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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

ROCKY MOUNTAIN ELK
FOUNDATION and PROPERTY AND
ENVIRONMENT RESEARCH
CENTER,

Plaintiffs,

vs.

U.S. DEPARTMENT OF THE
INTERIOR and U.S. FISH AND
WILDLIFE SERVICE,

Defendants,

and

CV-25-29-BU-DWM

**CENTER FOR BIOLOGICAL
DIVERSITY'S [PROPOSED]
SUPPLEMENTAL ANSWER IN
INTERVENTION**

DEFENDERS OF WILDLIFE and
CENTER FOR BIOLOGICAL
DIVERSITY,

Defendant-Intervenors

CENTER FOR BIOLOGICAL
DIVERSITY,

Proposed Cross-claimant

v.

U.S. DEPARTMENT OF THE
INTERIOR and U.S. FISH AND
WILDLIFE SERVICE,

Proposed Crossclaim-
Defendants.

Defendant-Intervenor Center for Biological Diversity (“Center”), through its undersigned counsel, files this Supplemental Answer in response to Plaintiffs’ Complaint. *See* ECF No. 26 (the Center’s June 16, 2025 Answer, filed in response to Plaintiffs’ March 10, 2025 Complaint). The Center’s Supplemental Answer adds crossclaims against Federal Defendants and the following allegations would be added immediately after the conclusion of the Center’s original Answer:

SUPPLEMENTAL CROSSCLAIMS AGAINST FEDERAL DEFENDANTS

Defendant-Intervenor Center for Biological Diversity (“the Center”) files these crossclaims for declaratory and injunctive relief against Defendants U.S. Department of the Interior and U.S. Fish and Wildlife Service (“the Service” or

collectively, “Federal Defendants”) and asserts as follows:

1. The Center’s crossclaims challenge the Service’s recently promulgated rule revising its implementing regulations for Endangered Species Act (“ESA” or “the Act”) section 4(d), 16 U.S.C. § 1533(d). *See generally*, U.S. Fish and Wildlife Service, Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 91 Fed. Reg. 45723 (July 21, 2026). The new rule revises the regulations challenged by Plaintiffs in this case by once again rescinding the Service’s longstanding “blanket” section 4(d) regulatory provisions, which furthered the ESA’s overarching goal of conserving imperiled species by offering critical protections for wildlife and plant species listed as “threatened”—meaning they are likely to become endangered within the foreseeable future, 16 U.S.C. § 1532(20)—unless and until the Service issued a species-specific 4(d) rule. 91 Fed. Reg. at 45736 (revising 50 C.F.R. § 17.31(a) and 50 C.F.R. § 17.71(a) to rescind the blanket rules for species listed as threatened after August 20, 2026). The new rule also adds novel provisions requiring the Service to analyze the economic consequences of the species-specific protections offered to threatened species. *Id.* (promulgating new regulatory text at 50 C.F.R. § 17.31(d) and 50 C.F.R. § 17.71(d)).

2. The Service’s revisions to its ESA section 4(d) regulations amount to an abdication of its responsibility to conserve threatened species, as required by the

ESA. Rather than further conservation, the revised 4(d) regulatory regime removes the “cornerstone” of the Act’s protections for threatened species, eliminating one of the Service’s best tools for halting such species’ decline towards endangerment and extinction. It also leaves the Service with the single, time-consuming option of developing species-specific 4(d) rules based on necessary and advisable findings for each threatened species that account for economics, which will lead to delayed and weakened protections for imperiled species and increase the workload of an already backlogged agency. The revisions are counter to the ESA’s plain language and structure, undermine its fundamental purpose, lack any rational basis or justification, are not supported by fact, are arbitrary and capricious, and are not in accordance with law, and are therefore unlawful under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

3. In addition, the Service improperly relied on a categorical exclusion to avoid evaluating the regulatory revisions’ significant environmental effects under the National Environmental Policy Act (“NEPA”). 91 Fed. Reg. at 45735–36.

