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.

**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**

RESPONSE AND REPLY BRIEF OF INTERVENOR-DEFENDANT-APPELLANTS AMERICAN TRANSMISSION COMPANY LLC, ITC MIDWEST LLC, AND DAIRYLAND POWER COOPERATIVE

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GLOSSARY

Acronym	Definition
APA	Administrative Procedure Act
App'x	Appellants' Appendix
ATC	American Transmission Company LLC and ATC Management Inc.
CD	Compatibility Determination
CHC	Cardinal-Hickory Creek
Co-owners	Collectively, Appellants American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative
Corps	U.S. Army Corps of Engineers
Dairyland	Dairyland Power Cooperative
DALC or Plaintiffs	Collectively, Plaintiff-Appellees Driftless Area Land Conservancy, National Wildlife Refuge Association, Wisconsin Wildlife Federation, and Defenders of Wildlife
EIS	Environmental Impact Statement
FA	Federal Defendants' Appendix
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act of 1935
FWS	U.S. Fish and Wildlife Service
ITC	ITC Midwest LLC
kV	kilovolt
MISO	Midcontinent Independent System Operator, Inc.
MVP	Multi-Value Project

NEPA	National Environmental Policy Act
Order	January 14, 2022, Opinion and Order of the District Court, No. 21-cv-0096
PA	Plaintiffs' Appendix
Project	Cardinal-Hickory Creek 345-kV Transmission Line Project
PSCW	Public Service Commission of Wisconsin
Refuge	Upper Mississippi National Wildlife and Fish Refuge
Refuge Act	National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997
ROW	Right-of-Way
RUS	Rural Utilities Service

JURISDICTIONAL STATEMENT

The Intervenor-Defendant-Appellants Co-owners agree that this Court has jurisdiction over these consolidated appeals.[1] Co-owners disagree with Plaintiffs' statement regarding the district court's jurisdiction for the reasons stated in their opening brief and below. Doc. 18, at 1–2, 28–33, 38–45.[2]

[1] Unless otherwise indicated, capitalized defined terms used in this brief have the same meaning as in the Glossary and as they do in Co-owners' Opening Brief (Doc. 18).

[2] Citations to "ECF" refer to the District Court Docket, No. 210-0096 (W.D. Wis.), and citations to "Doc." refer to the Appellate Docket, No. 22-1347 (7th Cir.).

STATEMENT OF THE ISSUES

The statement of issues for Co-owners' and Federal Defendants' appeals are presented in Co-owners' opening brief. Doc. 18, at 3–4. The sole issue in Plaintiffs' cross-appeal is whether the district court abused its discretion in declining to enjoin construction of the Cardinal-Hickory Creek Project, which is not a federal project and is being constructed almost exclusively on non-federal land, pursuant to permits issued by state utility regulators in Iowa and Wisconsin.

STATEMENT OF THE CASE

Co-owners incorporate by reference and refer the Court to the statement of the case set forth in their opening brief. Doc. 18, at 5–24.

SUMMARY OF ARGUMENT

Plaintiffs provide no legitimate reason for this Court to affirm or expand the district court's judgment. The district court exceeded its jurisdiction by ruling on:

- Co-owners' proposal to exchange land with FWS, which has not been finalized and is not ripe for review;
- Plaintiffs' challenge to FWS's rescinded CD and ROW permit, which are moot; and
- Plaintiffs' NEPA claim, which Plaintiffs lacked standing to bring.

Even if the district court had jurisdiction to decide these claims, it reached the wrong conclusions. The district court misinterpreted the law governing FWS land exchanges when it found that the Refuge Act requires FWS to issue a CD before exchanging land. The court conflated the law governing FWS's issuance of ROWs with separate statutory authority for land exchanges. The district court compounded its error by declaring that the (revoked) CD prepared for the (revoked) ROW prospectively prohibits FWS from approving a land exchange for the Project, even though FWS has yet to decide whether to approve an exchange and, if so, on what terms.

The district court's ruling on Plaintiffs' NEPA claims fares no better. The EIS's purpose and need statement reasonably incorporates the transmission planning objectives that the regional transmission planner,

MISO, established and state utility regulators affirmed when they approved the Project—over objections Plaintiffs presented in contested public hearings. RUS reasonably relied on the results of the grid planning and siting processes assigned to MISO and the states under the FPA when defining the Project's purpose and need and applied them appropriately to evaluate the Project and potential alternatives. RUS adequately explained its reasons for eliminating from in-depth review alternatives that did not satisfy the Project's purpose and need. Federal Defendants had no authority to make or override the decisions by MISO and the states approving the Project. Federal Defendants had no authority to order Co-owners to pursue Plaintiffs' preferred alternatives, which MISO and the states had already rejected. Federal Defendants, with no obligation under NEPA to study Plaintiffs' preferred alternatives in depth, nevertheless did examine them and reasonably concluded they did not satisfy multiple elements of the Project's purpose and need. Those conclusions are entitled to deference. The district court's finding to the contrary should be reversed.

Plaintiffs' cross-appeal seeking the extraordinary relief of a permanent injunction directed solely against private parties has no merit. Co-owners are private parties constructing the Project almost entirely on non-federal land in Wisconsin and Iowa. Construction outside the Refuge, for present purposes, requires no federal approval and is proceeding independently of the federal

actions challenged here. In this situation, the district court properly concluded that it lacks jurisdiction to enjoin the entire Project and declined to grant Plaintiffs' requested permanent injunction. The district court affirmed its decision on this point less than a week ago. This Court should affirm the district court's decision to deny permanent injunctive relief.

ARGUMENT

I. The district court lacked jurisdiction to reach Plaintiffs' NEPA and Refuge Act claims against RUS and FWS.

A. Plaintiffs' unpled challenge to the land exchange application is unreviewable.

1. Under the APA, FWS has not taken any final agency action regarding the land exchange application.

The district court exceeded its jurisdiction by issuing declaratory judgment on the proposed land exchange—potential agency action that was not before it and is not final. An APA challenge to agency conduct is ripe "only if it is filed after the final agency action." *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016). An action is "final" only if it "mark[s] the 'consummation' of the agency's decisionmaking process" and is one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted); 5 U.S.C. § 704.

Even if Plaintiffs properly pled a challenge to the land exchange (they did not), neither condition is satisfied here. The only federal "action" that

occurred in connection with the land exchange is a letter in which FWS agreed to "consider" Co-owners' application.[3] The one-page, single-paragraph letter does not "consummate" the land exchange review process, determine any rights or obligations, or create "legal consequences" for Plaintiffs or others.

The district court found and Plaintiffs argue that the land exchange is ripe based on cases involving challenges to final agency regulations, determinations, or pronouncements that subjected parties to the risk of civil sanctions (e.g., license revocation) or criminal prosecution. *See* Doc. 18, at 30; *San Francisco Herring Ass'n v. Dep't of the Interior,* 946 F.3d 564, 578 (9th Cir. 2019) (finding final agency action where officials announced intent to enforce criminal penalties against fishing in specified waters). Here, in contrast, FWS's letter merely expresses the agency's intention to *review* the land exchange and nothing more.[4] App'x 63. No legal consequences flow from it.

[3] The letter is not part of the administrative record. Co-owners submitted the letter to the district court as part of a motion for a stay, joined by Federal Defendants, based on the likelihood that review of the CD would become moot. ECF 53, 53-3 & 54. Two weeks later, FWS withdrew the CD. ECF 69.

[4] Even if FWS had expressed intent to approve the proposal, that *still* would not establish finality. *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 243–44 (10th Cir. 1991) (agency's announcement of "mere intention" to exchange land suitable for coal mining for unmineable tract not reviewable final agency action).

FWS's decision-making is far from complete. *See* Doc. 56, at 8 (describing procedures for land exchanges). FWS has committed to *review* the application, not to approve it. FWS's letter acknowledging receipt of Co-owners' application is not "final agency action" under the APA.

2. The proposed land exchange is not ripe for judicial review under Article III.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cleaned up). To determine whether an agency action is ripe for review, courts must consider whether (1) delayed review would cause hardship to the plaintiffs; (2) judicial intervention would inappropriately interfere with further administrative action; and (3) the courts would benefit from further factual development of the issues presented. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). All three factors show that the potential land exchange is unripe for judicial review.

First, Plaintiffs will not suffer any hardship from waiting until FWS acts on the land exchange because, until a decision is made, Co-owners cannot build the Project on the land proposed for exchange. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010) ("[I]f and when APHIS pursues a partial deregulation that arguably runs afoul of NEPA,

respondents may file a new suit challenging such action and seeking appropriate preliminary relief."). Plaintiffs complain that they would be harmed by needing to file another lawsuit, Doc. 61, at 44, but that is not hardship of the kind that justifies review of an unripe decision. *Ohio Forestry*, 523 U.S. at 734–35 (concerns underlying ripeness doctrine "ordinarily outweigh the additional costs of—even repetitive—postimplementation litigation").

Plaintiffs also argue that they are harmed by the ongoing construction of the Project *outside* the Refuge, because it could make future relief more difficult and costly for them. Doc. 61, at 44. That argument is a non sequitur. Agency actions do not cause hardship if "they do not command anyone to do anything or to refrain from doing anything [and] they create no legal rights or obligations." *Ohio Forestry*, 523 U.S. at 733. Moreover, even if FWS approves an exchange and Plaintiffs successfully challenge that decision, they would not as a consequence be entitled to enjoin construction on non-federal land outside the Refuge. *See infra* Section V.

