

No. 24-1492

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL WILDLIFE REFUGE ASSOCIATION, et al.,
Plaintiffs-Appellees,
v.
RURAL UTILITIES SERVICE, et al.,
Defendants-Appellees,
and
ITC MIDWEST LLC, et al.,
Intervenor Defendants-Appellants.

*On Appeal from the U.S. District Court for the
Western District of Wisconsin
No. 3:24-cv-139 (Hon. William M. Conley)*

**PLAINTIFFS-APPELLEES' MOTION TO DISMISS
INTERVENOR-APPELLANTS' MOTION FOR STAY
FOR LACK OF APPELLATE JURISDICTION
UNDER F.R.A.P 8(a)(2)**

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Plaintiffs-Appellees National Wildlife Refuge Association, Driftless Area Land Conservancy and Wisconsin Wildlife Federation (collectively, “Plaintiffs” or “Conservation Groups”) move to dismiss Intervenor-Defendants-Appellants ITC Midwest and Dairyland Power’s (“Intervenors”) motion to stay because it does not comply with Federal Rules of Appellate Procedure 8(a)(2). Intervenors’ motion to stay is Doc. 9 in this appeal.

On April 1, 2024, at night, Intervenors filed a motion to stay before the district court. On April 2, 2024, the district court promptly issued an Order setting a briefing schedule on the Intervenors’ stay motion providing for the Plaintiff Conservation Groups to respond by April 11, 2024. Intervenors’ stay motion is thus currently pending before the district court, which has given every indication that it will decide the motion soon, and it is moving this litigation forward on a prompt, orderly, efficient and timely basis as explained below.

The Intervenors’ motion before this Court does not “show that moving first in the district court would be impracticable” Fed. R. App. P. 8(a)(2)(i) because they have already filed a motion to stay in the district court. Intervenors’ motion before this Court cannot reasonably “state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.” Fed. R. App. P. 8(a)(2)(ii). They cannot do so because those are plainly not the facts and rulings in this case.

The procedural history of this lawsuit is summarized in this Court's decision in *Driftless Area Land Conservancy v. Rural Util. Serv.*, 74 F.4th 489, 492-93 (7th Cir. 2023), and then in the district court's recent Order entered on March 25, 2024 in *Nat'l Wildlife Refuge Ass'n v. Rural Util. Serv.*, Case: 3:24-cv-00139-wmc, Dist. Ct. Doc. 62, which is attached hereto as Exhibit 1. In short, this Court's decision held that the federal agencies had not issued final administrative actions, and that Plaintiffs could obtain judicial review after any such final agency action by filing a new lawsuit and their substantive claims would then be determined on the merits. *Driftless Area Land Conservancy*, 74 F.4th at 494-96. The Court stated: "[w]e do not express any opinion on the merits of the question." *Id.* at 495.

This Court's decision recognized that the district court should address the merits of Plaintiffs' legal claims once the federal Defendant agencies took final action. *Driftless Area Land Conservancy*, 74 F.4th at 494-96. That time is now. On February 23, 2024, Defendant U.S. Fish & Wildlife Service ("USFWS") issued documents constituting its final agency action. The documents announced USFWS's intent to close a land exchange within 30 days that would allow the Intervenor transmission companies to immediately commence building and bulldozing for their massive high-voltage transmission line to run through the middle of the protected Upper Mississippi River National Wildlife and Fish Refuge. Intervenors plainly stated their intention to start clearcutting and

bulldozing *before* Plaintiff Conservation Groups could have their “day in court” on the substantive merits of their claims. Plaintiffs promptly filed a complaint and a motion for a temporary restraining order before the district court.

The district court established an orderly process to conduct judicial review and adjudicate the merits on the substantive claims that Plaintiffs have raised in their new lawsuit following final agency action. The district court has heard two oral arguments, set expedited schedules for several briefs, and entered carefully defined preliminary injunction orders to maintain the status quo.

The district court held a status hearing on March 7, 2024, at which counsel for the Plaintiffs, the Federal Defendants and the Intervenors all appeared. The district court issued an Order, setting an expedited briefing schedule, which directed Plaintiffs to file their brief for a preliminary injunction six days later on March 13, 2024, and for the Federal Defendants and Intervenors to file their response briefs seven days later on March 20, 2024. Dist. Ct. Doc. 31 (attached hereto as Exhibit 2). The district court’s Order set oral argument on Plaintiffs’ motion for a preliminary injunction to be held on March 22, 2024, at 9:00 am. *Id.*

On March 21, 2024, the district court issued a text Order to continue maintaining the status quo until after the preliminary injunction hearing the next day: “In advance of tomorrow's hearing and consistent with the court's previous discussion with counsel on March 7, 2024, defendants are PRELIMINARILY

ENJOINED from closing on any land exchange involving the Upper Mississippi River National Wildlife and Fish Refuge before the court issues its decision on the pending motion for preliminary injunction.” Dist. Ct. Doc. 60 (attached hereto as Exhibit 3).

The district court heard oral argument from all parties for almost two hours on the morning of March 22, 2024 at which point the district court stated, among other things, that:

1. Plaintiffs have established a “likelihood of success on the merits.” Dist. Ct. Doc. 66 at 44-45. (Doc. 66 is the transcript of the March 22, 2024, preliminary injunction hearing and is attached hereto as Exhibit 4.).
2. The preliminary injunction would continue “until an administrative record has been produced to the Court.” *Id.* at 62.
3. “Both sides [are given] 30 days from receipt of that record to supplement their briefing as to why the record is sufficient to support the FONSI and the net benefit analysis.” *Id.*
4. The parties should promptly “proceed with specific briefing as to the notice and opportunity comment requirements” that are in dispute. *Id.*

On March 25, 2024, the following Monday, the district court issued an Order (attached hereto as Exhibit 1) continuing the preliminary injunction in order to

maintain the status quo, and setting forth an orderly and timely briefing schedule as was explained in court at the March 22, 2024, hearing.

Taken as a whole, the district court is managing this litigation in an orderly manner and acting on a prompt and timely basis while maintaining the status quo. Intervenors' clearly intended impact of their stay motion and 28-page supporting memorandum before the district court is to change the status quo and allow them to build through the protected National Wildlife Refuge now while judicial review on Plaintiffs' substantive claims are briefed and decided later after building and bulldozing is completed. Intervenors' memorandum in support of their stay motion before the district court states at page 1: "Work to complete the Project could proceed while the parties brief summary judgment motions and any further appeals." Dist. Ct. Doc. 72 at 1. They have said the same before this Court. Case: 24-1492, Doc. 9 at 1.

That does not maintain the status quo while the district court conducts effective judicial review to adjudicate the issues in this case. "[T]he [district] court does not even [yet] have the relevant administrative record prepared [by the Defendant federal agencies] to review." Dist. Ct. Doc. 62 at 3 (Exhibit 4).

Intervenors' stay motion with the district court is pending. The district court issued an Order setting a briefing schedule that requires Plaintiffs to file their response brief this week, on Thursday, April 11, 2024. Dist. Ct. Doc. 74 (attached

hereto as Exhibit 5). The district court's Order states that the court understands the Intervenors' desire for a prompt ruling on their motion. *Id.* (Exhibit 5).

Federal Rule of Appellate Procedure 8(a) states that a motion for stay pending appeal must first be litigated in the district court, unless the moving party shows that would be "impracticable" or that "a motion having been made, the district court denied the motion or failed to afford the relief requested." Fed. R. App. P. 8(a)(2). Intervenors' motion fails both requirements. Intervenors make only a single conclusory statement that "continuing to wait for a decision from the district court would be impractical." Case: 24-1492, Doc. 9 at 9. The totality of their legal reasoning is a reference to a practice manual and a "cf" citation to *Libertarian Party of Ill. v. Cadigan*, 820 F. App'x 446 (7th Cir. 2020). In that case, the party "argued that moving first in the district court would be impractical, see Fed. R. App. P. 8(a)(2)(A)(i), because the district court already denied its request to be allowed to establish appropriate ballot access requirements." (emphasis added).

That is *not* the legal or factual situation in the present case. Moreover, in *Libertarian Party*, this Court ultimately "concluded that the district court did not abuse its discretion when it entered a preliminary injunction drafted by the Board and agreed to by the parties or when it granted reconsideration in part." *Libertarian Party v. Cadigan*, No. 20-1961, Order (August 20, 2024).

Intervenors' premature stay motion before this Court would disrupt the district court's ability to efficiently manage this litigation and continue an orderly process of judicial review. Intervenors should not be allowed to impermissibly steamroll their project by building and bulldozing their high-voltage transmission line through and across the middle of the protected Upper Mississippi River National Wildlife and Fish Refuge *before* effective judicial review and the district court's determination of the substantive merits of Plaintiffs' claims, as the Seventh Circuit's Opinion expected. 74 F.4th at 494-96.

For the reasons stated above, the Plaintiffs respectfully request that this Court dismiss the Intervenors' stay motion as premature and not in compliance with Fed. R. App. P. 8(a)(2). Intervenors have not come remotely close to meeting the requirements of Fed. R. App. P. 8(a)(2)(i) or 8(a)(2)(ii) to bypass a decision expected soon by the district court on their pending stay motion below.

Respectfully submitted this 8th day of April, 2024

s/Howard A. Learner

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CERTIFICATE OF COMPLIANCE

I hereby certify that, in accordance with Federal Rule of Appellate Procedure 32(a)(7) the foregoing brief contains 1580 words, as counted by counsel's word processing system, excluding those portions of the brief exempted under Rule 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Circuit Rule 32(a)(6) 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 in 13-point Book Antiqua.

DATED: April 8, 2024

s/Howard A. Learner

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2024, I electronically filed the foregoing 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.

s/ Howard A. Learner

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL WILDLIFE REFUGE ASSOCIATION,
DRIFTLESS AREA LAND CONSERVANCY, and
WISCONSIN WILDLIFE FEDERATION,

Plaintiffs,

v.

ORDER

24-cv-139-wmc

RURAL UTILITIES SERVICE; ANDY BERKE,
Administrator, Rural Utilities Service; UNITED STATES
FISH AND WILDLIFE SERVICE; WILL MEEKS,
Midwest Regional Director, and SABRINA CHANDLER,
Manager, Upper Mississippi River National Wildlife and Fish Refuge,
UNITED STATES ARMY CORPS OF ENGINEERS,
LIEUTENANT GENERAL SCOTT A. SPELLMON, Chief of
Engineers and Commanding General, U.S. Army Corps of
Engineers, COLONEL JESSE T. CURRY, Commander
And District Engineer, Rock Island District, U.S. Army Corps of
Engineers, and COLONEL ERIC SWENSON, Commander and
District Engineer, St. Paul District, U.S. Army Corps of Engineers,

Federal Defendants,

and

DAIRYLAND POWER COOPERATIVE, and
ITC MIDWEST LLC,

Intervenor-Defendants.

A preliminary injunction hearing was held on Friday, March 22, 2024, in the above-captioned matter. Plaintiffs, comprised of various national and state recognized environmental groups, appeared by attorneys Howard Learner, Daniel Abrams, Scott Strand, and Maria Dambruinas. The so-called “federal defendants” appeared by Reade Wilson and Kimberly Cullen. Finally, the intervenor-defendants, Dairyland Power Cooperative and ITC Midwest, LLC, appeared by Stacey Bosshardt and Thomas Jensen.

Although recently filed, this lawsuit has a lengthy history as recounted in *National*

Wildlife Refuge Ass'n v. Rural Util. Serv., 580 F. Supp. 3d 588 (W.D. Wis. 2022). In that decision, this court held on the merits that federal defendants had failed “to meet the legal requirements for an Environmental Impact Statement, Compatibility Determination, and Land Transfer.” *Id.* at 593. On appeal, however, the Seventh Circuit held that the revocation of defendant United States Fish and Wildlife Services’ initial compatibility determination under the Refuge Act, 16 U.S.C. § 668dd(d)(1)(A), prevented this court from reaching the merits, resulting in a remand order to vacate the final judgment and dismiss the case. *Driftless Area Land Conservancy v. Rural Utilities Serv.*, 74 F.4th 489, 496 (7th Cir. 2023).

