

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION**

STATE OF TEXAS

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR,
et al.

Defendants.

Civil Action No. 7:24-cv-233-DC-RCG

**RESPONSE AND OPPOSITION TO THE JOINT MOTION FOR
VOLUNTARY REMAND WITH VACATUR**

For the third time in less than a year, the U.S. Fish and Wildlife Service (“Service”) is asking a Texas court to set aside a listing decision under the Endangered Species Act (“ESA”) without a trial or ruling on the merits. Each time, the Service under the Trump administration has entered settlement negotiations with the State of Texas, discovered some alleged flaw in the rulemaking process after indicating in their Answer an intent to defend the listing, and then purported to a federal court that the alleged flaw was so substantial that the listing decision cannot be sustained. The lesser-prairie chicken listing has already been vacated. Requests to vacate in this case and another involving various species of mussels are pending.

The government’s pattern of behavior is concerning. That is especially true here, where the Service’s explanation for its most recent change in position is so baseless and so lacking in record support as to lack credibility. As described further below, the Service’s own filings belie both the alleged flaw in the rulemaking process and the value of the additional work the Service now wishes to undertake on the original listing decision. The Center beseeches this Court to

scrutinize the Service’s change of position and deny the motion for remand with vacatur, to avoid what appears to be an improper end-run around mandatory administrative procedures.

STATUTORY BACKGROUND

I. The Endangered Species Act

Congress enacted the ESA in 1973 “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). Over fifty years later, the ESA remains “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). As the Supreme Court found, the “plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

For terrestrial species, the Secretary of the Interior, acting through the Service, must determine whether any species is “endangered” or “threatened.” 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 402.01(b) (2025). A species is designated as “endangered” when it is currently “in danger of extinction throughout all or a significant portion of its range,” 16 U.S.C. § 1532(6), and “threatened” when it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range,” *id.* § 1532(20).

The Service evaluates a species’ conservation status based five statutory factors: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” *Id.* § 1533(a)(1).

The ESA requires the Secretary to act on petitions to list species as threatened or endangered on a strict timeframe. Initial findings on whether the petition warrants further review must be made within 90 days. 16 U.S.C. § 1533(b)(3)(A). If so, the Service must issue a 12-month finding and, if listing is warranted, publish a proposed rule in the Federal Register for notice and comment. *Id.* § 1533(b)(3)(B). A final rule is required by statute within a year. *Id.* § 1533(b)(6). Although in practice the Service often misses these deadlines, Congress intended that assessments of the conservation status of a species be expeditious and time limited.

The Service must make listing determinations “solely on the basis of the best available scientific and commercial information regarding a species’ status.” 50 C.F.R. § 424.11(b) (2025); *see also* 16 U.S.C. § 1533(b)(1)(A). “The obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation and surmise.” *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

Given the Act’s statutory deadlines for making listing decisions, the word “available” does not mean the best information that could exist or which might later emerge. That standard is inherently temporal: “available” refers to the information before the agency *at the time* it acted. *See Nat. Res. Def. Council v. Haaland*, 102 F.4th 1045, 1067 (9th Cir. 2024). Consistent with that command, judicial review under the APA is confined to the administrative record in existence when the agency made its decision. *Harris v. United States*, 19 F.3d 1090, 1096 n.7 (5th Cir. 1995) (finding the court should not consider information outside the administrative record). The Fifth Circuit has applied this principle in ESA cases, rejecting attempts to rely on extra-record scientific materials and emphasizing that “best available science” does not mean the data a litigant prefers or later develops. *Sierra Club v. U.S. Dep’t of the Interior*, 990 F.3d 909

(5th Cir. 2021); *see also State v. Biden*, 10 F.4th 538, 552 (5th Cir. 2021) (“we cannot consider *post hoc* rationalizations”) (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)); *Haaland*, 102 F.4th at 1067 (requiring the identification of relevant scientific evidence available at the time of decisionmaking and a showing that it is better than what the agency considered to overcome the “best available science” standard).