Second, the district court's premature intervention interferes with further administrative action on the land exchange, effectively preventing FWS from making a decision that *would* be ripe for review. In its August 3, 2021 letter, FWS estimated that review of the proposed land exchange would likely take "up to nine months." App'x 63. One year later, FWS has made no

decision, Doc. 56, at 20, and has halted its review of the application in response to the Order. Plaintiffs argue that FWS has taken additional action on the land exchange, such as selecting a qualified appraiser. Doc. 61, at 46. But the document they cite to support this assertion is a declaration from August 25, 2021—almost five months *before* the district court issued the Order. FWS's decision to pause review of the land exchange demonstrates that it is interfering with future administrative action.

Third, the court would benefit from "further factual development of the issues presented." *Ohio Forestry*, 523 U.S. at 733. FWS has not decided whether to approve the land exchange or the terms and conditions that would apply to an exchange, so the exchange's "factual components" are not "fleshed out," *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990), and there is no administrative record to review. *See* 5 U.S.C. § 706 ("[T]he court shall review the whole record."). Plaintiffs nonetheless assert that the Court need not await a final decision because the determinative issues are "purely legal." Doc. 61, at 45. That contention must be rejected because "even purely legal issues may be unfit for review . . . if the agency action is not 'final agency action' under the APA." *Nevada v. Dep't of Energy*, 457 F.3d 78, 85 (D.C. Cir. 2006).

The district court admits that its decision rests on the lack of "*any evidence* to suggest that the land is indeed suitable for disposition." App'x 35

(emphasis added). This concession reveals the hypothetical nature of the court's opinion and absence of the administrative record required for judicial review. The district court erred by ruling on the proposed land exchange without a final agency action supported by an administrative record.

B. Plaintiffs' challenge to the CD and ROW permit is moot because FWS revoked those decisions.

FWS withdrew the CD and ROW permit, leaving no "effectual relief" for the district court to grant that could address Plaintiffs' alleged harms. *Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017). The district court's declaration that a ROW or land exchange would violate the Refuge Act was improper because when final agency action is successfully challenged under the APA, the remedy is to "vacate and set aside" that action—not future permutations of it. *See* Doc. 56, at 44–45; *Monsanto Co.*, 561 U.S. at 161 (invalidating district court injunction where terms "do not just enjoin the *particular* partial deregulation embodied in APHIS's proposed judgment. Instead, the District Court barred the agency from pursuing *any* deregulation.").

The mootness doctrine ensures that the requisite conflict between parties exists to meet Article III's "case or controversy" requirement. The purpose of the case-or-controversy requirement is to "limit the business of federal courts to questions presented in an adversary context." *Flast v.*

Cohen, 392 U.S. 83, 94–95 (1968). Here, two parties (neither of which is the government) are presenting arguments about a government action that the government is not defending. There is no actual case or controversy to justify the district court's action.

Plaintiffs try to evade mootness by arguing that the "voluntary cessation" doctrine applies. But voluntary cessation does not apply where the defendant demonstrates that "there is no *reasonable* expectation that the wrong will be repeated." *Ciarpaglini v. Norwood*, 817 F.3d 541, 546 (7th Cir. 2016) (quotation omitted). FWS met that burden by stating that it does not intend to issue another CD and ROW permit for the Project and declining to defend the withdrawn ROW permit in this litigation. Doc. 56, at 24, n.8. These representations are entitled to a presumption of regularity.[5] *Ozinga*, 855 F.3d at 734. Nothing in the record conflicts with this representation or suggests any inclination by FWS to resume the specific "wrong" Plaintiffs identify in their complaint. If there is to be a land exchange, it will rest on

[5] The district court inferred bad faith from Co-owners' application for and FWS's consideration of an amended ROW that would address Native American concerns regarding potential impacts to a burial mound and reduce the amount of Refuge acreage affected. App'x 4 (Defendants sought to amend ROW "*ostensibly* to avoid Ho-Chunk burial grounds") (emphasis added); App'x 15 (FWS "continue[s] to attempt to evade judicial review"); *see also* App'x 53–56 (describing amended route based on consultation with Native American tribes that started in July 2020). The district court made this assumption about FWS motives even though this process began more than six months *before* Plaintiffs filed their lawsuit. Federal Defendants repeatedly explained that the reason for the route change was to respond to concerns the Tribe raised after the Record of Decision was signed. App'x 54.

different FWS statutory authority with different requirements for agency decision-making.

The cases Plaintiffs cite are not on point. *City of Mesquite v. Aladdin's Castle, Inc.*, involved a challenge to unconstitutionally vague language in an ordinance regulating video game arcades, which the City had repealed by the time the case reached the Supreme Court. 455 U.S. 283, 286–89 (1982). But the City restored an age restriction effectively prohibiting the plaintiff's establishment after losing in state court on another ground. *Id.* The Court held that this pattern raised an inference that the City might "enact[] precisely the same provision" if the district court's judgment were vacated. *Id.* at 289.

In *West Virginia v. EPA*, the petitioners sought review of a regulation establishing power plant emission limits that had been reinstated by operation of law, but then judicially stayed at the government's request. 142 S. Ct. 2587, 2604–06 (2022). The Court exercised jurisdiction under the "voluntary cessation" doctrine in part because the government "nowhere suggest[ed] that if this litigation is resolved in its favor it [would] not," under the same rulemaking authority, reimpose the challenged rule and instead "vigorously defend[e]d the legality of such an approach." *Id.* at 2607 (quotation omitted); *see also Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) ("By not fully disclaiming the right to enforce this facially

invalid statute, the Board's halfhearted concession [on appeal] leaves us with no assurance that it will continue to recognize its unconstitutionality.").

In both cases, the government had left open the possibility that it would resume the allegedly unlawful conduct. That risk is absent in this case, where Plaintiffs challenge not an extant regulation or statute, but rather, a CD and ROW permit the government has repudiated. Neither has any continuing legal effect. And rather than "vigorously defend[ing]" the legality of the CD and ROW permit, *West Virginia*, 142 S. Ct. at 2607, the government is not defending either action. *See* Doc. 56, 24 n.8.

The district court's (and Plaintiffs') response is that the government "'remain[s] committed to a path through the Refuge" with a land exchange. Doc. 61, at 33–34. This assertion does not justify a finding of "voluntary cessation" for at least two reasons. First, the government has not "committed" to anything—it agreed to *consider* the land exchange proposal and nothing more. *See supra* Section I(A)(1). Second, unlike *West Virginia*, where the government could reissue the challenged emissions limitations under the *same statute*, the proposed land exchange would be a different final agency action governed by a different statutory provision—16 U.S.C. § 668dd(b)(3), not § 668dd(d)(1)(B)—and thus would not be the same "conduct" or "wrong" as a ROW permit. Under the Refuge Act, a land exchange is governed by

different processes and legal standards than a ROW permit.[6] *See infra* Section II; Doc. 18, at 8–9, 33–36. The court should have declined to reach Plaintiffs' unpled claim regarding the land exchange. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, N.Y.*, 140 S. Ct. 1525, 1526 (2020) (noting practice to vacate and remand "in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework") (quotation omitted).

C. Plaintiffs lack standing to challenge the EIS and Record of Decision because a favorable decision would not redress their harms.

Plaintiffs never dispute Co-owners' central argument that they lack standing to challenge the EIS based on RUS's potential future financial assistance to Dairyland. Plaintiffs instead argue that, because all three Federal Defendants signed the Record of Decision finding the EIS to be complete, Plaintiffs have standing to bring their NEPA claim. Doc. 61, at 64, 66. But RUS's potential funding decision is the only remaining agency action before this Court that relies on the EIS.[7] Doc. 18, at 42. Plaintiffs cannot

[6] The government states that FWS is "developing policy or guidance on the appropriate legal standard for Refuge land exchanges." Doc. 56, at 43. Whatever the guidance may provide, FWS affirmed in the proceedings below that no CD is required for a land exchange. ECF 115, at 7–8, 10–11.

[7] The Record of Decision supported FWS's CD and ROW permit; RUS's funding decision; and the Corps' issuance of an easement across Corps-owned and -managed

challenge the EIS in connection with that decision because they have not shown (or even pled) an essential element of Article III standing—that their harms would likely be redressed by the requested relief. The district court resolved this case on summary judgment, at which point Plaintiffs were required to adduce evidence to show standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiffs must establish standing "with the manner and degree of evidence required at the successive stages of the litigation."). Plaintiffs needed to demonstrate that if the new NEPA analysis they sought would cause RUS to deny funding, then Co-owners would abandon the project. They failed to make this showing, and therefore lack standing to bring their NEPA claim.

In NEPA cases involving federal financial assistance for private projects, courts have consistently found that a plaintiff cannot establish redressability and therefore lacks standing when he or she is unable to show that the party receiving the challenged funding would abandon the project without it. *See* Doc. 18, at 43 (citing cases). Plaintiffs do not meaningfully address this burden, instead citing a footnote in *Lujan* discussing procedural

lands within the Refuge. App'x 1178–81. FWS withdrew the CD and ROW permit, ECF 69, and Plaintiffs never challenged the Corps' easement. Moreover, the Corps did not rely on the EIS at issue here when issuing the Clean Water Act general permits and related Project verifications—which Plaintiffs unsuccessfully challenged (and have not appealed).

rights (but not its holding that the plaintiffs there lacked standing) and cases that did *not* involve government financial assistance to third parties. Doc. 61, at 66–67.