No one believed that would be the end of the parties’ dispute, including the Seventh Circuit. Rather, that court explained any merits review must await a new, proposed federal action. Although unknown to either court at the time of their respective ruling, those actions were already underway as U.S. Fish and Wildlife Service and one of the intervenor-defendants, Dairyland Power, had already entered into a non-binding understanding for a land exchange/purchase in a private writing dated October 29, 2021, which detailed the basic terms for the exchange of 19.84 acres of land located within the Refuge (the “Exchange Property”) for 35.69 acres of land held by ITC and Dairyland (the “Wagner Property”). (Dkt. #1-36.)

Although the basic terms remained the same throughout, the details of that transaction were then apparently hammered out by the federal defendants and intervenors for the next two years without any public input until the issuance of an over 100 page, draft “Supplemental Environmental Assessment” in September 2023, which quickly became the final SEA after a truncated, 14-day public review and comment period. (Dkt.

#1-21.) Although plaintiffs were able to meet the small window for comments, the federal agencies went dark again until last month when the federal defendants issued the following documents:

- Agreement for the Exchange of Lands (dkt. #1-18).
- Finding of No Significant Impact on Cardinal-Hickory Creek 345-kV Transmission Line Project Proposal for Route Modification B-IA3 and Land Exchange (dkt. #1-17).
- Land Exchange Net Benefit Analysis (dkt. #1-19).

Unsurprisingly, this prompted plaintiffs to again seek preliminary injunctive relief given that the intervening defendants were planning to proceed with immediate construction of the new transmission lines once the land exchange took effect, which meant as soon as the day after the preliminary injunction hearing, March 22nd, but for this court's temporary restraint of the land exchange.

There are a number of problems with the intervening defendants being allowed to proceed. Most fundamentally, federal defendants and intervening defendants have orchestrated the events here to preclude judicial review of the final determination until after substantial damage has already been done to what until now was the Refuge. Whatever the merits of plaintiffs' challenge to the federal defendants' decision to proceed with the land exchange under the relevant statutes, *some* meaningful review by this court is necessary to determine "whether that decision is supported by substantial evidence." *Driftless*, 74 F.4th at 494 (citing 5 U.S.C. § 706(2)(F)). Yet the court does not even have the relevant administrative record prepared to review.

In addition, although federal defendants and intervening defendants apparently take the position that no environmental assessment is even necessary for this specific land exchange, one so-called supplemental EIS upon which both defendants Fish and Wildlife Service and Rural Utilities Service purport to have relied, in turn relies substantially on an underlying environmental impact statement that this court already found deficient. As was discussed at last Friday's hearing, the Seventh Circuit's opinion vacating that ruling also suggests that perhaps a lower standard should be applied in determining the "suitability" of a land exchange under the National Wildlife Refuge System Improvement Act of 1997, as opposed to the "compatibility" of a designated use. *Driftless*, 74 F.4th at 494-95. Whatever the standard, however, plaintiffs at least have a right to challenge the proposed land exchange in court before the metes and bounds of the Refuge are forever altered and the foundation for a 195-foot powerline tower is planted in the middle of the Mississippi River bottom.

For the reasons stated above and during Friday's hearing, therefore, the court will continue to enjoin the land transfer at least until production and review of the relevant administrative record underlying the federal defendants' February 2024 Net Benefits Analysis and FONSI. The court also established the following briefing schedule as to any continuation of plaintiff's motion for preliminary injunction:

- (1) the parties will have 30 days from receipt of the administrative record to file briefs addressing whether that record is sufficient to support the federal defendants' Net Benefits Analysis and FONSI; and
- (2) additional briefing as to whether a notice and opportunity to comment period was required following release of the actual February 2024 Net Benefits Analysis,

FONSI, or the final, actual Agreement for Exchange of Land, as well as the underlying administrative record, will proceed as follows:

- (a) plaintiffs may have until April 8, 2024, to file a supplemental brief, and
- (b) intervening defendants have until April 18, 2024, to respond.

Entered this 25th day of March, 2024.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

EXHIBIT 2

Howard Learner

From: wiwd_ecf@wiwd.uscourts.gov
Sent: Friday, March 8, 2024 7:40 AM
To: wiwd_nef@wiwd.uscourts.gov
Subject: Activity in Case 3:24-cv-00139-wmc National Wildlife Refuge Association et al v. Rural Utilities Service et al Text Only Order

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U.S. District Court

Western District of Wisconsin

Notice of Electronic Filing

The following transaction was entered on 3/8/2024 at 7:40 AM CST and filed on 3/8/2024

Case Name: National Wildlife Refuge Association et al v. Rural Utilities Service et al

Case Number: [3:24-cv-00139-wmc](#)

Filer:

Document Number: 31(No document attached)

Docket Text:

**** TEXT ONLY ORDER ****

The court held a telephonic hearing on plaintiff's motion for a temporary restraining order (dkt. [2]), at which counsel for plaintiffs, the federal defendants, and interested utilities appeared. As discussed at the hearing, plaintiff's motion for a TRO is DENIED, and defendants' motion to convert the TRO to a motion for preliminary injunction (dkt. [15]) is GRANTED subject to the following schedule: plaintiff's brief in support of a preliminary injunction and proposed findings of fact are due March 13, 2024; defendants' brief in opposition and response to proposed findings of fact are due March 20, 2024; and an in-person hearing will be held March 22, 2024, beginning at 9:00 a.m. Signed by District Judge William M. Conley on 3/8/2024. (rks)

3:24-cv-00139-wmc Notice has been electronically mailed to:

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EXHIBIT 3

Howard Learner

From: wiwd_ecf@wiwd.uscourts.gov
Sent: Thursday, March 21, 2024 10:53 AM
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Western District of Wisconsin

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Case Name: National Wildlife Refuge Association et al v. Rural Utilities Service et al

Case Number: [3:24-cv-00139-wmc](#)

Filer:

Document Number: 60(No document attached)

Docket Text:

**** TEXT ONLY ORDER ****

In advance of tomorrow's hearing and consistent with the court's previous discussion with counsel on March 7, 2024, defendants are PRELIMINARILY ENJOINED from closing on any land exchange involving the Upper Mississippi River National Wildlife and Fish Refuge before the court issues its decision on the pending motion for preliminary injunction. Signed by District Judge William M. Conley on 3/21/2024. (jls)

3:24-cv-00139-wmc Notice has been electronically mailed to:

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EXHIBIT 4

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

NATIONAL WILDLIFE REFUGE
ASSOCIATION, et al.

Plaintiffs,

Case No. 24-CV-139-WMC

-vs-

RURAL UTILITIES SERVICE, et al.

Madison, Wisconsin

March 22nd, 2024

Defendants.

9:02 a.m. - 10:40 a.m.

* * * * *

STENOGRAPHIC TRANSCRIPT OF MOTION HEARING
HELD BEFORE DISTRICT JUDGE WILLIAM M. CONLEY

APPEARANCES:

For the Plaintiffs:

Environmental Law & Policy Center
BY: HOWARD LEARNER,
DANIEL ABRAMS,
SCOTT STRAND,
MARIA DAMBRIUNAS
35 East Wacker Drive, Ste. 1600
Chicago, Illinois 60601

Also Present:

JEFFREY HASKETT, National Wildlife Refuge Association
JENNIFER FILIPAİK, Driftless Area Land Conservancy
GEORGE MEYER, Wisconsin Wildlife Federation

For the Defendant:

DOJ-Enrd
BY: READE WILSON,
KIMBERLY CULLEN
150 M Street NE
Washington, DC 20002

PHILIP C. HARRELSON, RMR, CRR
United States District Court Reporter
120 North Henry Street
Madison, Wisconsin 53703

1 Appearances continued:

2 For Intervenor Defendant: ITC Midwest

3 Perkins Coie LLP
4 BY: STACEY BOSSHARDT,
5 THOMAS JENSEN,
6 MEGAN MCLEAN,
7 EDWARD BOLING
8 700 Thirteenth Street N.W., Suite 800
9 Washington, DC 20005

10 ***

11 (Proceedings called to order at 9:02 AM.)

12 THE CLERK: The United States District Court for the Western
13 District of Wisconsin is now in session. District Judge William
14 M. Conley presiding. Please be seated and come to order.

15 Case No. 24-CV-139, *National Wildlife Refuge Association et*
16 *al. versus Rural Utilities Service et al.*, called for a motion
17 hearing. May we have the appearances, please.

18 MR. LEARNER: For plaintiffs, Howard Learner, Daniel Abrams,
19 Scott Strand, and Maria Dambriunas, on behalf of plaintiffs
20 National Wildlife recreation -- National Wildlife Refuge
21 Association, Wisconsin Wildlife Federation, and the Driftless
22 Area Land conservancy.

23 MS. WILSON: Reade Wilson and my cocounsel Kimberly Cullen
24 from the Department of Justice on behalf of federal defendants.

25 MS. BOSSHARDT: On behalf of intervenor defendants ITC
Midwest and Dairyland Power Cooperative, I'm Stacey Bosshardt.
Seated with me at counsel table is my colleague Tom Jensen, and
my colleagues Megan McLean and Ted Boling are behind me.

1 THE COURT: Very good. It's an official -- or an efficient
2 rendition of the players, and I appreciate everyone being
3 prepared on short notice for this hearing.

4 I'm going to start in reverse order with the question of
5 notice and opportunity to be heard, and I think that means that I
6 begin with you, Ms. Wilson.

7 The -- the government isn't taking a position that there
8 isn't an obligation to provide notice and an opportunity to be
9 heard, is it?

10 MS. WILSON: Your Honor, the regulations require that notice
11 and opportunity to participate to the extent practical.
12 Plaintiffs were afforded an opportunity to participate in this --
13 in providing comments on the draft supplemental environmental
14 assessment that addressed the land exchange. The land-exchange
15 term sheet was attached to the supplemental EA, and the -- there
16 was a comment period for the public to -- to submit comments. It
17 was 14 days.

18 THE COURT: And I just want to be clear. So that notice was
19 provided on February 23. So less than a month ago?

20 MS. WILSON: No, Your Honor. That --

21 THE COURT: When was that notice issued?

22 MS. WILSON: I believe it was in October. The February 23rd
23 date is when the finding of no significant impact, net benefit
24 analysis, and the land-exchange agreement itself were published.

25 THE COURT: And who published that? Who made that decision?

1 MS. WILSON: Fish and Wildlife Service made the decision. I
2 believe they were published on the RUS website. Plaintiffs were
3 provided a copy contemporaneously.

4 THE COURT: So that's what happened on February 23rd, 2024?

5 MS. WILSON: Yes, Your Honor.

6 THE COURT: All right. Before February 23rd, 2024, what had
7 been disclosed was a statement of proposal for the land exchange
8 in October of last year; is that correct?

9 MS. WILSON: I believe it was September 8th of 2023 was when
10 the draft supplemental EA was released for public comment.

11 THE COURT: And what record did Fish and Wildlife rely upon
12 in -- before issuing its February 23rd rendition of the actual
13 land exchange -- the finding of no significant environmental
14 impact and no benefit analysis? What record did it create for
15 that purpose?

16 MS. WILSON: Are you referring to the administrative record
17 in support --

18 THE COURT: Yes.

19 MS. WILSON: -- of the decision? Presuma- -- the
20 administrative record, which is compiled after a decision is
21 made. Prior to the decision, the agency can't compile an
22 administrative record, because the document's considered
23 indirectly or directly in reaching that decision.

24 THE COURT: All right. And the administrative record --
25 where -- where does it stand now? Because the last time I spoke

1 with the parties on the phone, I emphasized the importance of
2 that being expedited.

3 MS. WILSON: It is being expedited right now. The agencies
4 are working to gather documents, put them in a format that can be
5 uploaded and lodged with the Court such that the metadata is
6 preserved and everything is in electronic format.

7 THE COURT: And when will I have that?

8 MS. WILSON: My -- my last estimate was a few weeks from now
9 still. It is a bit of a process to get the formatting correct.

10 THE COURT: All right. It seems as though -- whether the
11 standard is the same as last time or not -- and Judge Easterbrook
12 has left a number of -- in keeping with the season -- Easter eggs
13 for the Court to unfold, but one of those is that rather than
14 compatibility, I should focus on suitability. I'm not sure why
15 that is substantially different, but apparently it is -- at least
16 Judge Easterbrook seemed to think it was. How can I make that
17 determination without the administrative record to review?