II. The Administrative Procedure Act

The APA gives any person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action,” the right to federal judicial review. 5 U.S.C. § 702. A Court must “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). An agency acts arbitrarily if it “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43.

ARGUMENT

I. The Service’s Proffered Basis for Seeking Remand with Vacatur Is Baseless

The Service’s *post hoc* explanation for why it should be allowed to vacate the dunes sagebrush lizard listing rule is self-contradictory and unsupported by the record. Neither the Joint Motion nor the Leston Jacks declaration contradicts any finding in the listing rule; nor do they name a single scientific study not considered in the rule. Dkt. 43. Although the Service now claims that “experimental efforts at habitat improvement” have shown “promise for habitat restoration efforts,” Dkt 43. at 9, they point to no plan, no program, and no place where such efforts have taken place, let alone been successful. To our knowledge, there are in fact *no*

scientific studies, let alone peer reviewed ones, supporting the premise that small-scale habitat restoration – which primarily focuses on removal of caliche well pads and road infrastructure to reduce ground disturbance – has any impact whatsoever on the actual restoration of shinnery oak dunelands habitat. *Contra Haaland*, 102 F.4th at 1067. Indeed, Mr. Jacks admits that “habitat restoration of shinnery oak dunelands has not currently been achieved at a scale meaningful to dunes sagebrush lizard populations.” Jacks Decl. ¶ 14. That concession upholds the Service’s conclusion in the Final Rule.

What the Service offers here is the very definition of “speculation and surmise.” With no explanation or support in the record, the Service now claims it “discounted *experimental* efforts that *showed promise* for habitat restoration, resulting in *potentially inaccurate* assessment of conservation efforts that *may have* impacted the Service’s conclusions as to whether the dunes sagebrush lizard meets the statutory definition of an endangered species.” Dkt. 43 at 2 (emphases added). The italics are added here to show how the Service is heaping inference upon inference in the hope that this Court will not consider the actual record evidence in this case. The Service does not even indicate *where* such experiments have “shown promise” let alone offer any evidence that widespread adoption of such unproven techniques will occur or be successful.

The best available science at the time the agency promulgated the final listing rule includes studies by Dr. Lee Fitzgerald and Dr. Danielle Walkup at Texas A&M University, among others, cited throughout the Final Rule and Species Status Assessment. These studies conclude habitat loss is a serious threat to the lizard, that such habitat loss and fragmentation is ongoing, and that actual re-creation of lost dunes is a long-term geological process that can take centuries to accomplish. For example, one of the more recent studies by Fitzgerald et al. 2022, cited in the Service’s Species Status Assessment states clearly:

The condition and configuration of the irreplaceable landforms [the lizard] inhabits are directly linked to population vital rates and persistence of populations. The Mescalero-Monahans Sandhills overlies the Permian Basin, a region beset with increasing and extensive fragmentation from oil and gas development and sand mining for fracking. Fragmentation disrupts both the geomorphologic processes that maintain dunes and the dispersal dynamics that connect lizard neighborhoods. Effective conservation of shinnery oak dunes is a persistent challenge. Conservation agreements facilitate monitoring, land stewardship, and research. However, conservation agreements do not match dynamics of ecological scaling in this system and may not confront the problem of fragmentation that drives disappearance of the Dunes Sagebrush Lizard. The same recommendation has been made since 1997, with increasing precision—there is a clear need to protect extensive and relatively undisturbed areas of shinnery oak dunes that are home to this highly specialized species.¹

The Service’s Species Status Assessment and the Final Rule considered and rejected everything the Service now claims it failed to address:

Fragmentation of the shinnery oak ecosystem and DSL [dunes sagebrush lizard] habitat may be non-reversible. Ryberg et al. (2015, p. 896) indicate that once shinnery oak dunelands are disturbed, these landforms shift to alternative stable states that are not prone to self-regeneration through ecological succession. Trials to restore and recreate shinnery oak dunelands have not been successful and additionally it is “far from certain that artificial dune blowouts could support populations of the species” (Ryberg et al. 2015, p. 896). The authors further argue that the successful restoration of shinnery oak dune forms is unlikely, due to the complexities of the natural processes that form and maintain these landforms, and the difficulty of replicating these processes. Johnson et al. (2016, p. 34) also notes that the restoration of shinnery oak vegetation and sand dune-blowout topography is not feasible. *However, the authors suggest that the removal of caliche well pads and roads from the landscape may be able to recover the sand substrate component of DSL habitat at impacted sites and restore connectivity among habitat patches that were previously fragmented by oil and gas infrastructure.*

U.S. Fish and Wildlife Serv., Species Status Assessment for the Dunes Sagebrush Lizard (April 2024), <https://iris.fws.gov/APPS/ServCat/DownloadFile/249111> at 58 (emphasis added). This

¹ Fitzgerald, L.A., W.A. Ryberg, D. Walkup, T. Hibbitts, M.T. Hill, D.J. Leavitt, L.M. Chan, and M.R. Parker. 2022. Ecology and conservation of the imperiled Dunes Sagebrush Lizard: an ecological specialist in a threatened ecosystem. The future for reptiles: advances and challenge in the Anthropocene. pp 163-174. in: *Imperiled: The Encyclopedia of Conservation*. Eds. D.A. DellaSala, M.I. Goldstein. Elsevier.

last quoted sentence demonstrates two points: first, the Service did consider the potential benefits of small-scale restoration at caliche well pads *and*, second, such activities would not be sufficient replacement for actual restoration of shinnery oak dunes blowouts. The Service offers nothing to contradict the overwhelming weight of scientific evidence in the status assessment and the Final Rule concerning the lizard's habitat needs, the continued threat to that habitat, or the likelihood that a meaningful amount of the species habitat (more than 95 percent of which has been lost) could ever be restored.

The Final Rule itself could not be clearer:

The shinnery oak dunelands that the dunes sagebrush lizard relies on for habitat are flattened and removed during development. Even if a well pad is completely reclaimed, the sand dunes are lost until long-term geologic processes that take centuries and even millennia to occur can recreate the dunes (USFWS 2024, p. 34). Due to the dunes sagebrush lizard's reliance on this very specific and restricted habitat of shinnery oak dunes within the Mescalero and Monahans Sandhills, the species is highly susceptible to habitat loss and fragmentation, with loss of this habitat being the greatest threat to the species, as described in detail in the SSA report (USFWS 2024, pp. 55–70). Removal of shinnery oak dunelands can impair breeding, feeding, sheltering, dispersal, and survival, causing declines in abundance or even loss of populations. Degradation and fragmentation of shinnery oak dunelands may be irreversible; once disturbed, these dunelands shift to alternative stable states of other habitat type and, to date, attempts to restore this habitat have been unsuccessful at a large scale (Ryberg et al. 2015, p. 896; Johnson et al. 2016, p. 34). Reclaiming unused well pads is beneficial to the dunes sagebrush lizard because it allows for improved connectivity between dunelands. However, to date, there have been no successful efforts to recreate lost habitat.

89 Fed. Reg. 43,748, 43,755-56 (May 20, 2024). Put frankly, the Service's newly discovered error does not exist. The Service considered the best available science, including the possibility of small-scale restoration efforts, at the time of the decision and properly concluded that the lizard was endangered based on present and threatened habitat loss.

Nothing in the Service's current filings contradicts those conclusions or supports the notion that the Service's review of conservation efforts was "potentially inaccurate," Dkt. 43 at

2. The Service’s review of existing plans acknowledges some benefits but states “based on the information we reviewed in our assessment, we conclude that the risk of extinction for the dunes sagebrush lizard is high despite these efforts.” 89 Fed. Reg. at 43,750. As the Service found:

these conservation agreements have not eliminated the loss of dunes sagebrush lizard habitat. The current buffer around duneland habitat in New Mexico is 30 meters. As a result, development continues in close proximity to duneland habitat. This has led to increased habitat fragmentation and a loss of connectivity between important habitat patches. In Texas, the CCAAs [candidate conservation agreements with assurances] promote avoidance and minimization of impacts to dunes sagebrush lizard habitat. However, these CCAAs still allow development within dunelands when mitigation measures are applied, although some of these mitigation measures, such as mesquite removal, have been shown to provide little conservation benefit (USFWS 2024, pp. 86–87). Thus, continued development in dunelands contributes to increasing fragmentation, which has failed to be offset by mitigation.