4. As a remedy for these legal violations, the Center seeks an order: (1) declaring the regulatory revisions invalid; (2) holding unlawful and vacating the portion of the final rule and regulatory provisions rescinding the blanket rules; (3) holding unlawful and vacating the portion of the final rule and regulatory provisions requiring an economic impact analysis for species-specific rules; and

(4) reinstating the blanket rules.

JURISDICTION AND VENUE

5. The Center's crossclaims are brought pursuant to the APA, 5 U.S.C. §§ 701–706, and allege violations of the ESA, 16 U.S.C. §§ 1531–1544, and NEPA, 42 U.S.C. §§ 4321–4347. This Court has jurisdiction over the Center's crossclaims pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367(a) (supplemental jurisdiction). This Court has the authority to issue the requested relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 706(2).

6. The Center's crossclaims are proper because they arise out of the transaction or occurrence that is the subject of the original action and because the Center's crossclaims are against their co-parties, Federal Defendants U.S. Department of the Interior and U.S. Fish and Wildlife Service. Fed. R. Civ. Proc. 13(g).

7. Venue is proper pursuant to 28 U.S.C. § 1391(e) because this is a civil action brought against agencies of the United States; the Center maintains an office in this District and has members in this district; and many of the consequences of Federal Defendants' violations of the law giving rise to the crossclaims occurred or will occur in this district.

8. Venue is also properly vested in this Court because the Center's crossclaims are part of the existing action before this court. 6 Fed. Prac. & Proc.

Civ. § 1433 (3d ed.) (“The federal courts seem to agree that once a crossclaim has been asserted under Rule 13(g) and is brought within the supplemental jurisdiction of the court, objections based on a lack of venue cannot be raised.”).

CROSSCLAIM PARTIES

9. Cross-Claimant CENTER FOR BIOLOGICAL DIVERSITY is a non-profit environmental organization dedicated to the protection of species and their habitats through science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with offices throughout the United States, as well as an office in Mexico. The Center has more than 101,000 members throughout the United States and globally, including more than 500 members in the State of Montana. The Center and its members are concerned with the conservation of imperiled species, including ones that will be affected by the Service’s rescission of the blanket rules and requirement that economic impacts be analyzed as part of species-specific 4(d) rules, and with the effective implementation of the ESA.

10. The Center has advocated for years in support of imperiled species in geographic areas across the United States and internationally. As a result of the Center’s work, over 700 species and nearly half a billion acres of critical habitat have been protected under the ESA. The Center has filed lawsuits or intervened numerous times to defend the ESA and its implementing regulations, including

successfully intervening in this case to defend the Center's and its members' interests in the blanket rules and the conservation of threatened species. *See generally* ECF Nos. 10, 11, and 11-1 (Center's motion to intervene and memorandum and declaration of Noah Greenwald in support); ECF No. 24 (granting the Center's motion to intervene and recognizing the Center has an interest that may be impaired or impeded by the disposition of this case). The Center has also filed extensive comments opposing ESA regulatory rollbacks, including the revisions that are the subject of the Center's crossclaims here.

11. The Center and its members derive scientific, aesthetic, professional, spiritual, and other benefits from the existence of many of the species listed as threatened, under consideration for such listing, or awaiting species-specific 4(d) rules. For example, Center member Noah Greenwald has a strong interest in the Arctic grayling, a beautiful, highly imperiled Montana fish. As the result of a Center lawsuit, the Service is currently considering whether listing the grayling is warranted under the ESA and must make that decision by February 21, 2027. Mr. Greenwald has visited the Big Hole River in Montana, where the last native population of the fluvial form of Montana's Arctic grayling survives, and has found great joy in looking for and viewing grayling. Last year, Mr. Greenwald also visited Red Rock Lakes National Wildlife Refuge in southwestern Montana, where there is one of only two native lacustrine populations. Mr. Greenwald has also

visited the habitats of grizzly bears, Canada lynx, and American wolverines in Montana on numerous occasions in the hope of seeing these magnificent carnivores. Grizzly bears and wolverines are awaiting final species-specific 4(d) rules. Although he has not yet seen a wolverine or Canada lynx, which are both quite elusive, he has seen grizzly bears on several occasions in the northern Rockies. Mr. Greenwald plans to visit Montana in spring or summer of 2027 to again visit the habitats of these threatened species in the hope of seeing one or more of them.