18 MS. WILSON: Your Honor, the administrative record is
19 necessary for the merits determination. But at this stage, we're
20 at the preliminary injunction, and the standard is different.
21 The plaintiffs have to make a strong showing that they are
22 likely --

23 THE COURT: Right.

24 MS. WILSON: -- to proceed --

25 THE COURT: And I've --

1 MS. WILSON: -- on the merits.

2 THE COURT: -- read the parties' briefs, and I appreciate
3 that you're emphasizing some arguable change in how the Seventh
4 Circuit articulates the test, but it's still a balancing test.
5 It still is the level of harm against the likelihood of success
6 on the merits, and I've already found substantial harm by
7 stripping out part of the refuge.

8 I know that -- your position is, and I certainly respect it,
9 but this is a wonderful exchange. This is the best thing that
10 could happen for the refuge other than the fact that there are
11 going to be power lines. Higher power lines -- although, not
12 200-foot, but 75-foot -- power lines going through the refuge.

13 But don't you agree that I'm required to review the
14 administrative record? And what I have so far is an
15 administrative record that suggests you're ripping out part of
16 the refuge.

17 MS. WILSON: I think that's incorrect, Your Honor. This --
18 the nature of the exchange property is not such that this is
19 clearcutting.

20 THE COURT: How do I know that?

21 MS. WILSON: I believe intervenors attached photographs to
22 one of their --

23 THE COURT: But that's not --

24 MS. WILSON: -- declarations.

25 THE COURT: That's not sufficient -- a few photographs are

1 not going to tell me -- let me say it a different way. I have an
2 obligation to review what your agencies did, and I don't even
3 have an administrative record of what they considered.

4 MS. WILSON: You do have --

5 THE COURT: What I do have is ample evidence that this is
6 a -- this is removing the part of a refuge that congress felt
7 should not be changed.

8 MS. WILSON: Congress provided that the agency can engage in
9 land exchanges for the benefit of the refuge, and that is exactly
10 what has happened here. Fish and Wildlife has agreed to
11 exchange --

12 THE COURT: And with respect, I'm not asking you whether
13 that's true. I'm asking you how do I decide that without an
14 administrative record to review? I don't -- since October of
15 last year, there was a proposal. But apparently, the -- and I
16 guess it's Fish and Wildlife -- did an examination of the
17 environmental impact; right? They did a FONSI determination.

18 MS. WILSON: The FONSI was released in February, yes.

19 THE COURT: When you say "in February" -- it was released
20 less than a month ago.

21 MS. WILSON: Correct.

22 THE COURT: And I'm to assume that there's a substantial
23 record that supports that finding, but I don't have the record;
24 right?

25 MS. WILSON: Your Honor, you have the key documents that

1 support that finding.

2 THE COURT: How do I know that? I don't know that.

3 MS. WILSON: You have the decision documents. You have the
4 net benefit analysis that supports the agencies' determination
5 that this exchange is in the benefit of the refuge in the United
6 States.

7 THE COURT: So what opportunity has those who oppose this
8 change had to comment on the FONSI?

9 MS. WILSON: FONSI's are not subject to public comment.

10 THE COURT: And the same is true for the benefit analysis?

11 MS. WILSON: Yes, Your Honor.

12 THE COURT: Is it true that the actual land-exchange
13 agreement was signed in October of '21?

14 MS. WILSON: No, Your Honor. The land-exchanged agreement
15 was signed in February on the 23rd.

16 THE COURT: So what is -- plaintiffs talk about it -- the
17 statement of proposal -- when was that signed? Is that signed on
18 October 21?

19 MS. WILSON: I believe it -- yes, October 21. And that's
20 the term sheet so that the parties are in agreement on what
21 parcels will be exchanged and under what conditions. It's
22 necessary to then engage in the environmental review to determine
23 whether -- what the impacts will be.

24 THE COURT: And why wasn't that disclosed until two years
25 later?

1 MS. WILSON: It's still a proposal at that point.

2 THE COURT: Yeah, but it would have been -- it would have
3 been an opportunity for plaintiffs, as well as others, to review
4 and comment on it since, as you say, that started the process of
5 looking at the environmental impacts.

6 MS. WILSON: And the government produced that term sheet
7 with the supplemental environmental assessment that analyzed --

8 THE COURT: Less than a month -- less than a month ago.

9 MS. WILSON: No, the supplemental -- the draft supplemental
10 EA was produced in September of 2023.

11 THE COURT: So two years after the parties had arrived at a
12 statement of proposal?

13 MS. WILSON: Correct.

14 THE COURT: Okay.

15 MS. WILSON: And during that time, the --

16 THE COURT: And what was produced along with the actual
17 agreement as to the environmental impacts in September of last
18 year?

19 MS. WILSON: That's not the actual agreement. That's the
20 term -- the term sheet you're referring to?

21 THE COURT: Well, what was disclosed in September of last
22 year?

23 MS. WILSON: In September of last year was the draft
24 supplemental environmental assessment looking at the -- and
25 analyzing the -- any impacts related to the land exchange, and

1 the term sheet was attached to that draft EA -- supplemental EA
2 in the appendix, and it --

3 THE COURT: That's the term sheet that had existed for two
4 years? Or was it changed?

5 MS. WILSON: That is the same term sheet necessary for the
6 parties to have an -- an understanding of what environmental
7 impacts they're even considering because the term sheet defines
8 the nature of the exchange.

9 THE COURT: So who prepared the draft supplemental
10 environmental impact?

11 MS. WILSON: The draft supplemental EA? That would be RUS
12 as the lead agency for NEPA.

13 THE COURT: And what was the comment period?

14 MS. WILSON: So there was 14 days for the draft supplemental
15 EA. And prior to that, there was an EA that was 30 days. And
16 the EA looked at route modifications.

17 THE COURT: So what was the comment period?

18 MS. WILSON: For the supplemental EA -- draft supplemental
19 EA, it was 14 days. As stated in our brief, there is no comment
20 period required for a supplemental EA.

21 THE COURT: Is the government in agreement that there is an
22 obligation for an environmental assessment with a land exchange?

23 MS. WILSON: So Fish and Wildlife has a categorical
24 exclusion for land exchanges. What this process would look like
25 if it were just Fish and Wildlife and --

1 THE COURT: But it's not, obviously, because the Refuge Act
2 is involved. So my question is -- for your clients, is there an
3 agreement that an environmental assessment was necessary before
4 the land exchange could proceed?

5 MS. WILSON: The government engaged in an environmental
6 assessment to determine --

7 THE COURT: I'm not asking you that.

8 MS. WILSON: To determine --

9 THE COURT: And the Department of Justice is here
10 representing the defendants, the governmental federal defendants.
11 Is it your position, or do you dispute, that an environmental
12 assessment was necessary to proceed with the land exchange?

13 MS. WILSON: The agency determines how to comply with NEPA,
14 and my -- my point is just that the EA was done to determine
15 whether changed circumstances required a supplemental EI- -- EIS
16 or just an EA, which is what happened.

17 THE COURT: And a determination was made that it needed a
18 supplemental EA?

19 MS. WILSON: Correct.

20 THE COURT: So you're -- you're in agreement that that was
21 necessary?

22 MS. WILSON: Yes. I -- are you referring to the part in the
23 brief where we discuss categorical exclusions?

24 THE COURT: I'm just talking about whether the Refuge Act
25 required --

1 MS. WILSON: The refuge --

2 THE COURT: -- some step.

3 MS. WILSON: The Refuge Act did not require any -- a
4 supplemental EA. That's under NEPA. The refugee act -- the
5 Refuge Act does not have a --

6 THE COURT: Fair -- fair enough. So are you in agreement
7 that NEPA required a supplemental EA?

8 MS. WILSON: That is what happened here. I --

9 THE COURT: You don't take a position as to whether any of
10 that was required?

11 MS. WILSON: The agents --

12 THE COURT: So the government's position is that despite
13 completely protected refuge by congress -- that there could be a
14 land exchange without any environmental assessment?

15 MS. WILSON: So a land exchange under Fish and Wildlife's
16 NEPA procedures can occur by a categorical exclusion whether the
17 agency uses that way of complying with NEPA or does a more
18 fulsome analysis with an EA depends on the nature of the
19 exchange.

20 THE COURT: Was it required here, given the nature of this
21 exchange?

22 MS. WILSON: An EA was completed because of the history of
23 this project and that RUS was the lead on NEPA compliance.

24 THE COURT: I know what happened. I'm asking you legally
25 does the government have any position as to whether land

1 exchanges -- I mean, the criticism by the plaintiff is that this
2 is just a complete end-around of the protected area, and that if
3 this is allowed to go forward, this categorical exclusion, as you
4 yourself call it, will render meaningless the protections
5 afforded to the refuge because the government can -- can just go
6 ahead and -- and engage in a land exchange without any
7 environmental assessment.

8 MS. WILSON: I think I -- I misunderstood your question. A
9 categorical exclusion has not been applied here. That is the
10 typical path --

11 THE COURT: No, no. You didn't misunderstand my question.
12 You just don't want to answer the question. Is an environmental
13 assessment necessary to approve a land exchange in a protected
14 refuge?

15 MS. WILSON: And the answer has to be "no" on a general
16 basis because there is a categorical exclusion available for land
17 exchanges.

18 THE COURT: And I know that didn't happen here, but that
19 seems to be the position of the government, and it seems
20 extraordinary to me that given the protections assigned to
21 refuges, the special environmental respect with which congress
22 has placed them -- that you -- that an end-around can be
23 accomplished by a simple land exchange without an environmental
24 assessment.

25 MS. WILSON: So a net benefit analysis would still occur to

1 support a land exchange.

2 THE COURT: But -- but no environmental impact? At least --
3 at least in your view -- and that's fine -- I just want to make
4 sure I understand -- an environmental assessment isn't necessary;
5 although, a supplemental one was done in this case?

6 MS. WILSON: And whether it -- what NEPA would look like if
7 the Court remanded this to Fish and Wildlife is unclear, and
8 that's -- that's my -- my point. I --

9 THE COURT: In other words --

10 MS. WILSON: The agency would --

11 THE COURT: -- what else would --

12 MS. WILSON: -- decide how --

13 THE COURT: -- what else would need to be done.

14 MS. WILSON: I'm sorry?

15 THE COURT: What else would need to be done is unclear,
16 you're saying, under NEPA.

17 MS. WILSON: The agency --

18 THE COURT: Beyond what has already been done.

19 MS. WILSON: The agency would -- has to decide how to comply
20 with NEPA. So --

21 THE COURT: Yeah, I -- I think we're just talking by each
22 other now, but I understand the nuance that you're trying to
23 draw. The fact is, though, that the government's position is
24 that no EA is required in a land exchange.

25 MS. WILSON: Correct.

1 THE COURT: And that all that's necessary is a benefits
2 analysis.

3 MS. WILSON: Correct. But a net benefit analysis is still
4 required regardless.

5 THE COURT: Before I hear from plaintiffs, I want to give
6 intervenors a chance to clarify any part of that exchange that
7 you think is important for the Court to understand, again, with
8 respect to notice and opportunity to comment.

9 MS. BOSSHARDT: Thank you, Your Honor. So the notice and
10 opportunity argument that plaintiffs have made pertains to NEPA.
11 The M-Opinion says that NEPA must be done for land exchanges. It
12 does not say what level --

13 THE COURT: What -- and what do --

14 MS. BOSSHARDT: -- of NEPA is required.

15 THE COURT: And what do you mean by "NEPA must be done"?

16 MS. BOSSHARDT: Well, it -- as government counsel was
17 saying, the level of NEPA that needs to be done depends on the
18 nature of the exchange, and the M-Opinion notes that in some
19 case -- in many cases, it can be a categorical exclusion.
20 Separately, the Refuge Act requires --

21 THE COURT: Which would mean -- and so we're clear -- would
22 that mean no notice or opportunity to comment?

23 MS. BOSSHARDT: Well, in this case, there was notice and
24 opportunity --

25 THE COURT: I didn't ask you that. Would that mean if a

1 categorical exclusion was applied, which was not done here, that
2 there would be no need for a notice of opportunity to be heard?

3 MS. BOSSHARDT: Unless there were extraordinary
4 circumstances, the categorical exclusion means that the effects
5 are so cumulatively insignificant that -- that those ordinary
6 procedures -- those -- those procedures attendant to an EA are
7 not required.

8 THE COURT: But even if they are required, the only
9 requirement is a net benefit analysis?

10 MS. BOSSHARDT: Under the Refuge Act, the net benefit
11 analysis is required. Under NEPA, it depends. But importantly,
12 an SEA was done here. The plaintiffs submitted 12 pages of
13 comments on the land exchange. They had notice in September of
14 last year. They submitted comments on it. They understood the
15 details.