Id. Moreover, the Final Rule discusses how the 2012 Texas Conservation Plan and the newer 2020 plan have not provided expected benefits due to implementation errors, low enrollment, among other problems. *Id.* The Service thus concluded

based on performance reporting to date, it has not yet been demonstrated that these agreements will be adequate or effective at protecting the dunes sagebrush lizard or its habitat in Texas into the future. Therefore, the measures implemented by these agreements are not enough to reduce the risk of extinction of the dunes sagebrush lizard such that it does not meet the definition of an endangered species.

Id.

The Jacks declaration also fails to disclose that the 2012 Texas Conservation Plan is not in effect. Jacks Decl. ¶ 12(b). The state of Texas disavowed and discontinued activities under it in 2018 and attempted to submit a revised CCAA for the Service’s consideration. *See* Letter from Glenn Hegar, Texas Comptroller of Public Accounts to Amy Leuders, Regional Director, U.S. FWS (Nov. 8, 2018) (“[the Comptroller] understands that the permit is void and cancelled on the

Service’s receipt of this letter).² But the Service did not accept those revisions and did not issue a new permit for the Texas Conservation Plan until 2020. *See* U.S. Fish and Wildlife Serv., Species Status Assessment, *supra*, at 85. In the Final Rule, the Service found that the 2020 plan, now managed by the American Conservation Foundation, suffered from “low enrollment, stratification of properties, and lack of clarity to date on conservation measures and other activities.” 89 Fed. Reg. at 43,750. The Service further noted that “we are unsure of the extent of conservation measure implementation and the locations of all areas where conservation is occurring because specific data on enrolled locations are not available.” *Id.* at 43,764. Similarly, for the separate 2020 CCAA cited by Jacks, Jacks Decl. ¶ 12(c), the Service found that few acres of dunes lizard habitat have been enrolled and that “no specific actions have been reported to date; thus, we remain unaware of the specific conservation measures being implemented by each participant per their certificate of inclusion,” *id.* at 43,764. The Jacks declaration ignores all evidence of these plans’ failure to conserve the lizard.

Even if it were the case that new information calls into question the Service’s prior conclusions regarding the feasibility of shinnery oak dune habitat restoration or the likelihood that any such habitat restoration would happen under these or other conservation programs, the decision to list was properly made on the basis of the best scientific information available at the time. The Jacks declaration concedes, “[a]t the time of listing, the Service considered multiple conservation measures for the dunes sagebrush lizard in New Mexico and Texas.” Jacks. Decl. ¶ 10. He further says, “at the time of listing the Service improperly assumed that habitat restoration would not happen,” *id.* at ¶ 13, but there was nothing improper about that conclusion then or

² The Comptroller’s letter rescinding the 2012 Texas Conservation Plan is available at https://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/DSL-plan-withdraw-letter.pdf.

now. There is simply no record evidence of meaningful habitat restoration efforts at a scale that could affect lizard populations, and the Service offers none now. Jacks's own conclusion bears repeating: "habitat restoration of shinnery oak dunelands has not currently been achieved at a scale meaningful to dunes sagebrush lizard populations." *Id.* at ¶ 14