The Supreme Court has addressed how standing applies in environmental challenges to federal financial assistance. *See* Doc. 18, at 44. In *Lujan*, environmental groups had failed to show that their harms were caused by a challenged Interior Department regulation interpreting the ESA's consultation requirements to exclude funding for certain international programs. A plurality of the Court also found that the groups' alleged harms were not redressable, in part because government entities "generally supply only a fraction of the funding for a foreign project." 504 U.S. at 571. Because the plaintiffs had adduced "nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated," it was "entirely conjectural whether the nonagency activity that affect[ed]" them would be "altered or affected by the agency activity they seek to achieve." *Id.* Following *Lujan*'s plurality opinion, many courts have found that plaintiffs lacked standing where they were unable to show that without the challenged financial assistance (the "agency activity"), a privately built project ("the nonagency activity") would be abandoned. *See, e.g., Vill. of Bensenville v. FAA*, 457 F.3d 52, 70 (D.C. Cir. 2006) (petitioner lacked standing because the challenged federal funding represented "only . . .

a tenth of the funding" of the allegedly injurious airport expansion"); *S.E. Lake View Neighbors v. Dep't of Hous. & Urb. Dev.,* 685 F.2d 1027, 1036 (7th Cir. 1982) ("*South East Lake View*").

For example, in *South East Lake View*, the plaintiffs sought to block rent subsidies and other federal financial assistance to the developer of an apartment complex, which planned to rent more than half of the building's units to low-income, elderly, and disabled individuals and families. 685 F.2d at 1030. Claiming that the development "would lead to increased noise and air pollution, heightened risks of crime and injury, increased crowding and congestion, and enlarged traffic and parking difficulties," plaintiffs argued that the Department of Housing and Urban Development violated NEPA by failing to prepare an EIS. *Id.* at 1030–32. The district court dismissed the case on standing grounds, reasoning that occupation of the building was inevitable and the requested relief (enjoining federal funding) could not alter that result. *Id.* at 1037.

On appeal, this Court affirmed. Noting evidence that market rents would be paid for the remaining units in the complex and that the developers had access to alternative financing if the federal assistance were enjoined, the Court said, "it therefore appears that with or without the financing, the completed building will be occupied and the attendant congestion inevitable." *Id.* at 1038. The Court observed that despite the plaintiffs' burden to prove

standing, the record was "barren of any evidence contradicting the district court's very sensible conclusion" that the building would be "finished and occupied" regardless of the legal outcome. *Id.* As to the NEPA claim, the court explained:

> [I]t does not appear that if a risk of a new environmental injury was discovered, the injury could be avoided by withdrawing federal financial support to the project. Thus, requiring HUD to file an impact statement, an action which possibly could lead to withdrawal of federal assistance, will not benefit the plaintiffs.

Id. at 1039.

Plaintiffs cannot establish that if a new NEPA analysis were to result in a "no fund" decision, Co-owners would lack the wherewithal to build the line. Plaintiffs cannot show redressability (or, for that matter, causation)[8] due to the "relatively minor role" of RUS's possible post-construction financing for Dairyland's nine percent stake in the Project. *Vill. of Bensenville*, 457 F.3d at 70. The immediate cause of Plaintiffs' alleged injuries is not RUS's future funding decision, but rather, impacts from Project construction. *Cf. Food & Water Watch v. U.S. Dep't of Agric.*, 1 F.4th

[8] For many of the same reasons they have failed to show that relief from the court could redress their harms, Plaintiffs also fail to show that RUS's potential future funding caused their harms. Even if the prospect of RUS funding for Dairyland had somehow motivated Co-owners to begin work on the Project construction, Plaintiffs still could not show redressability given Co-owners' demonstrated commitment to complete construction before Dairyland even applies for this assistance.

1112, 1116 (D.C. Cir. 2021) (organization's "asserted injuries spring not from the [challenged loan] guarantee but from what the guarantee helped accomplish—the farm's construction and operation"). Because that construction would occur regardless of whether Plaintiffs prevail on their NEPA challenge to RUS's funding decision, the harms are not redressable. *South East Lake View*, 685 F.2d at 1039.

Co-owners are not arguing, as Plaintiffs seem to believe, *see* Doc. 61, at 66, that Plaintiffs must show that the purported NEPA defects they have alleged, if cured, would cause RUS to deny Dairyland's future loan application. Rather, Plaintiffs must show that, even assuming a new NEPA analysis would cause RUS to deny funding, the "no-fund" decision would *stop Co-owners* from building the Project (or at least, that there is a substantial probability of that result). Because Dairyland's Project Manager has stated that its loan application will not even be submitted until after the Project is built, ECF 90 ¶¶ 9–10, the available evidence is to the contrary: financial assistance clearly is not needed to build the Project. *South East Lake View,* 685 F.2d at 1038; *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1014 (9th Cir. 2018) ("[T]he fact that both Projects were already underway by the time funding from the Ex-Im Bank was authorized—nearly halfway complete in the case of [one] Project—suggests that the Projects did not rely on Ex-Im Bank financing.").

Plaintiffs' failure to satisfy their burden is reason enough to dismiss their NEPA claims for lack of standing. But if anything, Plaintiffs have *negated* their burden by acknowledging that "[i]t is not clear whether federal financing will be provided, or what a denial of federal financing might mean to the CHC transmission line." ECF 110 at 10 n.10. Plaintiffs have failed to establish that an order invalidating the Record of Decision under NEPA would have any bearing on construction, which is proceeding apace outside the Refuge. "It therefore appears that with or without federal financing," the Project will be built. *South East Lake View*, 685 F.2d at 1038.

The district court reasoned that, because it could redress Plaintiffs' harms by ruling in their favor on the Refuge Act claims, redressability exists for the NEPA claim as well. Plaintiffs make a similar argument here, asserting that "[t]his case involves federal funding *and* FWS/Corps permits *and* a significant public land obstacle to project completion." Doc. 61, at 66. But standing cannot be dispensed *in gross*—a plaintiff must demonstrate standing for each claim it asserts, and Plaintiffs did not even plead a NEPA claim against FWS. Doc. 56, at 50–52 (citing cases); *see also* FA 64–75; *supra* n.8. Even if they had, FWS revoked the only other agency actions that were both informed by the EIS and challenged in the complaint (the CD and ROW permit). Therefore, the only challenged federal action before the district court

relying on the EIS was RUS's potential future loan to Dairyland.[9] Plaintiffs cannot establish redressability (or causation) as to that claim, and they did not dispute this point in their brief.

The district court also opined that redressability was satisfied because "merely rerouting the CHC line outside the Refuge" would address Plaintiffs' concerns. App'x 23. But RUS is a funding agency with no siting or transmission planning authority, *see infra* Section IV.A.2, so no amount of additional NEPA analysis could produce that outcome. *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute . . .") (citation omitted).

II. The district court improperly found that a CD is required for a land exchange.

Plaintiffs argue—and the district court found—that FWS must issue a CD for any land exchange executed under the Refuge Act. Doc. 61, at 35–41; App'x 32–35. Plaintiffs assert that the purpose of the Refuge Act is to "eliminat[e] non-compatible uses," and that it would undermine this statutory purpose if FWS could enter into a land exchange without issuing a

[9] Plaintiffs mischaracterize the record by stating that "even without RUS financing, an *EIS* would still be required" for the agencies' respective decisions. Doc. 61, at 64 (emphasis added). But the record states only that "NEPA environmental review" would be required and does not predetermine what type of document is necessary or its geographic scope. App'x 795, 830, 1177.

CD. Doc. 61, at 37. The court accepted this argument, asking rhetorically why Congress "would . . . establish the Refuge Act's elaborate system of compatibility determinations . . . if FWS could avoid those requirements by using the land exchange section?." *Id*. at 38.

The statutory text answers the court's question. Congress did not "establish . . . [an] elaborate system of compatibility" in the abstract, but as part of a broad regime of land and resource management authorities. The system of "compatibility" cited by the court is found in specific provisions addressing when FWS can authorize "uses" of wildlife refuges. *See, e.g.*, 16 U.S.C. § 668dd(d)(1)(A), (d)(1)(B). Other statutory authorities empower FWS to expand the Refuge System through land acquisitions or exchanges. *See* 16 U.S.C. § 668dd(a)(4)(C), (b)(3). FWS enjoys broad discretion to manage its portfolio of hundreds of refuges and to adapt to changing public needs. The plain language and legislative history of the Refuge Act (1) authorize FWS to issue easements or ROWs for *new* uses, including transmission ROWs, and (2) confirm that Congress did not intend to restrict or eliminate pre-existing ROWs (such as Co-owners' existing transmission ROWs within the Refuge). *See supra* Section III(A). The basic premises of Plaintiffs' argument—that the Refuge Act's sole purpose is to eliminate non-compatible uses (and that powerlines are categorically incompatible)—are flawed.

Second, Plaintiffs are using "the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose." *Rapanos v. United States*, 547 U.S. 715, 755 (2006). Their argument contradicts the key interpretive principle that "no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Id.* at 752. Here, nothing in the text or structure of the Refuge Act indicates that FWS must find that a proposed land exchange is a compatible "use" to approve it. Nor would reading such a requirement into the statute serve its purposes, since once an exchange is consummated, the land being used is no longer *within* the Refuge system and is therefore not subject to the Refuge Act's requirements for compatibility.