16 THE COURT: Understood. And I've read your brief as well,
17 and I understand both arguments. But your position is also that
18 a supplemental EA, and certainly a -- a full EA was not necessary
19 for a land exchange?

20 MS. BOSSHARDT: Well, no. I'm saying in general, is an EA
21 required? Not always. Here, an EA was done.

22 THE COURT: I didn't ask you whether it was done. I know it
23 was done. I'm still trying to figure out the legal position of
24 the intervenors. Are they -- are you in agreement that, on the
25 facts here --

1 MS. BOSSHARDT: Yes.

2 THE COURT: -- a supplemental EA was necessary?

3 MS. BOSSHARDT: I defer to -- I do not think that it has
4 been shown that the way the Fish and Wildlife Service and RUS
5 proceeded here was arbitrary and capricious, which is what
6 plaintiff --

7 THE COURT: I didn't ask you that question either.

8 MS. BOSSHARDT: Yes.

9 THE COURT: And if you don't want to take a position, that's
10 fine.

11 MS. BOSSHARDT: Sure.

12 THE COURT: Do you want to defer to the government, which
13 seems to say they're not necessary; just a net benefit analysis
14 is necessary, that's fine too.

15 Anything else you want to add or clarify?

16 MS. BOSSHARDT: I assume you'll come back to us.

17 THE COURT: No, this is your last chance to speak today.
18 No. All we're talking about now is the notice and opportunity to
19 be --

20 MS. BOSSHARDT: Yeah.

21 THE COURT: -- to be heard.

22 MS. BOSSHARDT: Yeah.

23 THE COURT: All right. Then let me turn to plaintiffs and
24 begin with the position that your clients have known since
25 September of last year that a supplemental EA was done. You had

1 the draft, and you had an opportunity to comment on that. Why
2 doesn't that satisfy the notice and opportunity to comment under
3 NEPA?

4 MR. LEARNER: Because, Your Honor, there are two different
5 times here. There are the documents that were released in
6 September of -- and October of 2023, and we were given a 14-day
7 comment period on those.

8 THE COURT: Understood.

9 MR. LEARNER: There are the decisional documents released in
10 February of 2024. There were no drafts released to those. No
11 opportunity to comment. Nothing that we were able to do; nothing
12 we were able to say with --

13 THE COURT: And --

14 MR. LEARNER: -- regard to the --

15 THE COURT: -- and they're not --

16 MR. LEARNER: -- net benefits analysis --

17 THE COURT: And according to the federal government, there
18 is no requirement under NEPA or the Refuge Act for notice or
19 comment with respect to the final decisions. That's what your
20 movement to the Court is for.

21 MR. LEARNER: Your Honor, first of all, that's a different
22 position than is reflected in the FONSI. I'll direct the Court's
23 attention to Document 1-17, page 2, paragraph 5.

24 Here's what the Fish and Wildlife Service says in that
25 document: Together, the decision whether to approve the proposed

1 route modifications and the associated administrative action
2 necessary to facilitate the CHC project to cross the refuge is a
3 major federal action requiring compliance with NEPA. That's --
4 the document at the top says "page 3." It's actually --

5 THE COURT: And now you're talking about the FONSI that was
6 issued last month?

7 MR. LEARNER: That's correct. It's a major -- federal
8 defendant says, "Crossing the refuge is a major federal -- and
9 the associated administrative action necessary to facilitate the
10 CHC project is a major federal action requiring compliance with
11 NEPA."

12 THE COURT: All right. And I -- I get that.

13 MR. LEARNER: Okay.

14 THE COURT: But it doesn't tell me whether there is a notice
15 and opportunity to be heard after issuance of the final decision.

16 MR. LEARNER: Your Honor, first of all, there was no draft.
17 So, of course, we didn't have an opportunity to comment on a
18 draft. There was a final document.

19 THE COURT: Well, the -- I'm sorry. The --

20 MR. LEARNER: Yeah.

21 THE COURT: They're saying that the draft was essentially
22 the supplemental EA.

23 MR. LEARNER: Your Honor, two different time periods, and I
24 thought that federal defendants' counsel may have inadvertently
25 misspoken at one point. The October 2023 documents were from the

1 rural --

2 THE COURT: They say September 2023.

3 MR. LEARNER: September and October --

4 THE COURT: Well, which is it?

5 MR. LEARNER: There is a September document, and then there
6 was actually an October document.

7 THE COURT: Was there a draft supplemental EA issued in
8 September?

9 MR. LEARNER: Yes, there was.

10 THE COURT: Okay. So --

11 MR. LEARNER: We commented on that.

12 THE COURT: Right.

13 MR. LEARNER: That was from the Rural Utility Service.

14 THE COURT: Right.

15 MR. LEARNER: There was a different -- and it had some
16 updates -- some different information, some of which was
17 overlapping -- issued by the Fish and Wildlife Service
18 February 23 of this year. There was no --

19 THE COURT: That was not the FONSI?

20 MR. LEARNER: That was the final FONSI, a different
21 document. It was different than the draft that was done by RUS.

22 In that document, I just quoted the provision by which they
23 said "major federal action, triggering NEPA." And you have the
24 arguments at page 40 of our brief, Your Honor, why the CEQ
25 regulations under NEPA require notice and public opportunity to

1 be heard.

2 There was no draft on that. It went straight to final.
3 There was no opportunity to comment by the public. The first
4 time we saw that document -- the net benefits analysis -- no
5 draft. First time we saw the somewhat different FONSI issued by
6 Fish and Wildlife on February 23rd were final documents. No
7 opportunity to comment.

8 Now, with regard to the FONSI, I'll acknowledge there was
9 overlap. There was -- there were some things in the
10 February 23rd document that referred to things that the Fish and
11 Wildlife Service did in January and so forth that could not have
12 been in a document that was in September or October.

13 So major federal action. That's what it says -- Document
14 1-17, page 2, paragraph 5 -- that the associated administrative
15 actions crossing the refuge, major federal action requiring
16 compliance with NEPA. That includes NEPA both in terms of the
17 notice and public comment. We address that in our brief at page
18 40 in the CEQ regulations --

19 THE COURT: Let me just --

20 MR. LEARNER: -- that do apply.

21 THE COURT: So I make sure I stay with you.

22 MR. LEARNER: Yes, sir.

23 THE COURT: The NEPA requirement that you're relying on
24 would be to have a full environmental impact statement?

25 MR. LEARNER: Your Honor, in these circumstances --

1 THE COURT: That's not what I asked.

2 MR. LEARNER: Well --

3 THE COURT: But your interpretation of -- if we assume -- if
4 the Court finds this is a major federal action, then doesn't that
5 mean there had to be a full environmental impact statement?

6 MR. LEARNER: There has to be a lawful full environmental
7 impact statements. In other words, Your Honor, to be precise --
8 I understand your question; I want to make sure my answer is
9 fully responsive -- this Court has found that the 2019 final
10 environmental impact statement and the 2020 record or decision
11 signed by all three agencies violated NEPA.

12 In the fall of 2023 and in the February 23, 2024, documents,
13 the defendants get around doing it fully IS by saying "we're
14 relying upon the former one." I think the word they use is
15 "incorporation." So what they are doing is relying upon --

16 THE COURT: Well, even that wasn't -- they're really not
17 relying on an environmental impact statement. They concede
18 they're relying on an environmental assessment.

19 MR. LEARNER: Correct. There has to be -- in a major
20 federal action here, as it's stated at page 2 of Document 1-17 --

21 THE COURT: I've got that down. You don't --

22 MR. LEARNER: Yep.

23 THE COURT: -- need to keep repeating it.

24 MR. LEARNER: Got it, Your Honor.

25 THE COURT: Yep. Go ahead.

1 MR. LEARNER: Yes, there needs to be a legally compliant
2 environmental impact statement. They can't have it both ways.

3 THE COURT: Let me -- let me come back to you, Ms. Wilson.
4 Would you agree that there was not a full environmental impact
5 statement prepared with respect to the land exchange here?

6 MS. WILSON: No, Your Honor. And I think it would be
7 helpful to --

8 THE COURT: No, you would not agree that happened?

9 MS. WILSON: A full -- a full environmental review under
10 NEPA was completed. The --

11 THE COURT: Which I found to be inadequate.

12 MS. WILSON: Your Honor, I -- my understanding of your prior
13 decision is you found the "purpose and needs" statement to be
14 insufficient, and I -- and the government's position is that is
15 almost irrelevant in this -- at this point because the
16 "purpose and need- --"

17 THE COURT: I'll try not to be offended.

18 MS. WILSON: The "purpose and needs" statement is designed
19 to make sure adequate alternatives are considered. Here, the
20 Fish and Wildlife Service was presented with a land-exchange
21 proposal, and it considered the only alternatives available to
22 it. It could --

23 THE COURT: But it didn't do a full environmental impact
24 statement. It did, at this point, a supplemental environmental
25 assessment.

1 MS. WILSON: For the changed circumstances of a land
2 exchange as opposed to the right of way that was considered in
3 the original EIS. But to be clear, plaintiffs are referring to a
4 major federal action which is what triggers NEPA. NEPA was done
5 here. The provision in the FONSI that plaintiffs' counsel is
6 referred -- referring to does not require an EIS. An EIS is
7 required if the impacts are significant.

8 The federal agencies engaged in a --

9 THE COURT: I'm just absorbing what you said, and I
10 appreciate the nuance. It's one that Judge Easterbrook also
11 appreciated.

12 Were any federal funds used to finance the land exchange?

13 MS. WILSON: I'm not sure I understand your question, Your
14 Honor. Are you talking about an equalizing payment?

15 THE COURT: Yes.

16 MS. WILSON: No, there was not an equalizing payment.

17 THE COURT: But you're not disputing that this was a major
18 federal action?

19 MS. WILSON: No, Your Honor.

20 THE COURT: So the only question as to the necessity of a
21 full environmental impact statement is whether the exchange
22 significantly affected the quality of the human environment?

23 MS. WILSON: It comes down to an issue of significance, yes.
24 And Fish and Wildlife issued a finding of no significant.

25 THE COURT: All right. Let me go back to you, Mr. Learner.

1 Assuming that we take the agency at its word that this was a
2 major federal action, NEPA does require a significant effect to
3 the quality of the human environment, and the position, whether
4 or not notice and opportunity to comment was adequate, is that
5 the land exchange is a wonderful opportunity to give up lousy
6 land for much more environmentally significant land, which would
7 seem to suggest it doesn't significantly affect the quality of
8 the refuge. I know in your materials -- and certainly as a
9 general matter, I found that the integrity of the refuge itself
10 is a substantial interest of the public, but why couldn't a
11 federal agency conclude that this particular land exchange would
12 not significantly affect the quality of the refuge and,
13 therefore, does not require more than the supplemental EA that
14 was done under NEPA?

15 MR. LEARNER: Your Honor, this is another variation of the
16 shell game that's been played.

17 THE COURT: I'm aware that --

18 MR. LEARNER: As a --

19 THE COURT: The pejoratives aren't necessary. Just tell me
20 why that shouldn't be possible.

21 MR. LEARNER: A huge power line going through --
22 high-voltage power line going through a natural wildlife refuge
23 had significant impacts, and that was found --

24 THE COURT: Understood.

25 MR. LEARNER: -- in the 2019 final environmental impact

1 statement. It has been acknowledged, we explain in our brief,
2 all the impacts on habitat. In this particular area, on the
3 adjacent areas --

4 THE COURT: Does it matter that it's a 75-foot tower now
5 than a -- the 200-foot that you --

6 MR. LEARNER: Well, Your Honor --

7 THE COURT: -- wrote about originally?

8 MR. LEARNER: -- in a footnote in one of the briefs, it
9 refers to one of the towers as 198 feet. Some of them are
10 smaller. There's been sort of a moving target here. Okay?

11 THE COURT: Which is -- goes back to this question of
12 adequate notice and opportunity, but I understand.

13 MR. LEARNER: Correct. Footnote -- I believe it's in the
14 transmission company's brief -- says there's at least one
15 198-foot tower. Let's say, rounding that to 200 is not
16 inappropriate.

17 This is an area -- the specific quarter that Fish and
18 Wildlife Service has been actively managing along the Turkey
19 River bottom. These are floodplains. Fish and Wildlife has
20 conducting a forest-restoration project in this precise area, and
21 that's in our brief, record of decision 005473.

22 The refuge's comprehensive conservation plan highlights the
23 importance of preserving floodplains like this. That's in the
24 comprehensive conservation plan at page 121.

