authority to grant such relief, it would have been required to balance the four factors required under *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), as a prerequisite to awarding such relief, and the district court clearly did not do so.

Respectfully submitted this 25th day of August 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 25th day of August 2022.

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