"The 'cardinal canon' of statutory interpretation is that we look first to the text of the statute. When a statute is unambiguous, our inquiry starts and stops at the text." *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 622 (7th Cir. 2015) (citation omitted). The Court need look no further than the text of the Refuge Act itself to conclude that FWS is not required to issue a CD to exchange land. The Refuge Act authorizes FWS to "[a]cquire lands or interests therein by exchange (A) for acquired lands or public lands . . . under his jurisdiction which he finds *suitable for disposition*," provided that "[t]he values of the properties so

exchanged shall be approximately equal, or . . . equalized by the payment of cash to the grantor or to [FWS] as the circumstances require." 16 U.S.C. § 668dd(b)(3) (emphasis added). A separate provision of the statute provides that FWS may "permit the *use* of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as . . . powerlines . . . whenever he determines that such *uses* are compatible with the purposes for which these areas are established."[10] 16 U.S.C. § 668dd(d)(1)(B) (emphasis added).

Plaintiffs' (and the district court's) interpretation effectively grafts the compatibility requirement from the refuge law's "use" provisions (in section 668dd(b)(1)(B) and other sections) onto the land exchange provision (in section 668dd(b)(3)). But the plain language of the relevant provision of the Refuge Act requires only that FWS determine that the public land being exchanged is "suitable for disposition" and "approximately equal" in value (or equalized by cash payment) to the land being acquired; the word "compatible" is nowhere to be found. 16 U.S.C. § 668dd(b)(3). The court erred by reading a compatibility requirement into the land exchange provision where none exists in the law. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014)

[10] *See also* 16 U.S.C. § 668dd(d)(1)(A) (authorizing FWS to "permit the *use* of any area *within* the [Refuge System] for any purpose . . . whenever he determines that *such uses* are *compatible* with the major purposes for which such areas were established") (emphasis added).

("[W]hen 'Congress includes particular language in one section of a statute but omits it in another' . . . this Court 'presume[s]' that Congress intended a difference in meaning.") (citations omitted); *see also Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1111 (D. Colo. 2012) ("The plain language of the Refuge Act supports the conclusion that a compatibility determination is not required for the acquisition of land."), *aff'd sub. nom.* 784 F.3d 677 (10th Cir. 2015).

From a structural perspective, the standards governing land exchanges and those governing "uses" of wildlife refuges appear in different sections of the statute. If Congress intended FWS to issue a CD before entering into a land exchange under 16 U.S.C. § 668dd(b)(3), it would not have secreted that requirement away in different provisions of the law. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms *or ancillary provisions*—it does not, one might say, hide elephants in mouseholes.") (emphasis added). Had Congress intended to require a CD before FWS could proceed with a land exchange, it would have explicitly included that condition in the Refuge Act. The Court should decline Plaintiffs' invitation to write such a requirement into the law.

Plaintiffs' position is contrary to the text and logic of the Refuge Act. CDs are required so that lands *owned* by the federal government are *used* in

a manner consistent with the purposes of the refuges affected and the overall refuge system. *See* 16 U.S.C. § 668dd(d)(1)(B), (d)(3)(A)(i). Once those lands are transferred out of the system, they are no longer under federal ownership, and any uses thereof are purely private in nature. *Cf. Friends of Alaska Nat'l Wildlife Refuge v. Haaland*, 29 F.4th 432, 444 (9th Cir. 2022) ("Land transferred out of a conservation system unit in a land exchange is, by definition, no longer 'within any conservation system unit.'").

III. Even if a CD is required for a land exchange, the district court's finding that the Project is *per se* incompatible with the Refuge must be reversed due to errors of law and fact.

A. The district court improperly found that the CD precludes a "crossing" at the Nelson-Dewey location by ignoring the statute's definition of "purpose of the refuge."

If the Court finds it proper to reach the merits of Plaintiffs' Refuge Act claim, it should reverse that decision on the merits. The district court erred as a matter of law in finding that the Project was incompatible with the Refuge's purposes not based on the specific language of the statute that created the Refuge (16 U.S.C. § 723) and the facts underlying the CD, but on a flawed and selective analysis of the Refuge Act's legislative history (not its text) and other extraneous documents.

Having failed to appropriately limit its inquiry, the court also erred when relying on documents other than the Refuge's enabling legislation to determine its purposes. The CD listed the Refuge's purposes, as set forth in

its enabling statute, and found that the ROW was compatible with them. App'x 1151, 1166. These statutory purposes all relate to habitat—providing a refuge and habitat for bird, wildlife, plant and fish species.[11] The court's reasoning seems to concede that, if its review were confined solely to those purposes (as it should have), the court would have to uphold the CD. App'x 28 (citing 16 U.S.C. § 723). Finding that an inquiry solely into statutory purposes "would be unreasonably narrow," the court looked instead at certain of the (43) objectives set forth in the Comprehensive Conservation Plan for the Refuge; the legislative history of the Improvement Act; and a law review article to determine the Refuge's "purposes" under the Refuge Act. *Id*.

This was error; the Refuge Act explicitly identifies what documents are relevant to define a refuge's purpose: the "purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge." *See* 16 U.S.C. § 668ee(10). None of the materials relied upon by the district court fall within this definition. Statutorily recognized purposes would, however, include Co-owners'

[11] Congress created the Refuge to maintain it as a "refuge and breeding place" (a) "for migratory birds included in the [Migratory Bird Treaty]"; (b) "for other wild birds, game animals, fur-bearing animals, and for the conservation of wild flowers and aquatic plants," and (c) "for fish and other aquatic animal life." 16 U.S.C. § 723.

preexisting easements over FWS-owned land within the Refuge, which reserve Co-owners' right to expand the corridor to add a second line. FA 314–15. *See* 16 U.S.C. § 668ee(10) (the Refuge's purposes include "the purposes specified in . . . *agreement[s]* . . . *expanding* a Refuge") (emphasis added); 16 U.S.C. § 724(b) (Refuge may acquire lands burdened by easements or other encumbrances if it determines "that any such reservation or exception will in no manner interfere with the use of the area *for the purposes of this chapter*.") (emphasis added).

Second, the court's finding that the CD violated the Comprehensive Conservation Plan's goal to "maintain and improve scenic qualities" was also improper. Scenic values are not one of the Refuge's enumerated statutory purposes, and the Plan is not among the enumerated sources the court could consult to determine its purposes. The court found that the proposed use would be incompatible because the CD states that the line would be more visible to Refuge visitors once it is relocated, App'x 31, but the greater visibility is a product of the relocated line's proximity to a heavily used road and railroad, and collocating the multiple transmission lines on one set of structures, "which increases the visibility of the transmission lines and allows birds to make one ascent and descent to cross the lines." SuppApp'x 17 (noting relocation's "[b]eneficial impacts to viewers . . . from the Stoneman

river crossing at the Cassville public landing"); SuppApp'x 6 (noting expected reduction in avian collisions due to line configuration and structure height).

Third, the district court improperly relied upon a law review article to find that the "the twin policy aims of the Refuge Act were to reprioritize wildlife conservation over secondary uses and elevate wildlife-related uses, such as hunting, fishing, photography, and birding," App'x 28–29, and that those were therefore purposes of the Refuge.[12] The district court failed to acknowledge that, despite multiple proposed amendments over the years, the language of the provision authorizing FWS to issue ROWs for powerlines has never been modified. 16 U.S.C. § 668dd(d)(1)(B). Provided they satisfy the statutory compatibility criteria, new and expanded powerline ROWs are uses of wildlife refuges that Congress anticipated, has repeatedly protected, and has never prohibited. Contrary to the court's findings, the legislative history confirms Congress' continued intent to allow powerlines to be built in refuges.

The Refuge Act specifically authorizes the "construction, operation, and maintenance" of powerlines. 16 U.S.C. § 668dd(d)(1)(B). The provision's use of the term "construction" obviously contemplates something more than the

[12] The ROW is consistent with a statutory purpose of prioritizing wildlife conservation because it enlarges contiguous habitat within the Refuge over time by moving an existing line in a forested area to collocate it with a disturbed and fragmented area; configuring the lines to increase their visibility to birds; and making the height of the towers consistent with the tree canopy to reduce avian collisions. *See* Doc. 18, at 37–38.

renewal of existing uses. Because the plain statutory and regulatory language demonstrate that transmission line ROWs can be compatible uses of a Refuge, the court should have ended its inquiry there. *Singh v. Sessions*, 898 F.3d 720, 725–26 (7th Cir. 2018) ("when the meaning of the statutory text is clear, we do not '[v]entur[e] into legislative history'") (citation omitted).

In addition to the plain language of the statute, its legislative history also refutes Plaintiffs' theory that powerlines may never cross a refuge. In 1974, President Ford vetoed a bill that would have prevented the Secretary from approving any ROW through a refuge absent a finding that it is "the most feasible and prudent alternative." Observing that refuge resources were adequately protected by the compatibility requirement, the President exhorted Congress to "avoid changes in the law that could create further obstacles and delays in the construction of vitally needed facilities, particularly those facilities designed to help meet urgent energy needs." Veto of National Wildlife Refuge System Legislation (Oct. 22, 1974).