25 Comprehensive conservation plan and all sorts of other

1 documents, the Fish and Wildlife Service make the point of
2 promoting habitat connectivity and avoiding fragmentation,
3 putting a 260-foot-wide new transmission line quarter through the
4 middle of the refuge -- that's almost a football-field width --
5 on its face fragments habitat, and that's been recognized
6 previously by Fish and Wildlife.

7 Fish and Wildlife has also recognized the importance of
8 scenic viewsheds. This has all been recognized in terms of
9 significant impacts in the invalidated 2019 final environmental
10 impact statement, the comprehensive conservation plan, and the
11 fact that Fish and Wildlife Service has been actively managing
12 this land in a restoration project. And what they have said
13 elsewhere is it will take 30 to 50 years to revegetate it if it's
14 disturbed. So for this particular area --

15 THE COURT: And when you say "this," now you're talking
16 about the exchange property?

17 MR. LEARNER: No, that was with respect to another
18 property -- the low-power transmission line. But the --

19 THE COURT: But that's the one that is going to be restored;
20 correct?

21 MR. LEARNER: Correct. 30 to 50 years. With regard to this
22 quarter, the so-called Nelson Dewey, they -- Fish and Wildlife --
23 is working. They are actively managing the land in the Turkey
24 River bottoms. This particular quarter where the transmission
25 line is proposed to go with a 260-foot right of way -- they are

1 managing it, conducting a forest-restoration project intended to
2 create a bottom-land forest, and preserve the floodplain and the
3 wetlands. And that's all in the record.

4 THE COURT: Well --

5 MR. LEARNER: So that's with regard to --

6 THE COURT: And I'm just trying to understand, while that
7 may be in the record, the conclusion by that same entity -- Fish
8 and Wildlife -- was that it was appropriate to exchange away that
9 opportunity for better land.

10 MR. LEARNER: Fish and Wildlife made a decision, but that's
11 not a discretionary decision by Fish and Wildlife. Congress made
12 a --

13 THE COURT: But you're quoting me Fish and Wildlife as to
14 why this is a significant action, but now you're telling me that
15 I can't consider Fish and Wildlife's alternative decision that
16 it's appropriate to exchange this land, notwithstanding the
17 possible opportunities it presents for the floodplain.

18 MR. LEARNER: Okay. Your Honor, let me break it into two
19 pieces in response to your question.

20 THE COURT: I think you did just break it into two pieces.
21 That's my point.

22 MR. LEARNER: The first was "is it significant?" And I
23 tried to answer your question to the significant. The second
24 question that you asked is "Does Fish and Wildlife have the
25 discretion to decide that they think they're getting a good deal

1 so they want to do a swap?" And on that, that's not compliant
2 with the statute.

3 The 1997 Refuge Act, as you recognized in your earlier
4 opinion, was designed to bring an end to the "lets make a deal"
5 because refuges were dying a death of a thousand cuts as refuge
6 managers were saying, "Well, maybe we'll swap this and exchange
7 that," so forth.

8 So congress, which is the decision maker, put on guardrails
9 here. What congress said specifically is the secretary of Fish
10 and Wildlife may not initiate or permit a new use of a refuge
11 unless it's determined to be compatible. And then congress got
12 even more specific than that. What congress said -- and, Your
13 Honor, if we can just put it up on the screen here -- congress
14 said specifically when it comes to power lines, pipelines,
15 telephone lines, there has to be a compatibility determination.
16 So this is not a matter did Fish and Wildlife --

17 THE COURT: And while I generally agreed with you, Judge
18 Easterbrook seems to suggest that that's not the ultimate test
19 for exchanges, but rather suitability is what's now required
20 under the statute.

21 MR. LEARNER: Your Honor, I don't think you can take the
22 Seventh Circuit's decision that far. First of all -- first of
23 all --

24 THE COURT: You have that luxury. I don't.

25 MR. LEARNER: I understand that, Your Honor.

1 THE COURT: They're my bosses.

2 MR. LEARNER: Your Honor, I understand that --

3 THE COURT: And it says --

4 MR. LEARNER: But --

5 THE COURT: -- and I'm quoting, "The Refuge Act uses
6 different words to describe the standard that different potential
7 actions must meet." And then it says "An inquiry into whether a
8 land exchange is," quote, "suitable," unquote, "under the statute
9 may differ from the compatibility analysis for the right-of-way
10 permit."

11 So according to the Seventh Circuit -- and you're going to
12 get the same panel. This -- I mean, I realize I'm not the last
13 word in any of this.

14 MR. LEARNER: Yep.

15 THE COURT: The test is not compatibility, but rather
16 suitability, which -- and -- and this is where, perhaps, there is
17 still some room for argument -- may differ from compatibility.
18 We're all left to guess how, but, clearly, the Seventh Circuit is
19 suggesting that if only -- because a land exchange entails an
20 increase in the refuge extent, it may offset the loss otherwise.

21 So I'm required to make an examination -- more accurately,
22 the -- the federal entities are required to make an
23 examination -- of the offset. It's not just a one-side
24 compatibility of the new power line but also what are the
25 benefits -- what is the suitability of the exchange.

1 MR. LEARNER: Right. Your Honor, let me address your
2 question directly in terms of what the Seventh Circuit did and
3 did not do.

4 THE COURT: Right. Don't tell me that they didn't decide
5 this issue, because I agree they didn't decide this issue --

6 MR. LEARNER: Didn't decide the issue. We agree --

7 THE COURT: In fact, they haven't made any decision. In
8 fact, essentially, they voided what I decided. So --

9 MR. LEARNER: Well --

10 THE COURT: So then -- that doesn't help me. So what's your
11 other point?

12 MR. LEARNER: Okay. First of all, Your Honor, what they
13 didn't have before then was the document that was a signed
14 statement of proposed land exchange between the federal agency
15 and the transmission companies.

16 THE COURT: But what difference does that make as to whether
17 or not the stashed is different than compatibility?

18 MR. LEARNER: Because with regard to whether they viewed
19 there as being final agency action or not, the failure to
20 disclose that document and that to be available to the Seventh
21 Circuit and to you and to plaintiffs, they might have reached a
22 different view.

23 THE COURT: I -- I mean, I just think that's silly. Whether
24 it should have been disclosed or not, I don't know, but that's
25 water under the bridge, and I --

1 MR. LEARNER: Okay.

2 THE COURT: -- probably should not start using --

3 MR. LEARNER: Your Honor --

4 THE COURT: -- metaphors in a case --

5 MR. LEARNER: -- we don't --

6 THE COURT: -- like this.

7 MR. LEARNER: -- believe the Seventh Circuit said that a
8 land exchange and suitability is acceptable in this case.

9 THE COURT: I think that's exactly what they said.

10 MR. LEARNER: No, what the Seventh Circuit said is there's
11 compatibility and suitability. They're both in the statute. And
12 we're not going to decide exactly how they both apply. So
13 therefore, Your Honor needs to decide.

14 And the question that they did not decide on the merits "Is
15 this subject to compatibility or does it fit within suitability?"
16 So in order to get to the question of is it a good deal or not,
17 the threshold question is "Is the transaction here that would
18 allow a power line to run through a protected national wildlife
19 refuge subject to compatibility, or does it fit within
20 suitability, the Seventh Circuit having said they both appear in
21 the statute?" Those are both general provisions.

22 But in this statute, congress did something that was
23 important. They were very specific -- and that's what we have up
24 on the screen -- saying that with respect to some very large
25 projects -- power lines, pipelines, et cetera -- and that's the

1 provision. I don't need to read it. You can see it. You have
2 it in our briefs. It's obviously sort of confusing. 16 U.S.C.
3 Section --

4 THE COURT: No, no. I --

5 MR. LEARNER: -- 668 --

6 THE COURT: I've got it.

7 MR. LEARNER: -- et cetera. What congress said very
8 specifically was for power lines, it has to be a compatibility
9 determination. The Seventh Circuit did not address that point.
10 The Seventh Circuit didn't call balls and strikes on that one.
11 They said they weren't making a decision. And, Your Honor, as
12 you know, cardinal rule of statutory construction -- the specific
13 trumps the general. So two general provisions here -- one on
14 compatibility; one on suitability -- by which they're trying to
15 do the land exchange.

16 THE COURT: But you're not disagreeing that part of the
17 compatibility analysis includes what benefits may have been
18 conferred by the land exchange?

19 MR. LEARNER: Your Honor, that mixes and matches in a way
20 that we don't think is consistent with the statute.
21 Compatibility is defined, and that is whether something has a
22 material impact; okay? It's a wildlife-dependent decision. And
23 whether something's compatible or not doesn't turn on net
24 benefits. Whether it's compatible or not has a statutory
25 definition that I just put up on the screen. That's the

1 compatibility determination.

2 If Your Honor were to decide that the specific language in
3 the statute that requires a compatibility determination applies,
4 then what Fish and Wildlife needs to do is decide whether it's
5 compatible or not.

6 And Your Honor recalls the history. That's where they
7 began. They began saying this requires a compatibility
8 determination. They went down that road --

9 THE COURT: With what you view to be an end-run --

10 MR. LEARNER: And -- well --

11 THE COURT: -- to an exchange. And I'm just trying to --

12 MR. LEARNER: Right.

13 THE COURT: -- make sense of your position against the
14 language of the Seventh Circuit's opinion, which seem to endorse
15 Fish and Wildlife Services' recent opinion that land exchanges do
16 not require compatibility determinations, but that their
17 conservation benefits must outweigh identifiable harm.

18 MR. LEARNER: That is if a land exchange is being done under
19 the suitable for disposition in a proper way and it does not
20 involve a power line where congress has spoken specifically, then
21 you get to that box.

22 Notably, the M-Opinion that the Court looked at and indeed
23 the Court was focused on not resolving the merits, but the final
24 agency action, does not address power lines. And the reason it
25 doesn't address power lines or pipelines is because, under the

1 statute, congress has said power lines and pipelines are subject
2 to compatibility determination. The M-Opinion dances around
3 that. It has to because this isn't a discretionary decision by
4 Fish and Wildlife. This is a matter of what the statute itself
5 says, and that's inescapable.

6 What should have been done here is where they started, but
7 then they found they couldn't satisfy the standard. They should
8 have determined whether the power line specified by congress,
9 requiring a compatibility decision -- determination was
10 compatible or not. Fish and Wildlife hasn't done that.

11 So we're not in a situation here, Your Honor, where we're
12 looking at an administrative record where Fish and Wildlife has
13 decided it is or isn't compatible for whatever combination of
14 reasons. Fish and Wildlife withdrew what it did before on that,
15 as Your Honor recognized in your opinion. They tried to then say
16 it was a maintenance exception, but you can't really say they
17 didn't meet the definition of "maintenance," as Your Honor
18 recognized.

19 Fish and Wildlife has not done what the statute requires,
20 which is compatibility determination. We're not here before Your
21 Honor arguing that their compatibility determination is, in our
22 view, arbitrary and capricious. That determination has not been
23 made. They debated --

24 THE COURT: I understand.

25 MR. LEARNER: -- it for the reason you said.

1 THE COURT: You said that three times.

2 MR. LEARNER: Thank you, Your Honor.

3 THE COURT: This is probably a good time to go back to you,
4 Ms. Wilson.

5 MS. WILSON: May I clarify a few points?

6 THE COURT: You may.

7 MS. WILSON: The section that plaintiffs' counsel put on the
8 screen discussing power lines is within subsection (d), which
9 relates to right of ways and uses of the refuge. The exchange
10 authority is in subsection (b), and that was untouched by the
11 1997 Refuge Improvement Act.

12 Plaintiffs' counsel --

13 THE COURT: I don't know which way that cuts, though,
14 because the reality is that there's going to be a power line put
15 through this exchanged land, and it seems to be the position is
16 that I should ignore that.

17 MS. WILSON: The ex- --

18 THE COURT: But that's not a consideration in either the
19 assessment of suitability, because there's no right of way at
20 issue.

21 MS. WILSON: The exchange provision does not have any
22 qualifiers for how the exchanged property will be used. The
23 M-Opinion says that the Fish and Wildlife Service should consider
24 how the exchanged property will be used in its net benefit
25 analysis, and that occurred here. But the statute and the agency

1 guidance do not require a compatibility determination with
2 respect to a land exchange. That is only for uses on the refuge.