Moreover, even if there were new scientific evidence supporting the proposition that habitat restoration at any scale warranted reconsideration of the listing (which there is not), the Service's request for remand is not appropriate for two reasons. First, the ESA's listing factor A requires an assessment of the "present or threatened destruction, modification, or curtailment of habitat or range," 16 U.S.C. § 1533(a)(1)(A), not a speculative assessment of future actions that are not likely to occur and have not shown to be of significant benefit to the species. All the evidence in the record suggests that the lizard is presently endangered and continues to suffer ongoing loss of habitat and range. As the Final Rule properly found, the threats to the lizard—primarily habitat loss, fragmentation, and climate change—continue. "Oil and gas development, along with other threats like frac sand mining, continue to contribute to habitat loss and fragmentation, the primary threats to the dunes sagebrush lizard." 89 Fed. Reg. at 43,753. The Service proffers no evidence and makes no claim contrary to its conclusion in the Final Rule that the lizard is presently endangered. The mere possibility of future, unnamed, *experimental* habitat restoration on a small well-pad scale is irrelevant in the face of *current* threats to the species.

Second, the proper recourse for considering new information that could affect a listing determination is to leave the listing in place, open a new species status assessment, take public comment, and, if any changes are required, then publish a new listing rule. That is why the ESA requires the Service to conduct five-year reviews to determine whether a species status has changed since the time of its listing or its last status review. 16 U.S.C. §1533(c)(2).

What the Service cannot do is simply assert that there is a “potential” possibility that additional analysis could maybe lead to a different conclusion, provide no scientific basis for that assertion, and then seek the Court’s complicity to vacate a lawfully promulgated rule. The Service does not even seem to be entertaining the notion that the species could be listed *instead* as “threatened” rather than “endangered” if, in fact, the risk of extinction is not imminent. Using the courts to obtain an end-run around the statutory reviews and processes built into the ESA for reevaluation is a very slippery slope, as it will always be possible to identify *something* not fully considered, declare it to be fundamental, and then claim the possibility that further review could have impacted the decision. That is why the ESA’s standard is “best scientific and commercial data *available*,” 16 U.S.C. 1533(b)(1)(A) (emphasis added), not data that could possibly exist if the Service imagined hard enough.

What is more, the consideration of *post hoc* explanations or information (although the Service cites no new or recent studies of effective habitat restoration as justification for invalidating its previous conclusions) to invalidate an otherwise lawful rule would improperly convert arbitrary-and-capricious review into hindsight review. The Supreme Court has made clear that courts must evaluate agency technical judgments based on the information before the agency, not in light of subsequently developed evidence. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989).

II. Remand With Vacatur Is Not Appropriate

Remand without vacatur is not appropriate where, as here, the Service committed no actual error in the Final Rule, there’s been no decision on the merits, and there is a serious possibility the Service would reinstate its decision to list the dunes sagebrush lizard on remand; moreover, the equities weigh in favor of preventing extinction and reducing industry uncertainty

while the Service confirms that its own fully reasoned analysis, based on decades of best available science was, in fact, correct. The Service seeks a remand to address the mere possibility that its assessment of conservation efforts was “potentially inaccurate.” Dkt. 43 at 3. As demonstrated above, the Service’s claim is baseless and contrary to the listing record. Even if the Service now has in its possession new information that may bear on the species listing (although the Service never says what it is), that is not a basis for remand with or without vacatur. The Service is instead free, under the APA and ESA, to conduct a new species status assessment and propose changes, if warranted, to the listing pursuant to notice and comment rulemaking.

While remand with vacatur is the ordinary remedy for an adjudicated violation of the APA, there has been no demonstrated violation here. Moreover, vacatur without a ruling on the merits has been questioned or deemed inappropriate in multiple circuits under a growing body of case law. *See, e.g., Ctr. for Biological Diversity v. Haaland*, 641 F. Supp. 3d 835, 842 (N.D. Cal. 2022) (“The Court concludes that it cannot grant pre-merits vacatur on voluntary remand”) (citing *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022) (mem.) (granting application for stay of district court pre-merits vacatur order)); *In re: Wash. Cattlemen’s Ass’n*, No. 22-70194, 2022 U.S. App. LEXIS 26415, 2022 WL 4393033, at *5 (9th Cir. Sept. 21, 2022) (holding that the court “clearly erred in vacating the 2019 Rules without ruling on their legal validity”). *Cf. Sierra Club v. U.S. Env’t Prot. Agency*, 60 F.4th 1008, 1021-22 (6th Cir. 2023) (“What is not clear is whether, in the [APA] context, we have the authority to vacate the EPA’s action without first finding it invalid on the merits. There is no consensus on this question.”).