When the Refuge Act was amended in 1997, Congress revised the definition of "compatible use" to include "a wildlife-dependent recreational use *or any other use* of a refuge that in the sound professional judgment of the Director, will not materially interfere with or detract from" the System's mission or the purposes of the refuge. 16 U.S.C. § 668ee(1) (emphasis added). The drafters added the phrase "or any other use" to clarify that compatible

uses are not limited to wildlife-dependent uses. Language in the original bill that would have banned all non-wildlife-dependent uses of refuges was removed. *Compare* H.R. REP. No. 105-106, *25, § 5(1) (1997) *with* 16 U.S.C. § 668ee(1). The originally proposed language was rejected because it could pose a "significant problem" because "our national wildlife refuges support many uses, including wildlife-dependent uses such as hunting and fishing, *but also important nonwildlife-dependent uses, like . . . electricity transmission*." A Bill to Amend the Nat. Wildlife Refuge System Admin. Act of 1966 to Improve the Management of the Nat. Wildlife Refuge System, and for Other Purposes: Hearing S. 1059 Before the S. Comm. on Env't and Public Works, 105th Cong. 3 (1997) (statement of Sen. Kempthorne) (emphasis added).

The court erred both in consulting legislative history in the first instance and in how it interpreted that history. The Refuge Act does not permit a court to look at a Refuge's Comprehensive Conservation Plan, the Refuge Act's legislative history, or law review articles to determine an individual refuge's purposes. The court erred as a matter of law in finding that the Project was incompatible with the Refuge's purposes. If this Court finds that the Refuge Act claims are not moot and otherwise justiciable (*see supra* §§ I.A.–C.), it should reverse on the merits. Alternatively, to the extent its order is construed as a *per se* ban, the relief is improper under the APA.

B. The district court erred by determining that any crossing of the Refuge by the Project "as currently proposed" was precluded by the CD.

The district court stated that "the CHC project's proposed crossing cannot be deemed compatible with the Refuge," App'x 32; *id.* (elimination of maintenance exception "tak[es] away the one defense the Utilities had to the obvious *in*compatibility of the CHC project with the Refuge's express purposes"); *see also* App'x 47 (declaring that "the [CD] precludes the CHC transmission line as currently proposed from crossing the refuge by right of way or land transfer"). It is unclear what the phrase "as currently proposed" means. But under the APA when final agency action is successfully challenged, the proper remedy is to "vacate and set aside" that action—not all future permutations of it. Doc. 56, at 44–45; *Cf. Monsanto Co.*, 561 U.S. at 161 (invalidating district court injunction where terms "do not just enjoin the *particular* partial deregulation embodied in APHIS's proposed judgment. Instead, the district court barred the agency from pursuing *any* deregulation"). Here, any interpretation that the district court's order restricts all future proposed crossings of the Refuge—as Plaintiffs have urged, *see* Doc. 61, at 43—would be inconsistent with the APA, and should thus be disfavored. At most, the declaratory judgment should be construed to preclude the specific use of refuge land analyzed in the now-revoked CD. *Cf. Patriot Homes, Inc. v. Forest River Hous., Inc.*, 512 F.3d 412, 415 (7th Cir.

2008) (Federal Rules' requirement of specificity in injunctions "spares courts and litigants from struggling over an injunction's scope and meaning by informing those who are enjoined of the specific conduct regulated by the injunction.") (quotation omitted).

IV. The EIS complies with NEPA.

Plaintiffs assert that Federal Defendants defined the Project purpose too narrowly and failed to consider reasonable non-transmission alternatives or routing alternatives that avoided the Refuge. App'x 35–41. Plaintiffs' attack on the EIS attempts to relitigate the battle against the Project they fought and lost before the regional and state agencies charged with energy and transmission policy and operation of the regional power grid.

Plaintiffs' NEPA argument has no merit. Agencies have considerable discretion when defining the purpose and need of a project, and those determinations are entitled to judicial deference. Doc. 18, at 46–47. This case is a paradigmatic example federal agencies reasonably relying on the planning efforts and studies of other governing, expert authorities. Doing so was reasonable and fully consistent with NEPA's requirements.

It was reasonable and, indeed, prudent for Federal Defendants to rely substantially on MISO's transmission planning criteria when framing the purpose and need statement for the EIS because only MISO has legal responsibility for planning and managing the region's transmission grid.

Plaintiffs' position seems to be that NEPA requires Federal Defendants to consider energy policy, grid design, and transmission routing on non-federal land as if they held the power to make those decisions. But NEPA did not require Federal Defendants to study Plaintiffs' preferred alternatives as if Federal Defendants were responsible for approving or disapproving those proposals. Nor did NEPA require Federal Defendants to give detailed consideration to alternatives rejected by or inconsistent with decisions made by the federal, regional, and state entities with grid planning and management authority. *See Protect Our Parks v. Buttigieg*, 39 F.4th 389, 393 (7th Cir. 2022) ("Federal law does not require agencies to waste time and resources evaluating environmental effects that those agencies neither caused nor have the authority to change.").

The agencies nonetheless did consider alternatives beyond their jurisdiction, and their analysis was more than sufficient under NEPA. Federal Defendants considered several non-transmission alternatives, found that they did not feasibly or economically meet the needs the Project was intended to address, and dismissed them from further consideration. App'x 867–76. Federal Defendants also carefully evaluated siting alternatives that would have avoided routing the Project through the Refuge, which they rejected as not economically or technically feasible, and because state and local authorities would not permit them. App'x 799, 1186; *see also* Doc. 18, at

53–62. Those conclusions were not arbitrary and capricious; this Court should therefore reverse the district court's ruling that the EIS failed to adequately consider non-transmission alternatives and routing alternatives that avoided the Refuge.

A. The EIS's purpose and need statement was sufficiently broad.

1. The transmission planning objectives in the purpose and need statement were reasonable.

Plaintiffs argue (and the district court found) that the six-part purpose and need statement "unduly limit[ed] the alternatives and routes considered." Doc. 61, at 55–56. This argument lacks merit. The purpose and need statement properly incorporated the transmission planning objectives that MISO identified when it approved the Project as part of the MVP portfolio a decade ago. *Compare* App'x 102–129 (MISO discussion of need for and benefits of MVP portfolio) *with* App'x 832–45 (RUS's discussion of Project's purposes and benefits); *see also* Doc. 18, at 48.[13] MISO approved the MVPs to solve *multiple* transmission problems and provide *multiple* types of

[13] Plaintiffs characterize MISO's MVP analysis as "outdated," Doc. 61, at 56–57, but MISO reaffirmed the benefits of and need for the MVP portfolio twice since it was approved in 2011, most recently in 2017. App'x 835. The PSCW and Iowa Utilities Board also reaffirmed the need for and benefits of this specific project within months of Federal Defendants' issuance of the Record of Decision. *See infra*, Section IV.

economic, reliability, and public policy benefits to the region. App'x 102–105, 637–39; *see also* Doc. 39, at 14–16. As this Court stated:

> [E]very multi-value project is to be large, is to consist of high-voltage transmission (enabling power to be transmitted efficiently across pricing zones), and is to help utilities satisfy renewable energy requirements, improve reliability (which benefits the entire regional grid by reducing the likelihood of brownouts or outages, which could occur anywhere on it), facilitate power flow to currently underserved areas in the MISO region, *or attain several of these goals at once.*

Ill. Comm. Comm'n v. FERC, 721 F.3d 764, 774 (7th Cir. 2013) (citations omitted and emphasis added). MISO designed the Cardinal-Hickory Creek Project to serve multiple energy policy and transmission goals. It was thus logical and reasonable for Federal Defendants to incorporate those goals into a multi-part purpose and need statement.

These general goals did not unduly constrain the scope of reasonable alternatives considered in the EIS. The only specific objective that Plaintiffs (and the district court) take issue with is the goal of "increasing transfer capability" between Iowa and Wisconsin. App'x 37–38; Doc. 61, at 55. Plaintiffs claim that this objective is "a means, not an end," and that "[r]equiring the project to 'increase transfer capability' between Iowa and Wisconsin is no different from requiring one water source to serve two communities as in *Simmons*." Doc. 61, at 55.

The Plaintiffs are wrong. Transfer capability refers to the movement of electric power between two regions—in this case, Iowa and Wisconsin. *See* App'x 840–41. The EIS acknowledges that non-transmission alternatives like solar generation and energy storage *can* increase transfer capability, but did not serve as a viable alternative to the Project's ability to carry large amounts of new renewable energy from where it is generated to where it is consumed. App'x 870–71; *see also* App'x 707. The *general objective* of "increasing transfer capability" between two states is therefore unlike the purpose-and-need statement this Court rejected in *Simmons*, which effectively adopted the *specific alternative* the project's sponsor proposed (requiring one water source to serve two communities).

But this case bears no resemblance to *Simmons*. There, the City of Marion, Illinois applied to the Corps for a permit to construct a dam on a creek, which would create a reservoir that could serve Marion and a nearby water district. *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 667–69 (7th Cir. 1997). This Court held that the Corps violated NEPA because its EIS analyzing the application defined the project's purpose too narrowly—namely, creating a single source of water for Marion and the nearby water district. *Id.* at 669. "The general goal of Marion's application is to supply water to Marion and the Water District—*not* to build (or find) a single reservoir to supply that water." *Id.*

A key reason behind the Court's ruling was the Corps' failure to include *any* explicit statement of purpose in its EIS. *See Simmons v. U.S. Corps of Army Eng'rs*, No. 96-4246, 1996 WL 1323088, at *12 (S.D. Ill. Dec. 18, 1996) (*Simmons II*); 120 F.3d at 669 (noting that "the district court had to 'fill in the blanks' to ascribe this purpose to the Corps"). The Corps confined its analysis to single-source alternatives for supplying water without ever considering "whether this single-source idea is the best one—or even a good one." *Simmons,* 120 F.3d at 667. This omission was particularly egregious because, five years earlier, the district court found that "[t]he Corps did not consider whether a separate water supply could be obtained for Lake of Egypt Water District." *Simmons II,* 1996 WL 1323088, at *12 (quoting *Simmons v. U.S. Army Corps of Eng'rs*, No. 91–cv–4188 (S.D. Ill. June 25, 1992)).