3 THE COURT: And so I should ignore the elephant in the room,
4 allow the agency to proceed to assess a land exchange under a
5 suitability test, even though we all know that what's really
6 going on is a power line is going to go through the middle of the
7 refuge.

8 MS. WILSON: And there's already a power line there, and
9 the -- the Fish and Wildlife Service did not ignore that this
10 parcel would be used for a transmission line. It evaluated the
11 net benefits of having the transmission line co-located with a
12 road versus a larger transmission line through the utility's
13 existing easements and determined that, on balance, this exchange
14 is in the benefit of the United States and the refuge overall.
15 You have to look at the refuge and the land exchange in -- in
16 their entirety. You can't just look at the --

17 THE COURT: But that would seem to --

18 MS. WILSON: -- isolated pieces.

19 THE COURT: But that would seem to suggest that there should
20 be a compatibility analysis done.

21 MS. WILSON: No, Your Honor. It's a net benefit analysis.
22 It's a different --

23 THE COURT: Well, no --

24 MS. WILSON: It's different --

25 THE COURT: -- you've said that, but there is this provision

1 which specifically talks about use of grants, easements, and --
2 across or upon, through or under areas within the system for
3 purposes of such, which seems to suggest that the Fish and
4 Wildlife did need to make a compatibility determination for this
5 new larger power line.

6 MS. WILSON: I'm sorry. The new power line I was referring
7 to is -- is -- let me back up. So this -- this provision on
8 power lines is example of uses.

9 THE COURT: Right.

10 MS. WILSON: There is no compatibility analysis that would
11 be required whether or not the Fish and Wildlife engaged in an
12 exchange because the utilities have an existing easement. If
13 they didn't -- if the exchange does not close, the utilities have
14 said that they will pursue using that existing easement for their
15 project and a --

16 THE COURT: Well, but that's what they were --

17 MS. WILSON: -- compatibility analysis --

18 THE COURT: -- doing and --

19 MS. WILSON: I'm sorry?

20 THE COURT: -- and they abandoned that approach.

21 MS. WILSON: I think that is an alternative. They have not
22 abandoned that approach.

23 THE COURT: Well, they were proceeding down that road, which
24 required a -- a compatibility analysis.

25 MS. WILSON: A compatibility analysis is not required for

1 preexisting easement rights. The utilities companies in the
2 Stoneman crossing have preexisting easement rights that they have
3 said that they will pursue if the land exchange does not close.

4 What was required here under the Refuge Act for exchanges is
5 a determination that, on balance, to -- looking at the refuge as
6 a whole -- that the exchange is in the best interest of the
7 refuge, that it comports -- it provides a net conservation
8 benefit. Fish and Wildlife Service considered the significant
9 benefits of acquiring the Wagner parcel, having the Stoneman
10 crossing restored. That's extremely sensitive habitat -- having
11 that restored, those transmission towers removed, and co-locating
12 fragmentation.

13 There is already an existing information line there. This
14 land exchange would allow the existing one to come down and the
15 new project to be co-located along the road. The exchange
16 property is not this pristine environment, and there's a gravel
17 road down the middle of it. It is not -- has little to no
18 wildlife habitat.

19 THE COURT: The problem with that is both sides represent
20 diametrically opposed visions of that, and I don't have an
21 administrative record to decide which is right.

22 MS. WILSON: I think there's a distinction between talking
23 about the Turkey River bottom's area in general, which is a much
24 larger area, and this exchange property, which is the road and
25 the surrounding area that has --

1 THE COURT: Which is -- which is, again, a fine
2 representation, but I don't have the administrative record to
3 decide if you're right or they're right.

4 MS. WILSON: At this stage, Your Honor, this is not a merits
5 determination. This is -- this is whether they have shown that
6 there's -- there -- there's a -- made a strong showing that
7 they're likely to succeed on the merits.

8 And, Your Honor, the -- as I mentioned at the earlier part
9 of the hearing --

10 THE COURT: The difference is I've already concluded that
11 there's substantial reason to believe that a larger power line is
12 going to have significant environmental impacts.

13 MS. WILSON: And the impacts were analyzed in the EIS.

14 THE COURT: That's -- so you say, but I don't have the
15 administrative record.

16 MS. WILSON: You have the administrative record from the
17 prior cases, and -- and the United States did lodge that with
18 this case. So it's available for review.

19 THE COURT: I still don't have the record that you tell me
20 the Wildlife relied upon and was created between September or
21 October of last year and February of this year which resulted in
22 the decision that was made by Fish and Wildlife.

23 MS. WILSON: I think there's an important distinction. So
24 the EIS that was completed in 2019, which is part of the record
25 in the prior cases and has been lodged in this one, looked at the

1 impacts of putting a transmission line in this area. The only
2 thing that changed is -- is the supplemental environmental
3 assessment looked at whether that was accomplished by a land
4 exchange or as compared to the right-of-way permit that was
5 analyzed in the EIS. The impacts are --

6 THE COURT: The latter of which I found to be inadequate.

7 MS. WILSON: Related to the purpose and need.

8 THE COURT: Right.

9 MS. WILSON: At this stage of the litigation, plaintiffs are
10 only challenging the land exchange. The land exchange was not
11 before this Court in the prior case.

12 THE COURT: You can't have it both ways. You can't tell me
13 that I can just rely on the earlier record, which I found was
14 inadequate, and don't need to look at the new record and then
15 tell me that this was a new -- this was a new consideration --
16 the land exchange -- and so I can't rely on the last -- on the
17 earlier record. You're just talking in circles.

18 MS. WILSON: They're two different issues, Your Honor. The
19 EIS --

20 THE COURT: So you say.

21 MS. WILSON: -- looked at the impacts of the physical
22 transmission line, the impacts in the --

23 THE COURT: I understand that, Counsel, and I found that to
24 be inadequate. So I don't know how that helps you.

25 MS. WILSON: But plaintiffs haven't alleged --

1 THE COURT: In any event, you're telling me it doesn't
2 matter, because now I'm dealing with a land exchange, and I have
3 to look at the benefits of the land exchange, which was not
4 before me last time. So I still need an administrative record
5 considering the land exchange.

6 MS. WILSON: For a merits determination, yes, Your Honor.

7 THE COURT: Well, you seem to think that everything that's
8 gone before doesn't at least raise substantial concerns with
9 respect to the placement of a major power line on this exchanged
10 land, and I don't know how I ignore that. It's the -- repeatedly
11 the elephant in the room.

12 It seems -- and perhaps this is where I should hear with
13 Ms. Learner [sic] because I think their brief argues it more
14 directly. What you're saying for the government is that it
15 doesn't matter how the land is going to be used for a power line,
16 that the only consideration is whether there is an improvement in
17 the land exchange.

18 MS. WILSON: I did not say that, Your Honor. And the Fish
19 and Wildlife did consider how this exchanged property would be
20 used and that it would be used for a transmission line.

21 THE COURT: When did they do that?

22 MS. WILSON: It's in the net benefit analysis. It's in -- I
23 believe it's also in the FONSI.

24 THE COURT: Which means they relied upon whatever the
25 administrative record was before them in making the net benefit

1 analysis?

2 MS. WILSON: I'm not sure I follow.

3 THE COURT: I'm not sure I do either.

4 Ms. Learner [sic], do you want to expand on this?

5 MS. BOSSHARDT: Ms. Bosshardt. Yes.

6 THE COURT: I apologize.

7 MS. BOSSHARDT: No worries.

8 THE COURT: Thank you. Ms. Bosshardt.

9 MS. BOSSHARDT: I think to answer Your Honor's question
10 about, you know, how do you know that this land is going to be
11 exchanged that -- you know, the strip that is currently Oak Road
12 going to fairy -- how do you know that that's not suitable
13 habitat? And the reason is because it is documented in that net
14 benefit analysis. That is part of what will certainly be the
15 administrative record for the summary judgment decision, and that
16 is sufficient because that is where the expert Fish and Wildlife
17 Service managers determined this road already fragments this
18 habitat. The place where the utilities currently have their
19 high-voltage transmission lines is in a more heavily forested
20 area, and they would be removed as a result of this land
21 exchange, which is one of the reasons that this land exchange is
22 so beneficial to the refuge as a whole.

23 I just wanted to touch on a few other things that came up.

24 And I --

25 THE COURT: Before you do, though, that doesn't seem to

1 suggest that the Court -- and I understand that the argument is,
2 at this point, I can look at the net benefit analysis and find
3 that was adequate --

4 MS. BOSSHARDT: And the FONSI.

5 THE COURT: -- and the burden is on the -- and the FONSI --
6 and the burden is on the plaintiffs to show that it wasn't, but
7 you also conceded that the administrative record for the net
8 benefit analysis -- and really for the FONSI -- is not presently
9 available to the plaintiffs. Well, the plaintiffs -- they
10 crossed the finish line in the previous lawsuit and won on the
11 merits in the previous lawsuit. Isn't that evidence of
12 substantial success on the merits?

13 MS. BOSSHARDT: Your Honor, first of all, I -- I have not
14 taken any position on the administrative record.

15 THE COURT: Well, you just got done saying that the net
16 benefit analysis depended on the -- the administrative record
17 that was created.

18 MS. BOSSHARDT: The adequacy of the record that's before the
19 Court, but I do think that --

20 THE COURT: It's not before the Court. That's the problem.

21 MS. BOSSHARDT: But the agencies articulated rationale for
22 why they decided why this is so beneficial to the refuge is in
23 the record, and it is adequate, and it is owed deference because
24 these are the Fish and Wildlife Service experts who know where
25 the best habitat is for these species, and they know that the

1 Wagner parcel --

2 THE COURT: And had there been a full --

3 MS. BOSSHARDT: -- is -- has tremendous --

4 THE COURT: -- had there been a full opportunity for comment
5 by the public, including by the plaintiffs, to either the FONSI
6 or the net benefit analysis, I would have more confidence in
7 that, but you can't undo the history of this case which includes
8 deficient environmental examination. And so this is -- you're --
9 you're -- I'm just struggling, obviously, with the
10 appropriateness of my finding that the plaintiffs, who seem to
11 have done everything they can to create an appropriate record,
12 have not shown at least some likelihood of success, and I know
13 there's -- there's an argument about what that is, but --

14 MS. BOSSHARDT: Your Honor --

15 THE COURT: -- the environmental harm which I found already
16 is substantial, and the -- as a --

17 MS. BOSSHARDT: There is a --

18 THE COURT: -- weighing matter, I don't know why I wouldn't
19 at least wait to find -- to get the administrative record and
20 allow the plaintiff an opportunity to at least comment on the
21 administrative record before I give deference to Fish and
22 Wildlife, who seems to have been bouncing back and forth as to
23 what is required.

24 MS. BOSSHARDT: They have documented -- well documented the
25 rationale for finding that the exchange meets the requirement in

1 the M-Opinion, which Your Honor did not have the benefit of
2 before in the prior round of litigation, but which the Seventh
3 Circuit had, and which they cited, I believe, immediately
4 following the passage that you --

5 THE COURT: No, I'm aware. Yep.

6 MS. BOSSHARDT: By the way, plaintiffs say that the
7 M-Opinion dances around a requirement for a compatibility
8 determination. On page 2, the statutory text structure and
9 legislative history of the administration and improvement acts
10 demonstrate that Refuge Act land exchanges are not new uses of
11 refuge system lands that require a compatibility determination.
12 That's page 2. It's not danced around at all.

13 I do also have to address the tower height because
14 plaintiffs have misleadingly said that that has been a moving
15 target. We have never -- and Fish and Wildlife Service has never
16 taken any position other than our position today, which is that
17 those towers are 75 feet tall to coincide with the tree canopy
18 for the benefit of birds like everything else the utilities are
19 doing in the refuge.

20 THE COURT: Is there --

21 MS. BOSSHARDT: There is one --

22 THE COURT: -- a 195-foot tower?

23 MS. WILSON: There is only one that will not -- at least
24 one -- only one -- that has to be that high closest to the river
25 because of navigability concerns. And, by the way, we -- we

1 might not have stressed this enough for the Court, but there is
2 already a 175-foot tower there for the existing line. And,
3 again, it is that height because of the coastguards requirements
4 for something close to the river, and there is a picture of the
5 existing 175-foot-tall tower. I believe that is in the
6 declaration of Mark Rothfork, but I can -- I can find that for
7 the Court.

8 THE COURT: That's unnecessary.

9 MS. BOSSHARDT: But there is no moving target, and
10 plaintiffs have consistently argued, despite the record showing
11 to the contrary, that these are 200-foot -- that there are
12 more -- that there are 200-foot towers throughout to refuge.
13 That is misleading. They know better.