12. Center member Brett Hartl has traveled to Africa to view wildlife, including giraffes and leopards, regularly since his first visit to Tanzania in 2010. Two species of giraffes were proposed for ESA-listing as threatened in November 2024. While leopards are currently listed as threatened, a new finding is due on the species in June 2027 as a result of a petition submitted by the Center and allies. Since Mr. Hartl's first visit to Africa, he has visited South Africa, Namibia, and Botswana in 2015, Ghana in 2017, Uganda in 2018, Kenya and the Central African Republic in 2019, South Africa in October 2021, and Tanzania in 2010 and in 2024. During all of these trips, looking for, observing, and photographing giraffes and leopards in their habitat has brought Mr. Hartl great aesthetic enjoyment. He is returning to Africa in 2026 to visit Zambia, Namibia, and South Africa, and again in 2028 to visit Kenya, Uganda, Angola, Malawi, and South Africa. During these

trips, he will continue deriving aesthetic enjoyment from looking for, observing, and photographing giraffes, leopards and other species being considered for listing as threatened or already so listed.

13. The Center and its members are also concerned about the impacts the rescission will have on their interests in many other imperiled species that are currently proposed or likely to be proposed for threatened listing such as monarch butterflies, southern hognose snake, and the Pecos pupfish, as well as already-listed species for which the Service has proposed or is likely to propose changes to its listing status or protective regulations, including the threatened Florida manatee and Spalding's catchfly. The regulatory revisions: remove the default option the Service relied on for decades that extended vital protections to threatened species; require a species-specific rule for each threatened species, which is likely to further slow the ESA listing process; and will likely result in even fewer protections being extended to threatened species under species-specific 4(d) rules due to the economic considerations the Service has now unlawfully interjected into the development and adoption of such rules.

14. The Center and its members have concrete interests in the Services' lawful implementation of the ESA and its role in promoting the recovery of imperiled wildlife. The regulatory revisions challenged in the Center's crossclaims cause actual and imminent harm to these interests and undermine and contradict

the ESA's requirements. The past, present, and future enjoyment of the Center's and its members' interests has been, is being, and will continue to be harmed by the Services' disregard of its statutory duties and by the unlawful injuries and risk of injuries imposed on imperiled species by its actions. These direct and adverse effects will continue to occur unless the Court grants the relief for which the Center prays.

15. Cross-claimant Defendant U.S. Department of the Interior is the executive department of the United States Government charged with protecting and managing the Nation's natural resources and cultural heritage.

16. Cross-claimant Defendant U.S. Fish and Wildlife Service is an agency of the U.S. Department of the Interior, charged with administering the ESA with respect to threatened and endangered terrestrial and freshwater plant and animal species. The Department of Interior has delegated that authority to the Service, which promulgated the final rule that the Center challenges here.

LEGAL BACKGROUND

The Endangered Species Act

17. The Endangered Species Act, 16 U.S.C. §§ 1531–1544, is “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).

18. In passing the Act, Congress found that “various species . . . have been rendered extinct as a consequence of economic growth and development untampered by adequate concern and conservation” and that “other species . . . have been so depleted in numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(1)-(2).

19. The ESA’s fundamental purposes are “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). Thus, ESA-listed species are afforded “the highest of priorities.” *Tenn. Valley Auth.*, 437 U.S. at 194.

20. The ESA directs that the Service, by its own initiative or in response to a listing petition, shall determine whether any species under its delegated authority is threatened or endangered because of any one of, or a combination of, five factors. 16 U.S.C. § 1533(a)(1)(A)-(E).

21. The Service must base all listing determinations “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

22. An “endangered species” is any species that “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).

23. A “threatened species” is any species that “is likely to become an endangered species within the foreseeable future throughout all or a significant

portion of its range.” 16 U.S.C. § 1532(20).