Those facts are noticeably absent from this case. Unlike the EIS at issue in *Simmons*, this EIS specifically defined the purpose of and need for the Project, using non arbitrary, sufficiently general criteria. App'x 837–45. Whereas the Corps in *Simmons* failed to consider separate source alternatives, Federal Defendants discussed several different non-transmission alternatives, found that they could not effectively meet the needs the Project was designed to address, and dismissed them from further, detailed analysis. App'x 867–76. NEPA required nothing more.

2. Federal Defendants were not required to conduct a detailed study of non-transmission alternatives they have no legal authority to implement or that would not meet the Project's stated purposes.

Plaintiffs' real quarrel is not with the scope of the purpose and need statement, but with the fact that Federal Defendants did not join Plaintiffs' effort to overrule MISO and the state utility regulators. MISO and the regulators in Iowa and Wisconsin had found that the Project, not Plaintiffs' proposals, would best meet future state and regional transmission needs. Federal Defendants did not ignore Plaintiffs' preferred energy and grid policies. They evaluated non-transmission alternatives and found, as the states and MISO had, that Plaintiffs' proposals would not meet the purpose and need for the Project. *See* App'x 867–76.

Under the FPA, the entities with primary responsibility for planning and authorizing the Project are MISO and the states in which the Project will be located. FERC has jurisdiction over the transmission of electricity in interstate commerce, 16 U.S.C. § 824(b), which includes authority to oversee interstate transmission planning.[14] *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55–59 (D.C. Cir. 2014). FERC has exercised this authority to encourage the creation of multi-utility regional transmission organizations, which are

[14] Co-owners respectfully suggest that the Court consider inviting FERC to participate in this case in light of the potential impacts of the district court's decision on FPA administration.

independent, non-profit organizations that operate, maintain the reliability of, and plan expansions to the transmission system. *See id.*; 18 C.F.R. § 35.34(k)(7). They play a critical role in promoting competition in wholesale electricity markets. *Ill. Comm. Comm'n*, 721 F.3d at 770. MISO is the regional transmission organization with responsibility over the transmission system in a large swath of the Midwest, including Iowa and Wisconsin. *Id.*

At the same time, the FPA preserves state authority over the siting of generating resources and transmission lines. *See* 16 U.S.C. § 824(b)(1); *Ill. Comm. Comm'n*, 721 F.3d at 773. Both Iowa and Wisconsin require utilities to obtain a permit before they can construct certain high-voltage transmission lines within the state's borders. *See* Iowa Code § 478.1; Wis. Stat. § 196.491(1)(f), (3). These state permitting processes are complex, requiring the agencies to consider economics, electric reliability, the environment, and other matters. *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 516 (7th Cir. 2021) (describing the Wisconsin permitting process); Iowa Code § 478.3 (describing legal standards in franchise proceedings).

In this case, MISO exercised its authority by approving the Project as part of its MVP portfolio. *See* Doc. 18, at 11–13. MISO found that the MVP portfolio was needed to bring low-cost wind power from areas west of the Mississippi River (where it is plentiful) to areas east of the river (where there

is more electric demand). *Ill. Comm. Comm'n*, 721 F.3d at 771–72. MISO also found that the MVPs would "increase the reliability of the electricity supply in the MISO region and thus reduce brownouts and outages, and also increase the efficiency with which electricity is distributed throughout the region." *Id.*; App'x 164–216.

Under the MISO tariff, all transmission owners are required to use due diligence to build the facilities approved in the MVP portfolio—including the Project. App'x 837. Co-owners therefore applied to Wisconsin and Iowa for authorization to construct the Project. In 2019, the PSCW issued a Certificate of Public Convenience and Necessity for the Project, finding that it "provides a robust long-term solution for Wisconsin's energy needs"; that the non-transmission alternatives proposed by DALC were not "sufficiently credible"; and that those alternatives "do not have the same breadth of benefits as the project." App'x 706–07. Several months later, the Iowa Utilities Board likewise found that the Project is needed to meet current and future transmission needs and is in the public interest.

Federal Defendants have no authority to act as a super transmission siting authority and override these determinations or otherwise order Co-owners to pursue Plaintiffs' preferred alternatives. RUS is authorized to provide low interest loans and loan guarantees to cooperatives like Dairyland. It is not a regulatory agency that has authority to set energy

policy or design and manage transmission buildout. Doc. 18, at 5, 50–51. Similarly, the Refuge Act authorizes FWS to issue approvals or exchange land to allow the Project to cross the Refuge area. FWS has no authority to dictate whether, where, or how the Project is built on non-federal land in Iowa and Wisconsin, or whether other alternatives should be pursued in lieu of the Project.

The limited scope of Federal Defendants' authorities readily demonstrates that Plaintiffs' challenge to the EIS's purpose and need statement is without merit. As this Court recently recognized, "[i]t would be unreasonable to require agencies to spend time and taxpayer dollars exploring alternatives that would be impossible for the agency to implement." *Protect Our Parks*, 39 F.4th at 400; *Env't Law & Policy Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 684 (7th Cir. 2006). In *Protect Our Parks*, a group of Chicago residents argued that the National Park Service and Department of Transportation violated NEPA by failing to study reasonable alternatives to siting the Obama Presidential Center in Jackson Park, Chicago. *Id.* at 396–97. The City of Chicago approved siting the center in that location. *Id.* at 393. The federal agencies had no role in the City's siting decision, but were required to provide certain limited reviews or approvals of the project. *Id.*

On appeal from the district court's denial of their motion for a preliminary injunction, the plaintiffs argued that NEPA required the agencies to study alternative locations for the center—a claim this Court emphatically rejected.[15] *Id.* at 399–400. The Court stressed that the City—not the federal agencies—had chosen the site, and that the federal agencies had no authority to choose another site or force the City to move the center. As such, the agencies had "no obligation to examine the effects of state and local government action that lies beyond the federal government's control." *Id.* at 399.

This case stands on all fours with *Protect Our Parks*. Consistent with their respective roles under the FPA, MISO and the state utility commissions determined that the Project is needed, in the public interest, and better suited to meet current and future transmission needs than other alternatives. MISO established the electrical endpoints (i.e., substations) for the Project,[16] App'x 137–38, 835–36, and the states were left to authorize the specific route the Project would follow between those two points. Federal Defendants have

[15] The Court made similar findings when denying the plaintiffs' motion for an injunction pending appeal. *See Protect Our Parks v. Buttigieg*, 10 F.4th 758, 763–64 (7th Cir. 2021).

[16] Plaintiffs erroneously suggest that MISO "did not precisely identify the route for its proposed transmission lines." Doc. 61, at 63. As noted above, MISO specified which substations the Project needed to connect. Plaintiffs' suggestion that the same benefits could be achieved by connecting two different substations lacks evidentiary support in the record and should be disregarded.

no legal authority to override these determinations, order that the Project be located elsewhere, or require Co-owners to pursue one of Plaintiffs' preferred alternatives in lieu of the Project.[17] Federal Defendants were not required to conduct a detailed study of those alternatives in the EIS, and Plaintiffs' challenge to the purpose and need statement must fail.

If accepted, Plaintiffs' arguments would effectively usurp and reallocate the role that Congress has assigned exclusively to FERC and regional grid operators to plan and operate the interstate transmission system under the FPA. It would also call into question the states' authority to manage construction and siting of transmission lines within their jurisdictions. *Cf. Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013) ("For the Corps to assume unilateral responsibility for determining the acceptability from a transportation standpoint of alternative highway projects would usurp the role federal and state law have assigned to federal and state transportation authorities."). The Court should reject Plaintiffs' attempt to leverage NEPA to supersede and disrupt Congress' allocation of

[17] FWS's authority over the Project's crossing of the Refuge under some scenarios does not change this conclusion: the fact that an agency's approval is a "but for" cause of a project's location "'is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.'" *See Protect Our Parks*, 39 F.4th at 399–400 (citations omitted).

decision-making authority over interstate transmission among FERC, the states, and regional transmission grid operators.

B. The EIS sufficiently analyzed non-transmission alternatives and potential transmission routing alternatives that avoided the Refuge.

1. Non-Wires Alternatives

Federal Defendants, relying on findings from MISO and the PSCW, reasonably determined that only the Project could feasibly and cost-effectively achieve the transmission planning objectives in the purpose and need statement. Doc. 18, at 54–58. Federal Defendants reasonably concluded that non-transmission alternatives—including local renewable generation, energy storage, energy efficiency, and demand response—are not reasonable alternatives to the Project and declined to carry those alternatives forward for more detailed analysis in the EIS. App'x 867–872.

Plaintiffs suggest that some combination of non-transmission alternatives could achieve the same benefits as the Project and that Federal Defendants arbitrarily declined to evaluate them. Doc. 61, at 60. Plaintiffs claim to have submitted "expert testimony" identifying such alternatives. *Id.* But the most they offer are generic endorsements of "energy efficiency," "demand response," and "solar energy generation"—terms that embrace a "virtually limitless range of possible actions and developments," *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 552 (1978).