14 THE COURT: So the tower will have a single step-up from
15 75 feet to 195 feet, or are there interim towers?

16 MS. BOSSHARDT: No, they're 75 feet except for the one next
17 to the river.

18 THE COURT: If I did not enjoin the land exchange, would the
19 utilities immediately proceed to build those towers?

20 MS. BOSSHARDT: They would proceed to build the towers as
21 soon as the closing happens because this project is a vital piece
22 of transmission --

23 THE COURT: Well, so --

24 MS. BOSSHARDT: -- infrastructure.

25 THE COURT: So -- so the answer's "yes"?

1 MS. BOSSHARDT: Yes. That MISO found to be needed 13 years
2 ago.

3 THE COURT: Mr. Learner.

4 MR. LEARNER: Your Honor, let me tick off a couple of points
5 that you asked counsel. Counsel for the federal defendants said
6 we weren't challenging on NEPA grounds. Count 4 of our complaint
7 is NEPA.

8 THE COURT: I don't think they were questioning whether
9 you're attempting to make a NEPA challenge. I think their point
10 was that it's been satisfied.

11 MR. LEARNER: I'm sorry. It's what?

12 THE COURT: It's been satisfied here by virtue of the
13 suitability analysis, and the parties just disagree as to --

14 MR. LEARNER: Your Honor, you understand our argument.

15 THE COURT: I do, and you don't need --

16 MR. LEARNER: I won't --

17 THE COURT: -- to repeat it.

18 MR. LEARNER: -- repeat it.

19 THE COURT: Yeah.

20 MR. LEARNER: With regard to the M-Opinion that was just
21 mentioned, the M-Opinion says that land exchanges are not uses.
22 But as Your Honor has explained, that's simply an evasion of what
23 the statute says. The statute says compatibility determinations
24 for all new uses and specifies power lines.

25 There's a sequencing issue here in terms of understanding

1 the legislation and the history. The suitability for disposition
2 provision predated 1997, and it was a source of the problem that
3 congress identified that Your Honor pointed to in your January of
4 '22 opinion that that was being used to carve up the
5 wilderness -- wildlife refuges, that -- the death of a thousand
6 cuts that was referred to.

7 So what did congress do in 1997? Congress sought to tie the
8 hands of the Fish and Wildlife Service's discretion. Congress
9 said compatibility applies to new uses and with regard to
10 specific new uses, got beyond the general. Here, on the one
11 hand, suitability for disposition, general compatibility,
12 general -- congress said something very specifically, which the
13 Seventh Circuit didn't address -- that for power lines -- boom --
14 must be compatibility. Your Honor has just already explained why
15 they're attempting to evade that. I won't repeat that.

16 THE COURT: In your view, then, that also answers the
17 ability -- or the need for a compatibility determination, even if
18 the utilities were to proceed under their existing easement?

19 MR. LEARNER: That's correct, Your Honor, because -- let's
20 go to what congress also said -- because congress was trying to
21 not open up another loophole. Congress said Fish and Wildlife
22 cannot allow a permit for a new use of a refuge that expands,
23 renews, or extends an existing use of the refuge. So what
24 they're proposing to do on what they called the "Stoneman
25 line" -- that's a low power line -- it -- I'm sorry.

1 Low-voltage -- low-voltage power line -- they're looking to
2 replace it with a high-voltage power line --

3 THE COURT: Which would be a new use. That's your argument.
4 And I --

5 MR. LEARNER: Correct.

6 THE COURT: -- I just wanted to confirm --

7 MR. LEARNER: It would --

8 THE COURT: -- that's your position.

9 MR. LEARNER: -- expand -- to be more specific, Your Honor,
10 as we have flashed on the slide -- it would expand, renew, or
11 extend an existing use of the refuge.

12 The Stoneman line was pre-1997. It was grandfathered. And
13 what congress tried to do in the statute was not allow another
14 loophole to be created where, oh, you could take some old low
15 power line with low towers, and then put in something big and
16 tall. And that's what they're proposing to do here.

17 They would have tall towers -- that's what they say. I
18 don't know the exact height. They say "tall" or "very tall"
19 towers. It would be expanding or extending or renewing an
20 existing use of the refuge. There has to be a compatibility
21 determination on that. That's the statutory section that we have
22 before the Court here. 16 U.S.C. Section 668dd(d)(3) --

23 THE COURT: You don't need to repeat it.

24 MR. LEARNER: Okay. I know they're -- so counsel referred
25 to the suitability being in a different section of the statute.

1 Subparagraph (e). This is (d). This is what congress added in
2 1997. And there's also -- we've quoted in our brief. I won't
3 repeat it here -- about getting rid of nonconforming uses.

4 So there was an old line that was grandfathered pre-1997.
5 This is akin to, you know, there's a corner store in a
6 residential neighborhood where somebody has had it grandfathered
7 in even though it doesn't meet the zoning, and now they come in
8 and say, "Well, since it's been grandfathered in, we want to put
9 up a big-box store -- you know, a vertical big-box store." You
10 can't do that, and that's why congress closed that loophole.

11 Fish and Wildlife keeps saying there's nothing we can do if
12 the transmission companies want to take the Stoneman crossing,
13 put their very tall towers, and go there. Yes, they can. That's
14 what congress has said in the statute.

15 This isn't about the Fish and Wildlife Service's discretion.
16 We're not on the arbitrary and capricious side. We're on the
17 side of they're not following the law that congress passed. And
18 indeed in the M-Opinion, they recognized that the M-Opinion may
19 well not be consistent with Your Honor's decision in January of
20 2022. They don't flatout say "Judge Conley was wrong." They
21 recognize, and they put it nicely, that -- here it is at page 8
22 of the M-Opinion -- that they don't, in effect, think -- the
23 conclusions here, quote, "are arguably at odds with this
24 decision."

25 THE COURT: Which I guess brings me back to the question,

1 however polite it may be, is whether or not, between Fish and
2 Wildlife and Judge Easterbrook's decision, I have been corrected
3 as to the requirement for compatibility.

4 MR. LEARNER: Your Honor, I don't believe so --

5 THE COURT: And I understand the argument.

6 MR. LEARNER: You got my argument.

7 THE COURT: Yeah.

8 MR. LEARNER: Seventh Circuit did not get -- the Seventh --

9 THE COURT: You don't need to repeat it.

10 MR. LEARNER: I understand, Your Honor.

11 THE COURT: I'll hear anything more for the defendants.

12 MS. WILSON: Plaintiffs' counsel said that the Stoneman
13 crossing transmission line was grandfathered, but that's actually
14 incorrect. The Stoneman crossing transmission line easement
15 rights were granted before this was even refuge. So it's not
16 that it predates the 1997 act --

17 THE COURT: It predates the refuge acts.

18 MS. WILSON: -- it predates -- and so the Fish and Wildlife
19 has no ability and no authority to control how they use their
20 preexisting easement rights. It cannot impose a new
21 compatibility analysis to change how that easement is used.

22 THE COURT: And I'm -- I'm confused about this, and this
23 raises a whole 'nother aspect of constitutional law, but why
24 couldn't congress, since power lines are on notice that they're
25 subject to changes and regulation --

1 MS. WILSON: Because the United --

2 THE COURT: -- have been imposed -- just let me finish --

3 MS. WILSON: Sorry.

4 THE COURT: -- the question -- have imposed a new
5 requirement with respect to power lines in '97 that required
6 specific compatibility determinations for that new use with a --
7 with a larger power line?

8 MS. WILSON: The United States -- when the United States
9 acquired fee title of that land, it took subject to the easements
10 that were already in place.

11 THE COURT: Again, why couldn't -- this -- I mean, this is
12 really a -- a takings issue.

13 MS. WILSON: Yeah, it would get into --

14 THE COURT: And it --

15 MS. WILSON: -- a takings issue.

16 THE COURT: But it's not clear that industries that are
17 heavily regulated -- and this has been litigated to the Supreme
18 Court for automobile manufacturers and for others -- that they're
19 not on notice that congress has the power to further regulate.
20 So I don't know that it constitutes a taking. It may, but that's
21 yet another area where there are colorable arguments for both
22 sides.

23 MS. WILSON: I think the -- the regulations and the statute
24 are -- are clear with respect to rights of way -- strike that.

25 THE COURT: What is it that -- what is it that you think

1 says -- that there is no ability of congress to regulate power
2 lines on an existing easement?

3 MS. WILSON: Because those property --

4 THE COURT: Clearly, they can regulate it.

5 MS. WILSON: Those property rights existed prior to the
6 United States having fee ownership, and it does get into a
7 regulatory takings issue to then dictate and narrow the -- the
8 property -- it would narrow the property rights with which the
9 utilities could ex- -- could exercise. It would --

10 THE COURT: So there is no ability under the Refuge Act or,
11 more importantly, I guess, under NEPA for this purpose, for the
12 government to regulate any power line that goes through the
13 existing easement?

14 MS. WILSON: That's not what I said. It's specific --

15 THE COURT: It seemed like what you said --

16 MS. WILSON: It's specific --

17 THE COURT: Because it would be a takings.

18 MS. WILSON: It's specific to this easement rights that
19 predate refuge. It's different --

20 THE COURT: I'm sorry. Did I not say "predated the Refuge
21 Act"? I still don't believe that that's the law. There may be a
22 takings claim. I don't know. But it doesn't mean that it
23 couldn't be regulated, and congress arguably did just that
24 when -- when they made -- called special attention to the use of
25 power lines.

1 MS. WILSON: And I'm sorry. I'm trying to make the
2 distinction between easement rights that the United States came
3 to in acquiring land, and -- and easements that the United States
4 granted. Easements the United States granted are subject to the
5 compatibility analysis, and that compatibility review. It is not
6 the same where the United States came to the easement.

7 THE COURT: Understood.

8 And, Ms. Learner [*sic*], you seem eager to make --

9 MS. BOSSHARDT: "Bosshardt."

10 THE COURT: -- another point.

11 MS. BOSSHARDT: Sorry. Thank you.

12 THE COURT: No, that's fine. Go ahead.

13 MS. BOSSHARDT: So --

14 THE COURT: I was going to give you a chance anyway.

15 MS. BOSSHARDT: I know. I know. So Lot 1, which is --

16 THE COURT: And I'm sorry. I keep doing this.

17 Ms. Bosshardt.

18 MS. BOSSHARDT: Yes. Thank you.

19 Lot 1, which is part of the utilities' existing easement
20 here was acquired by Fish and Wildlife Service in 1999, subject
21 to those easements. They weren't originally, but, you know,
22 plaintiffs' counsel has said, "Oh, this is the boundaries that
23 congress chose in 1924."

24 The refuge has expanded significantly. Refuges expand and
25 they liberally use their acquisition and exchange authorities to

1 do so. But if this Court were to find that these easements,
2 which the government agreed to when it purchased the land, are no
3 longer good, that would be a significant disincentive to anyone
4 ever parting with property again to be part of a wildlife refuge.

5 THE COURT: Well, I wouldn't be finding they're no longer
6 good. I'd be finding that they may still be subject to
7 government regulation.

8 MS. BOSSHARDT: Well --

9 THE COURT: And in this case, regulation on the height of
10 the power lines that are put across that easement.

11 MS. BOSSHARDT: These power lines -- the structures that are
12 going in comply with all applicable legal requirements.

13 THE COURT: Well, they do if you're right that NEPA doesn't
14 require a full environmental impact statement.

15 MS. BOSSHARDT: A net benefit -- so NEPA --

16 THE COURT: We don't need to go back around on this
17 argument --

18 MS. BOSSHARDT: I want --

19 THE COURT: -- but I take your point.

20 MS. BOSSHARDT: I did want to -- also, I have a photo. I
21 don't know if I can bring it to the Court or --

22 THE COURT: You can easily put it if you --

23 MS. BOSSHARDT: Okay.

24 THE COURT: I shouldn't say "easily." But if someone would
25 assist by just allowing you -- you have to raise the arm -- just

1 all the way up. Just keep going. Now it's on. And then --

2 MR. LEARNER: Here, I'll pull ours off.

3 THE COURT: You don't need to.

4 MR. LEARNER: Okay.

5 MS. BOSSHARDT: By the way, another thing I wanted to
6 mention for the Court's benefit before I come back to this is the
7 ability -- the provision authorizing Fish and Wildlife Service to
8 grant rights of way for power lines, pipelines, and roads has
9 existed since 1966. It was not added in 1997. So that is
10 another way in which congress could have, but did not, you know,
11 amend the two separate provisions of the Refuge Act governing
12 exchanges on the one hand and rights of way for third-party uses
13 on the other. And there are twenty -- twenty --

14 THE COURT: And you wanted to make a point on the --

15 MS. BOSSHARDT: Yeah, I'm sorry. So this is a photograph
16 that is attached to the declaration of Rodley Pritchard, which
17 we've submitted in support of the public interest in -- in the
18 exchange. This shows the area of Oak Road where the new
19 transmission lines would go once the -- I'm sorry -- concurrently
20 with the old transmission line being removed from the
21 more-heavily-forested area that would then offer greater habitat
22 connectivity in that area.