24. The prohibitions in section 9 apply automatically to endangered species. 16 U.S.C. § 1538(a)(1)–(2).

25. In contrast, upon listing a species as threatened, the Service “shall issue such regulations as [it] deems necessary and advisable *to provide for the conservation of such species*,” and the agency may also extend any of the prohibitions in section 9 to such species. 16 U.S.C. § 1533(d) (emphasis added). Regulations issued pursuant to this provision are often colloquially referred to as “special rules” or “4(d) rules.”

26. Congress defined “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary,” *i.e.*, when the species have recovered and no longer need the ESA’s protection. 16 U.S.C. § 1532(3); *see also id.* § 1531(b) (providing that one of the ESA’s purposes is “to provide a program for the conservation of . . . threatened species”). These “methods and procedures” are further defined to “include, but are not limited to,” activities such as “research,” “census,” “law enforcement,” and “habitat acquisition and maintenance.” *Id.* § 1532(3).

27. As the legislative history reflects, Congress required section 4(d) rules to “regulate these [species] before the danger becomes imminent,” S. Rep. No. 93-

307, at 3, and ensure that threatened species do not become endangered but instead are recovered. Thus, Congress granted the Services “an infinite number of options” for conserving threatened species. H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 12 (1973).

The National Environmental Policy Act

28. The National Environmental Policy Act (“NEPA”) requires federal agencies, including the Service, to prepare a “detailed statement” that discusses the environmental effects of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an Environmental Impact Statement (“EIS”), and it must be prepared prior to issuing a final decision. An agency must “ensure the professional integrity, including scientific integrity, of the discussion and analysis in [its] environmental document,” *id.* § 4332(2)(D), and must “make use of reliable data and resources.” *Id.* § 4332(2)(E).

29. An environmental assessment (“EA”) can be used to determine if an EIS is required or to analyze agency actions that do not significantly affect the quality of the human environment. If the EA concludes that no EIS is required, agencies issue a Finding of No Significant Impact to document their determination.

30. Agencies may invoke a “categorical exclusion” to NEPA and thus avoid NEPA analysis, 42 U.S.C. § 4336(a)(2), where their actions “normally do

not significantly affect the quality of the human environment.” 43 C.F.R. § 46.205; *see also id.* § 46.210 (listing categories of departmental categorical exclusions).

The Department of Interior has identified categories of actions that agency bureaus have determined “normally do not significantly affect the quality of the human environment,” 43 C.F.R. § 46.205, and has categorically excluded these actions from NEPA’s requirement to prepare an EA or an EIS. *Id.* § 46.205(a); *see also id.* § 46.210 (listing categorical exclusions).

31. The Department of Interior has adopted a NEPA categorical exclusion for “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 C.F.R. § 46.210(i).

32. Even where an action falls within a categorical exclusion, NEPA analysis is still required where “extraordinary circumstances” exist. 43 C.F.R. § 46.205(c)(1) (“Any action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances in § 46.215; if it does, further analysis and environmental documents must be prepared for the action.”).

33. The Department of Interior has identified actions that have significant

impacts to species listed on the ESA or proposed to be listed as an “extraordinary circumstance” to otherwise categorically excluded actions under NEPA. 43 C.F.R. § 46.215(g).

The Administrative Procedure Act

34. The Administrative Procedure Act (“APA”) provides a cause of action to any person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” 5 U.S.C. § 702.

35. Final agency actions are judicially reviewable under the APA if there is no other adequate remedy in a court. 5 U.S.C. § 704.

36. The Service’s final rule is a final agency action within the meaning of the APA.

37. The APA requires that reviewing courts “shall . . . hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

38. An agency must provide a reasoned explanation for its actions. An agency action is arbitrary and capricious “if the agency has 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.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

39. Further, when an agency changes its policy, it must provide good reasons for doing so, including good reasons for any factual findings that are contradictory to the prior policy. An agency’s failure to do so renders its action arbitrary and capricious.