These are concepts, not alternatives. Plaintiffs cannot invoke these notional solutions, then fault the agencies for failing to satisfactorily evaluate proposals the Plaintiffs themselves would not identify with specificity.[18]

Notably, the PSCW rejected the testimony of Plaintiffs' purported "experts" as not "sufficiently credible" when concluding that the alternatives they proposed were infeasible and incapable of delivering the same benefits as the Project. Doc. 18, at 54–55; App'x 706–07. It would have been reasonable for Federal Defendants to reject Plaintiffs' proposed non-transmission alternatives based solely on MISO's approval of the Project as part of the MVP portfolio and the PSCW's findings—because the job of making such findings belongs to the grid manager and states, not the Federal Defendants. Nevertheless, the EIS does discuss non-transmission alternatives. *See* App'x 867–76; *see also Protect Our Cmtys. Found. v. U.S. Dep't of Agric.*, 845 F. Supp. 2d 1102, 1110 (S.D. Cal.) (rejecting Administrative Law Judge findings cited by plaintiffs when "[t]he conclusions of the [California Public Utility Commission] Administrative Law Judge . . . were rejected by the CPUC"), *aff'd* 473 Fed. Appx. 790 (9th Cir. 2012); *Protect*

[18] Like the nuclear power plant developer in *Environmental Law and Policy Center*, 470 F.3d 676, two of the Co-owners are in no position to implement alternatives like solar generation, energy efficiency, or demand response. Neither ITC Midwest (an "independent transmission owner" under Wisconsin law) nor ATC (a "transmission company" under Wisconsin law), may own power plants; they are limited to providing *transmission service*. *See* Wis. Stat. § 196.485(1)(dm), (1)(ge), (3m)(a).

Our Cmtys. Found. v. U.S. Dep't of Agric., No. 11-cv-00093, 2011 WL 13356151, at *3 (S.D. Cal. Sept. 15, 2011) (deferring to CPUC determination that "the In-Area Renewable Alternative . . . did not meet [transmission line]'s goal to reduce congestion and power supply costs and would have significant impacts").

2. Non-Refuge Alternatives

Plaintiffs claim that "[t]he EIS did not seriously consider alternative routes that would avoid cutting through the Refuge and ecologically sensitive portions of the Driftless Area." Doc. 61, at 62. This statement misrepresents the record.

The Refuge runs for approximately 261 miles between Buffalo County, Wisconsin and Davenport, Iowa, along the course of the Mississippi River, which separates Iowa and Wisconsin. Doc. 18, at 59. The Project is designed to strengthen the regional grid by connecting two substations—one in Dubuque County, Iowa and another in Dane County, Wisconsin, App'x 137–38—so it must cross the river *somewhere*. At FWS's request, Co-owners prepared an extensive study of seven potential river crossings, four of which would proceed through administrative breaks in the Refuge. *See* App'x 217–378. This study concluded—and FWS agreed—that these non-Refuge crossings "were not economically or technically feasible and would have greater overall environmental and human impacts, compared with the

Refuge crossing locations." App'x 1186; Doc. 18, at 60–61. Plaintiffs' assertion that the EIS did not sufficiently consider alternative routes "that would avoid cutting through the Refuge" is wrong.

Tellingly, Plaintiffs offer nothing specific to support their claim that some reasonable routing alternative exists that FWS failed to consider. There are none. The next-closest non-Refuge crossings, if used, would require a detour of 17 miles to the north or 20 miles to the south of the routes considered in the Alternative Crossings Analysis. App'x 251–52. Co-owners and FWS gave serious consideration to these alternatives (all of which would unavoidably also have crossed the Mississippi River, the Mississippi Flyway, and the Driftless area). FWS and Co-owners concluded that the other routes were not feasible and would have greater adverse impacts than the Refuge crossing.[19] The EIS fully explains the potential impacts associated with the river-crossing alternatives, including impacts on the environment and local communities, and the rationale for choosing the route ultimately approved. App'x 799–817, 901.

[19] Plaintiffs assert that Co-owners "knew [these crossings] were not viable," but cites no evidence to suggest that Co-owners held this opinion when they undertook a lengthy, good faith effort to study them. Doc. 61, at 63.

V. The district court properly declined to enjoin construction of the Project in Iowa and Wisconsin—private activity occurring entirely outside the Refuge.

For the last four years, the lead Plaintiffs in this litigation (the Driftless Area Land Conservancy and Wisconsin Wildlife Federation) have sought to halt construction of the Project by pressing a variety of claims before the PSCW, *see* App'x 705–07, the Wisconsin state courts, *see Cnty. of Dane v. Pub. Serv. Comm'n of Wis.*, 976 N.W.2d 790, 2022 WI 61 and the federal courts, *see Valcq*, 16 F.4th 508. Their claims in those fora have been roundly rejected as not "sufficiently credible," App'x 707, "not remotely plausible" and "contrived," *Valcq*, 16 F.4th at 518, 527, and "meritless and borderline frivolous," *Cnty. of Dane*, 2022 WI 61, ¶ 86 (Hagedorn, J., concurring).

Plaintiffs' request that this Court permanently enjoin Project construction is similarly quixotic. Having failed to obtain this relief in other venues—and, for that matter, before the district court—Plaintiffs renew their efforts here.[20] This Court should decline to entertain Plaintiffs' request, because the vast majority of the Project is being built on private land, as

[20] Dane County and Iowa County, which submitted an amicus brief in this case, assert that "two courts have issued separate injunctions" against the Project. Doc. 65, at 5. As discussed below, the preliminary injunction dissolved by its own terms. And the preliminary injunction the Dane County Circuit Court issued never went into effect and will also likely be dissolved, given the Supreme Court of Wisconsin's ruling in *Cnty. of Dane*, 2022 WI 61.

authorized by state utility commissions in Iowa and Wisconsin, and requires no federal land, permits, or approvals. App'x 673–784, 877, 895, 903. Contrary to Plaintiffs' assertions, neither the APA nor NEPA authorize the federal judiciary to exercise jurisdiction over or enjoin non-federal action being carried out by private parties on non-federal land. In addition, the district court did not make the required findings to support injunctive relief under *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). This Court should deny Plaintiffs' cross-appeal and affirm the district court's decision not to award permanent injunctive relief.

A. The district court's preliminary injunction—which dissolved by its own terms—has no bearing on Plaintiffs' request for permanent injunctive relief.

As an initial matter, Plaintiffs suggest that because the district court issued a preliminary injunction against Co-owners, it was legal error for the district court not to award permanent injunctive relief. Doc. 61, at 71–72. The court's preliminary injunction order provides no support for Plaintiffs' requested permanent injunction because of the narrow scope of that preliminary relief, the claims to which it applied, and the fact that it expired by its own terms when the Order issued.

In November 2021, the district court enjoined construction activities connected to the Clean Water Act permit verifications the Corps issued to Co-owners under a regional permit for activities involving utility lines. PA 126.

The injunction affected authorizations for less than 0.1 acres of permanent wetland fill and less than 14 acres of temporary wetland fill across the approximately 90-mile segment of the Project being built in Wisconsin. App'x 1032, 1098. During the approximately ten weeks the injunction was in effect, construction proceeded along most of the route.

On summary judgment, the district court rejected Plaintiffs' Clean Water Act claims. App'x 41–44. Plaintiffs have (wisely) not appealed the district court's decision on those claims. Having ruled in the Defendants' favor on these claims, the district court had no basis to extend or enlarge the preliminary injunctive relief it granted just a few weeks earlier. Plaintiffs' suggestion that this narrow and now defunct preliminary relief justifies a broader, Project-wide injunction ignores the fact that it lost on those claims.[21]

B. The district court properly found that it lacked jurisdiction to permanently enjoin Project construction outside the Refuge.

The entry of injunctive relief, as the district court recently recognized, "is an extraordinary remedy never awarded as of right.'" ECF 245 at 4 (quoting *Winter*, 555 U.S. at 24). The district court properly recognized the limits on its remedial powers. Plaintiffs' failure to cite a single, on-point case

[21] Nor does this Court's denial of Co-owners' motion for an injunction pending appeal, ECF 52, support the entry of permanent injunctive relief. The motion addressed solely the harms to both parties while the appeal is pending.

in which a court enjoined purely private activity that had no nexus with the challenged federal action refutes their argument that the court should have enjoined work outside the Refuge. Plaintiffs assert that the district court erred because federal courts have the power to "'go beyond the matters immediately underlying [their] equitable jurisdiction and . . . give whatever other relief may be necessary under the circumstances.'" Doc. 61, at 72–73 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). But a federal court's equitable authority must instead be evaluated in the context of the statute at issue and "'remains a question of interpretation in each case.'" *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1350 (2021) (citation omitted). This Court recently acknowledged that *Porter* lacks its original force. *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 775–82 (7th Cir. 2019).[22] "Whatever strength *Porter* . . . retain[s], [it] cannot be used as . . . a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure." *Id.* at 782. This is because "Congress, not the judiciary, controls the scope of remedial relief when a statute provides a cause of action." *Id.*

Accordingly, Plaintiffs' request for a Project-wide injunction must be evaluated in the context of the statutes under which they brought their

[22] *Porter* was decided one month before the APA was enacted.

claims—namely, NEPA, the Refuge Act, and the APA.[23] None of these statutes authorizes injunctive relief against non-federal entities, such as Co-owners, or non-federal projects, like Cardinal-Hickory Creek. This Court should reject Plaintiffs' request for permanent injunctive relief.