The Fifth Circuit has yet to decide this question, but the conclusion of many courts that final rules should not be set aside without a merits ruling flows from the APA itself.³ Under the APA, courts may only vacate agency actions when those actions are “found” to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “without observance of procedure required by law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2). And courts may do so only after reviewing the “whole record,” or relevant parts cited by the parties. *Id.*

As the Ninth Circuit held: “By granting courts authority to ‘set aside’ agency actions ‘found to be’ unlawful, the APA not only expressly explains *when* a court may set aside agency action (upon a holding of unlawfulness), it also implicitly explains when a court *cannot* (without a holding of unlawfulness).” *Illinois v. Wheeler (In re Clean Water Act Rulemaking)*, 60 F.4th 583, 595 (9th Cir. 2023) (emphasis in original). Recognizing that the Supreme Court has interpreted the APA to require that “agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015), the Ninth Circuit issued this stern admonition:

Endorsing the practice of voluntary-remand-with-vacatur where there is no merits ruling would essentially turn courts into the accomplices of agencies seeking to avoid this statutory requirement, as it would allow agencies to repeal a rule merely by requesting a remand with vacatur in court. Because Congress set forth in the APA a detailed process for repealing rules, we cannot endorse a judicial practice that would help agencies circumvent that process.

³ In *Texas v. U.S. Environmental Protection Agency*, the Fifth Circuit granted vacatur after EPA confessed that the necessary documents to decide the case were not in the record. 122 F.4th 1008, 1009 (5th Cir. 2024). But the Service makes no such claim here, and it appears the Fifth Circuit there did issue a ruling on the merits, albeit based on an unquestioned reliance on EPA’s statement. *Id.*

60 F.4th at 595. Likewise, the Sixth Circuit in *Sierra Club v. EPA* noted, “multiple courts in the United States District Court for the District of Columbia—where much litigation concerning federal agencies takes place—have concluded that a federal court cannot grant a request for vacatur without a determination of the merits.” 60 F.4th at 1022 (citing *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135 (D.D.C. 2010); *Nat’l Parks Conservation Ass’n v. Salazar*, 660 F. Supp. 2d 3, 4-5 (D.D.C. 2009); *Friends of Animals v. Williams*, No. 21-cv-2081 (RC), 2022 U.S. Dist. LEXIS 154585, 2022 WL 3714226, at *7 (D.D.C. Aug. 29, 2022) (collecting additional cases)).

In its recent application to the U.S. Supreme Court for a stay pending appeal of a lower court’s vacatur of a regulation, the State of Texas itself has recognized that an agency’s request for voluntary remand allows an agency to unilaterally undo a regulation in contravention of the APA’s notice-and-comment requirements:

“Section 4 of the APA, 5 U.S.C. § 553, prescribes a three-step procedure for [the] so-called ‘notice-and-comment rulemaking.’ *Perez*, 575 U.S. at 95–96 (*i.e.*, notice, a public comment period, and a concise general statement of the rule’s basis and purpose). Any contrary view would permit agencies to wipe away rules of a prior Administration, supplanting Congress’s carefully laid plan for the repeal of regulations, based only upon policy preferences and not “constitutional prescriptions or [otherwise] rooted in the language of the APA itself.” Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 Sup. Ct. Rev. 345, 363.

App. for Stay Pending Appeal, *Louisiana v. Am. Rivers*, No. 21A-539 (U.S. March 21, 2022), at *19-20 (cleaned up). Lower courts in this circuit have taken this same approach. “Without a finding that the Final Order is arbitrary and capricious, or otherwise unlawful, a ruling vacating or setting aside the Final Order is premature.” *Frito-Lay, Inc. v. U.S. Dep’t of Labor*, 20 F. Supp. 3d 548, 557 (N.D. Tex. 2014) (citing *Carpenters Indus. Council*, 734 F. Supp. 2d at 135).