23 THE COURT: All right. Mr. Learner, I'll give you the last
24 word.

25 MR. LEARNER: Okay. Your Honor, I'll start with specifics

1 and then go to the broader request. Clearly, the 1997 act did
2 much more than Ms. Bosshardt has just said. Your Honor discussed
3 that in your opinion in January of 2022. I won't repeat it here.

4 THE COURT: Thank you.

5 MR. LEARNER: These statutory provisions make clear what
6 should happen, namely a compatibility determination on a power
7 line. With regard to the Stoneman crossing -- with all due
8 respect -- that's not before the Court right now in the sense of
9 that that's not what's being --

10 THE COURT: Well, it is -- it is --

11 MR. LEARNER: -- proposed. It's in the background. I get
12 it.

13 THE COURT: It's not just in the background. It is a part
14 of the consideration for Fish and Wildlife if they -- that it
15 would be a worse result than the one currently under
16 consideration.

17 MR. LEARNER: Your Honor, that's fair. But, again, there's
18 no final agency action on that. There's no record on that.
19 It -- it doesn't --

20 THE COURT: No, but it's --

21 MR. LEARNER: We -- we get --

22 THE COURT: I don't know that it needs to be. Not to -- I
23 think it's appropriately considered, but --

24 MR. LEARNER: Okay.

25 THE COURT: -- this is going to be an issue.

1 MR. LEARNER: Okay. And we believe -- we'll stand on what
2 we've said about what the 1997 legislation does -- expand, renew,
3 or extend an existing use. Congress sought to close that
4 loophole, and Fish and Wildlife service is bound, obviously, but
5 what congress specifically said.

6 THE COURT: Unless they're right that that is a preexisting
7 easement that allows them to replace those lines without
8 regulation by NEPA.

9 MR. LEARNER: Well, Your Honor, I don't know of anything
10 that Fish and Wildlife has done where they've gone to congress
11 and said that provision that you enacted -- you can't do it.
12 That is the law. If Fish and Wildlife Service believes it's
13 somehow unconstitutional -- either overall on its face or as
14 applied -- they certainly ought to raise that argument. They
15 haven't. That law has been in effect now for --

16 THE COURT: Well, they did today, but go ahead.

17 MR. LEARNER: Well, it's been in effect for 27 years.

18 THE COURT: No, I understand.

19 MR. LEARNER: And let's say that that constitutional
20 argument has not been made to the best of our knowledge.

21 We respect your point about the administrative record. You
22 understand our point about the evasion that's going on here.
23 Your Honor's already recognized that in your 2022 opinion, and we
24 come back to the core matter.

25 Today, we're before Your Honor on a preliminary injunction.

1 Or, to be more precise, extending the preliminary injunction that
2 you issued yesterday until such a time as there can be a decision
3 on the merits. And with regard to that, whether it's some or a
4 reasonable likelihood of success or different formulations, we
5 believe we've met that. Your Honor's already found that in your
6 '22 opinion. Your Honor's already found irreparable harm in your
7 previous preliminary injunction decision. The balance of harms
8 weigh in our favor, and congress has defined the public interest
9 here.

10 The preliminary injunction that you entered yesterday is
11 necessary. It's vital. It's important so that the arguments
12 that are being made by the parties are based on, as you said, an
13 administrative record and one in which there's an opportunity for
14 plaintiffs to really review, and we believe, under NEPA, we had a
15 right to comment on these documents that got popped on us without
16 an administrative record, absolutely no public comment on the
17 February 23rd documents, which, in our view -- and we explained
18 this in our brief -- are not consistent with some of the other
19 positions that Fish and Wildlife historically has taken.

20 The Seventh Circuit opinion stressed the importance of an
21 administrative record. One of the reasons they said there wasn't
22 final agency action was they didn't know what the agency was
23 going to do. They didn't have the availability of the statement
24 of proposed land exchange -- which is exactly the same, two years
25 later, that they went forward with -- nor do the Seventh Circuit,

1 not knowing what Fish and Wildlife was going to do.

2 At that point, the Court said there needs to be an
3 administrative record. The Court stressed that a couple of
4 times. Nor did the Court decide compatibility or suitability
5 what the Court said, as Your Honor recognizes.

6 Those are two different standards under the statute. We're
7 not resolving the issue on the merits. And that is for Your
8 Honor to resolve. We believed that nothing --

9 THE COURT: And you don't need to repeat your entire
10 argument.

11 MR. LEARNER: Yeah, nothing is --

12 THE COURT: I said I'd let you have the last word. I didn't
13 mean start over again.

14 MR. LEARNER: Okay. Your Honor --

15 THE COURT: Is there anything else --

16 MR. LEARNER: -- I'll wrap it up --

17 THE COURT: -- you want to add to the --

18 MR. LEARNER: -- three sentences.

19 THE COURT: Yeah.

20 MR. LEARNER: Grant or continue the preliminary injunction.

21 THE COURT: I got that, yeah.

22 MR. LEARNER: Direct the parties to produce the
23 administrative record.

24 THE COURT: I got it, yep.

25 MR. LEARNER: And direct the parties to meet and confer and

1 develop a briefing schedule on a summary judgment consideration
2 by the Court that's pegged to, when the administrative record
3 becomes available, and we commit to work with the opposing
4 counsel --

5 THE COURT: Yeah, I'm going to meet you half way. I'm --
6 I'm going to continue the preliminary injunction until an
7 administrative record has been produced to the Court. I'll give
8 both sides 30 days from receipt of that record to supplement
9 their briefing as to why the record is sufficient to support the
10 FONSI and the net benefit analysis. And relatedly, because I
11 really haven't had this, I'm going to ask you to proceed with
12 specific briefing as to the notice and opportunity comment
13 requirements.

14 If I understand the government's position today, no such
15 obligation exists. If I understand the plaintiffs' position
16 today, there should have been another notice and opportunity to
17 comment once the FONSI and the actual land-exchange agreement and
18 net benefit analysis was issued. And so plaintiffs may have 14
19 days to file their brief addressing exactly that right and where
20 you think it exists in the administrative -- in the regulations
21 or the statutes, and I'll give 10 days for the defendants to
22 respond to that.

23 I -- I'm not going to hold up a decision -- or continue a
24 preliminary injunction until a merits determination. I think I
25 owe it to the defendants to address this under the preliminary

1 injunction standard again when I have a basis to do so. But
2 between the findings that I made in the original lawsuit, the
3 fact that there is an arguably precipitous issuance of final
4 decisions just -- less than a month before the exchange would
5 proceed and the absence of any administrative record for me to
6 determine the adequacy of the determinations that were made with
7 respect to the FONSI and the benefit analysis is more than
8 adequate to justify a continuation of the preliminary injunction
9 until I have a better understanding of that process.

10 Anything more for the plaintiff today?

11 MR. LEARNER: Your Honor, just one quick clarification and
12 an introduction. When you referred to the February 23rd
13 decisional documents -- actually, what we wanted to do was an
14 opportunity to comment on what the draft is. Now they've gone to
15 final. We'll comment on the final. There should have been a
16 draft for comment. Just to be clear.

17 THE COURT: You're -- you're -- I'm not precluding you from
18 arguing --

19 MR. LEARNER: Got it.

20 THE COURT: -- that the September release wasn't adequately
21 handled either, but I'm focused in particular on --

22 MR. LEARNER: On February.

23 THE COURT: -- on what notice and opportunity to comment was
24 required upon issuance of the February 23 --

25 MR. LEARNER: I understand, Your Honor.

1 THE COURT: -- materials.

2 MR. LEARNER: Your Honor, if I might also just request the
3 Court's indulgence for one moment. I'd like to just introduce
4 our clients who are in the room. Jeffrey Haskett is the
5 president of the National Wildlife Refuge Association, former
6 chief of the U.S. Fish and Wildlife Refuge System. Jennifer
7 Filipiak is the executive director of the Driftless Area Land
8 Conservancy. George Meyer is director of the Wisconsin Wildlife
9 Federation, former secretary of the Department of Natural
10 Resources.

11 THE COURT: Nice to have you all here.

12 MR. LEARNER: Thank you, Your Honor.

13 THE COURT: And thank you for your participation.

14 I'll hear the same. Anything more for the defendants at
15 this time?

16 MS. WILSON: No, Your Honor. I imagine your order will
17 clarify on the -- on the dates. Thank you.

18 THE COURT: Anything more for the intervening defendants?

19 MS. BOSSHARDT: Yes, Your Honor. Thank you.

20 The plaintiffs, in their Seventh Circuit appeal, briefed the
21 merits of the land exchange. They argued that the Seventh
22 Circuit --

23 THE COURT: But the --

24 MS. BOSSHARDT: -- and this Court -- --

25 THE COURT: -- Seventh Circuit was the --

1 MS. BOSSHARDT: -- had enough information --

2 THE COURT: Counsel, the Seventh Circuit was the one who
3 said there isn't enough information. I can't decide the land
4 exchange and revoke that order. So I don't know why you're
5 raising that.

6 MS. BOSSHARDT: Plaintiffs thought, at that point, Your
7 Honor, that they had enough detail about the land exchange.

8 THE COURT: But the Seventh Circuit didn't. My bosses have
9 decided there wasn't enough. So I don't know what this has to do
10 with anything.

11 MS. BOSSHARDT: And, again, they offered 12 pages of
12 comments on the SEA devoted exclusively to the land exchange.

13 THE COURT: You made that -- you made that point as well.

14 MS. BOSSHARDT: Thank you, Your Honor. We hope -- we
15 appreciate the Court's time and hope that you will consider the
16 vital importance of this project to reliability --

17 THE COURT: And I am, and that's why I'm not going to wait
18 until summary judgment, but rather when I have an administrative
19 record and a better understanding --

20 MS. BOSSHARDT: Thank you, Your Honor.

21 THE COURT: -- of the obligations of the parties, I will
22 endeavor to address --

23 MS. BOSSHARDT: Thank you.

24 THE COURT: -- any continuation of the preliminary
25 injunction.

1 With that, we are, I believe, adjourned, and I thank you
2 all.

3 MR. LEARNER: Thank you, Your Honor.

4 THE COURT: You're free to move about as you wish.

5 THE CLERK: This Honorable Court stands adjourned.

6 (Proceedings concluded at 10:40 AM.)

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EXHIBIT 5

Howard Learner

From: wiwd_ecf@wiwd.uscourts.gov
Sent: Tuesday, April 2, 2024 1:11 PM
To: wiwd_nef@wiwd.uscourts.gov
Subject: Activity in Case 3:24-cv-00139-wmc National Wildlife Refuge Association et al v. Rural Utilities Service et al Text Only Order

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U.S. District Court

Western District of Wisconsin

Notice of Electronic Filing

The following transaction was entered on 4/2/2024 at 1:10 PM CDT and filed on 4/2/2024

Case Name: National Wildlife Refuge Association et al v. Rural Utilities Service et al

Case Number: [3:24-cv-00139-wmc](#)

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Docket Text:

**** TEXT ONLY ORDER ****

The court is in receipt of intervenor-defendants' motion to stay pending appeal and for expedited consideration (dkt. #[71]), as well as plaintiffs' request for an additional seven days to respond beyond the automatic seven-day deadline (dkt. #[73]). Given that the motion to stay reads more as a motion to reconsider, the court agrees that some extension to respond is appropriate while recognizing the intervenor-defendants' desire to expedite a request for stay by the Seventh Circuit should this court deny its motion. Accordingly, the court will extend the deadline for plaintiffs' response by three days, making it due on or before April 11th. Signed by District Judge William M. Conley on 4/2/2024. (lam)

3:24-cv-00139-wmc Notice has been electronically mailed to:

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