The APA authorizes persons who have been "adversely affected or aggrieved" by "agency action" to seek judicial review of such action. 5 U.S.C. § 702. The remedy in an APA action is for a court to "hold unlawful and set aside *agency action*" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706 (emphasis added). By its terms, the APA does not authorize injunctive relief against non-federal parties. *Friends of Lydia Ann Channel v. U.S. Army Corps of Eng'rs*, 701 Fed. App'x 352, 358 (5th Cir. 2017) (unpublished) ("[I]t is well settled that suits under the APA may not be pursued against *nonfederal* entities, nor may federal courts enjoin nonfederal entities based on the conduct of federal agencies held to run afoul of the APA.") (citing cases); *Karst Env't Educ. and Prot., Inc. v. EPA*, 475 F.3d 1291, 1298 (D.C. Cir. 2007) ("[N]othing in the APA authorizes claims against nonfederal entities . . . ."). NEPA claims, which are necessarily subject to judicial review under the APA, are no exception to this rule. *Edwards v. First Bank of Dundee*, 534 F.2d 1242,

[23] Neither the Refuge Act nor NEPA creates a private cause of action.

1245–46 (7th Cir. 1976) (district court lacked jurisdiction under NEPA and the National Historic Preservation Act to enjoin demolition of historic building, which was a "purely private activit[y that] require[s] no participation by any agency of the federal government").

Here, there is no jurisdictional basis for a federal court to enjoin construction of the entire Project. It is a private venture being built almost entirely on nonfederal land in Iowa and Wisconsin, under permits from the respective state utility commissions. App'x 877, 903. The only portion of the Project that will be built on federal land—and thus would require federal authorization—is a less than 1.3-mile segment that will cross the Mississippi River in the area of the Refuge. *See* App'x 895, 899, 1179–80. Even for that portion, Co-owners have the option to build the Project on easements that predate FWS ownership *without* a CD or additional property rights from FWS.[24]

The Project's other federal approvals are likewise insufficient to provide a basis for injunctive relief.[25] Plaintiffs have not appealed the district court's

[24] App'x 74–81; ECF 238, ¶ 17 & n.4; Doc. 56, at 16. These easements are associated with Co-owners' existing 161-kV and 60-kv lines that run through the Refuge. App'x 1152.

[25] The fact that all three agencies completed an EIS for the entire Project does not alter this conclusion. Regardless of the breadth of a NEPA analysis, "NEPA does not expand an agency's substantive powers." *Nat. Res. Def. Council v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (citation omitted).

decision upholding the Corps' Clean Water Act general permits and Project-related verifications, so those claims necessarily cannot form a basis for any injunctive relief. Although Dairyland anticipates requesting a loan from RUS to finance its nine percent ownership stake in the Project, RUS has not yet authorized such funding. App'x 1221. The "mere expectancy" of federal funding is insufficient to "federalize" for NEPA purposes the remaining 91 percent of the Project that requires no federal funding. *City of Highland Park v. Train,* 519 F.2d 681, 695 (7th Cir. 1975). Indeed, Plaintiffs cite no cases in which a court enjoined private activity based on the mere *possibility* of future federal financial assistance.

Plaintiffs cite several cases for the proposition that "[i]njunctions against non-Federal activities requiring federal permits are routine NEPA remedies." Doc. 61, at 75. Those cases are not on point because, in each one, the non-federal activity was occurring on federal land or in federal waters and thus *could not proceed* without federal authorization. *See Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1119–24 (9th Cir. 2005) (private development could not proceed without Corps authorization because the (federal) jurisdictional waters on site "could not be segregated from private lands [and] the district court [therefore] had the power to enjoin the entire project"); *Minn. Pub. Int. Rsch. Grp. v. Butz*, 498 F.2d 1314, 1323–24 (8th Cir. 1974) (affirming injunction against logging activities on federal land); *see also*

Habitat Educ. Ctr., Inc. v. Bosworth, 363 F. Supp. 2d 1070, 1088–90 (E.D. Wis. 2005) (enjoining Forest Service from implementing a timber sale on federal land).[26]

Here, in contrast, Co-owners—two private, investor-owned transmission utilities and an electric cooperative—are building almost all of the approximately 101-mile Project on non-federal land in Iowa and Wisconsin under permits issued by the state utility regulators. The federal government has not provided any funding. Even *if* this Court agrees with Plaintiffs on the merits of its Refuge Act and NEPA claims, Co-owners could still build the Project on their existing ROWs within the Refuge. There is simply not a sufficient federal nexus for this Court to enjoin construction of the entire Project.[27]

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[26] Plaintiffs erroneously assert that in *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986), the Fourth Circuit enjoined private developers from constructing a road that would pass through a state park purchased with federal funds. Doc. 61, at 74–75. Instead, the appellate court reversed the district court's dismissal of the plaintiffs' NEPA claim for failure to state a claim and remanded, instructing the court to *consider* plaintiffs' motion for a preliminary injunction. Given the procedural posture, the court was required to assume the truth of the plaintiffs' allegations. It remanded the case to the district court to decide "unresolved disputes in essential facts" related to the request for a preliminary injunction. 808 F.2d at 1043. On remand, the district court declined to enjoin construction. *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 78 (4th Cir. 1989).

[27] The district court reached the same conclusion when it recently denied Plaintiffs' motion for an injunction pending appeal. ECF 245, at 5–6.

Apparently recognizing as much, Plaintiffs assert that federal courts "can reach activities on 'private lands not otherwise under federal control' that threaten the federal lands' designated purpose." Doc. 61, at 74. Plaintiffs imply that ongoing Project construction in Iowa and Wisconsin threatens the Refuge. There are two problems with this argument. First, current construction activities do not pose a threat to the Refuge. ECF 245, at 5 (finding "no evidence that the utilities have already been building in the refuge against court orders"). Co-owners are not doing any construction work within the Refuge and have no intention of doing so unless and until they can negotiate a land exchange with FWS or develop an alternative approach. ECF 238, ¶ 17.[28]

Second, the authorities Plaintiffs cite in support of this argument, as the district court recently recognized, ECF 245, at 6, are inapposite. Both *Kleppe v. New Mexico*, 426 U.S. 529 (1976) and *State of Minn. by Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) were constitutional challenges to statutes that incidentally reached private lands. But *Congress'* constitutional authority to regulate conduct "on or off the public land that would threaten the designated purpose of federal lands," *id.* at 1249, does not authorize the

[28] Building the Project along the existing easement rights would require additional study and detailed engineering, which has not yet been initiated. ECF 238, ¶ 17 & n.4.

federal courts to enjoin private activity under a statute that authorizes review of federal agency action. 5 U.S.C. § 701(b)(1).

Amici Dane and Iowa County assert that this Court should issue a permanent injunction because state law gives Co-owners authority to exercise the power of eminent domain under the Certificate of Public Convenience and Necessity issued by the PSCW. Doc. 65, at 4–7. This is little more than a collateral attack on the use of eminent domain, a matter that is not at issue in this case. Wisconsin law provides an exclusive process for challenging the exercise of eminent domain. *See* Wis. Stat. § 32.06(5); *Falkner v. N. States Power Co.*, 75 Wis.2d 116, 248 N.W.2d 885, 889 (1977). This case, challenging federal decisions under the APA, NEPA, and the Refuge Act, is not the appropriate forum for such a challenge. *Green St. Ass'n v. Daley*, 373 F.2d 1, 6 (7th Cir. 1967). Nor does Co-owners' use of eminent domain, as authorized under *state law*, provide an adequate basis for a *federal court* to enjoin construction of a critical infrastructure project authorized by the PSCW. The Court should ignore Amici's plea to enter injunctive relief on matters of state law that are not properly before it.

C. Even if it had the authority to grant injunctive relief, the district court did not make the requisite findings under *Winter* to justify such relief.

Even if, as a legal matter, the court had jurisdiction to award injunctive relief against the Co-owner's private activity outside the Refuge, the district

court would have been required to balance the equities under *Winter* as a pre-requisite to awarding injunctive relief. *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995); *see also Lawson Products, Inc. v. Avnet, Inc.,* 782 F.2d 1429, 1436 (7th Cir. 1986) (to decide whether to award injunctive relief, court must "take a number of non-discretionary actions: (1) it must evaluate the traditional factors enunciated in the case law; (2) it must make factual determinations on the basis of a fair interpretation of the evidence before the court; and (3) it must draw legal conclusions in accord with a principled application of the law"). Because it did not, there is no record as to *Winter*'s four-part test for this Court to review. *Alaska Wilderness*, 67 F.3d at 732 (questions concerning injunctive relief "raise intensely factual issues, and for that reason should be decided in the first instance by the district court."). Therefore, if this Court finds that the district court had authority to grant relief outside the Refuge, the case must be remanded with instructions to make the requisite factual findings. *Keweenaw Bay Indian Cmty. v. United States*, 136 F.3d 469, 477 (6th Cir. 1998). Plaintiffs offer no authority for the proposition that this Court may make such findings in the first instance.[29]

[29] Co-owners have addressed the equitable factors in their motion for a stay pending appeal, Doc. 9, although the harms to Co-owners and the public interest from *permanent relief* would be correspondingly greater. Co-owners' motion discusses the harms from a "no project" scenario. *Id.* at 21–22.

CONCLUSION

This Court should reverse and vacate the Order and final judgment and remand with instructions for the district court to dismiss all of Plaintiffs' claims with prejudice.

Respectfully submitted this 8th day of August 2022.

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RULE 32 CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 32(c) because this brief contains 13,963 words, including the glossary and figures and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 7th Cir. R. 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13-point Century Schoolbook font.

Dated this 8th day of August 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 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.

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