Ensuring that agencies follow the APA’s procedures for repealing regulations aligns with the

Supreme Court’s objective, articulated in *Loper Bright Enterprises v. Raimondo*, “to ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” 603 U.S. 369, 376 (2024) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

Even if this Court were inclined to grant a remand without a decision on the merits, vacatur is not appropriate. Given the record evidence of continued habitat loss, the lizard’s dependence on irreplaceable shinnery oak habitats, and the Service’s failure to cite a single example of successful habitat restoration with actual impacts on lizard populations, there is more than a “serious possibility that the agency will be able to substantiate its decision given the opportunity to do so.” *Texas v. United States*, 50 F.4th 498, 529 (5th Cir. 2022) (cleaned up). It is simply not true that the Service’s allegedly insufficient analysis of the potential for small-scale habitat restoration to aid in the species’ recovery “renders the Service’s entire analysis inadequate.” Dkt. 43 at 13. Under the ESA’s listing factors, which require consideration of present and threatened habitat loss (which is still ongoing), the odds that further exploration of this issue would affect the Service’s ultimate listing conclusion are slim. Even if the Service cannot say with certainty that it “will be able to substantiate its decision” on remand, there is at least a “serious possibility” that it could, and that is the standard. 50 F.4th at 529.

As for the consequences of the alleged error, we again dispute that any error occurred. Second, there are serious consequences for the Center and its members, who have fought for decades to protect the existence of the dunes sagebrush lizard should the Court allow vacatur. Moreover, in balancing the equities of species conservation against economic interests in the context of an injunction, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities,” *Tenn. Valley Auth.*, 437 U.S. at 194. Finally, while the Service claims that it will be

able to reconsider the listing decision within two years, the less disruptive consequence would be to maintain the lizard's protections during that time rather than continually change the regulatory landscape, maximizing uncertainty for industry and conservationists alike. The Service already concluded that the voluntary conservation measures Jacks relies on to fill the gap are inadequate to conserve the species. While they may have some benefit, the plans do not sufficiently reduce the threats to the species and its habitat "such that it does not meet the definition of an endangered species." 89 Fed. Reg. at 43,750. Indeed, the Service has no idea what conservation measures are even being undertaken under many of the CCA/CCAA plans. *Id.* at 43,764.

One final point. The Service states that "there is no suggestion of any fraud, collusion, or the like that impugns the procedural fairness of the settlement." Dkt. 43 at 11. The Center is not convinced. The fact that the Service and the State of Texas have now reached three different settlement agreements to vacate endangered species listing rules without rulings on the merits in the past year calls the integrity of the listing process into question. Such motions have not occurred in any other Service region. Either the Service's Southwest Region 2 repeatedly commits "fundamental errors" in considering controversial species— despite decades of study— or some other political or policy motivation is at work. But the Court need not decide that issue because, as this submission has shown and as the Center would demonstrate further if permitted to intervene and fully argue the matter, the Service's sudden discovery of a "possibility" that unnamed, unpublished habitat restoration "experiments" could "potentially" upend the conclusions of its 2024 Species Status Assessment and Final Listing Rule is not credible.

As there is no basis for remand, with or without vacatur, the parties' Joint Motion to Enter a Stipulated Settlement Agreement should be rejected. Should the Court decide to remand anyway, vacatur under such circumstances is not appropriate.

CONCLUSION

For the foregoing reasons, the Center strongly opposes the parties' Joint Motion to Enter a Stipulated Settlement Agreement and urges this Court to reject it.

DATED: June 5, 2026

Respectfully submitted,

/s/ Jason C. Rylander

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2026, I electronically filed the foregoing Renewed Motion to Intervene or Submit an Amicus with the Clerk of the Court for the United States District Court for the Western District of Texas by using the CM/ECF system, which will serve a copy of the same on the counsel of record.

/s/ Jason C. Rylander

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