FACTUAL BACKGROUND

The Service Promulgated the Blanket Rules Roughly Contemporaneously with the ESA’s Enactment and Consistently Implemented Them for More Than 40 Years

40. In 1975, only two years after Congress enacted the ESA, the Service issued rules extending, by default, ESA section 9’s essential protections for species listed as endangered—including, *inter alia*, the general prohibitions on “taking” wildlife, import, and certain sales—to threatened wildlife automatically upon listing unless the Service determined that a species-specific 4(d) rule was necessary and advisable for the conservation of the species. *See* U.S. Fish and Wildlife Service, Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44412, 44414 (Sept. 26, 1975) (codified at 50 C.F.R. pt. 17.31(a)); *see also* 16 U.S.C. § 1533(d). The Service described the blanket rule as “the cornerstone of the system for regulating threatened wildlife.” 40 Fed. Reg. at 44414.

41. The Service clarified and reaffirmed this regulatory regime in 1977.

See U.S. Fish and Wildlife Service, Protection for Threatened Species of Wildlife, 42 Fed. Reg. 46539 (Sept. 16, 1977) (emergency rulemaking adding additional section 9 prohibition to blanket rule); *see also* U.S. Fish and Wildlife Service, Protection for Threatened Species of Wildlife, 42 Fed. Reg. 46561 (September 16, 1977) (proposed rule to make emergency rulemaking permanent). That same year, it also adopted a similar default blanket rule option for plants. *See* U.S. Fish and Wildlife Service, Prohibitions on Certain Uses of Endangered or Threatened Plants, Permits for Exceptions to Such Prohibitions, and Related Items, 42 Fed. Reg. 32377, 32380 (June 24, 1977) (codified at 50 C.F.R. pt. 17.71(a)).

42. The Service applied this regulatory regime for more than 40 years. During this time, the blanket rules provided critical protections to hundreds of threatened species, including species found in Montana such as the piping plover, Rufa red knot, and Spalding's catchfly.

43. Nonetheless, contrary to the Service's suggestions otherwise, the blanket rules did not restrict the Service's ability to adopt tailored, species-specific 4(d) rules. Instead, they provided the Service with the option to either default to the precautionary blanket rules *or* craft species-specific rules as consistent with the plain language of section 4(d) and the ESA's conservation purpose. Between 1975 and 2019, the Service opted out of the default option and issued species-specific 4(d) rules for approximately 25 percent of threatened species. *See* U.S. Fish and

Wildlife Service, Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23919, 23921 (Apr. 5, 2024). According to the Service, since reinstating the blanket rules in 2024, it has issued five species-specific 4(d) rules and has not applied the blanket rules to any threatened species. 91 Fed. Reg. at 45727.

The Service's 2019 Rescission of the Blanket Rules and 2024 Reinstatement

44. Despite more than four decades of consistent implementation and regulatory certainty, and the Service's express acknowledgment that the blanket rules provide for the conservation of threatened species, in 2018 the Service proposed to rescind the longstanding blanket rules as part of the first Trump Administration's efforts to eliminate allegedly unnecessary regulatory burdens. *See* U.S. Fish and Wildlife Service, Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174, 35176 (July 25, 2018); *see also* Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12285 (Mar. 1, 2017).

45. The Center submitted comments in opposition to the proposed rule, noting that it would eliminate critical protections for newly listed threatened species and have other unintended, negative consequences for such species.

46. On August 27, 2019, the Service issued a final rule rescinding the blanket rules. *See generally*, U.S. Fish and Wildlife Service, Regulations for

Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019). In doing so, the Service again emphasized that the changes were motivated by the goal of reducing regulation. *See id.* at 44756 (claiming that removing the blanket rules will, among other things, allow tailored 4(d) rules that may “reduce unneeded permitting”); *id.* at 44758 (stating that the rule is consistent with Executive Order designed to reduce regulatory burdens).

47. Despite rescinding the blanket rules, the Service acknowledged that the blanket rules “have worked, and will continue to work, to conserve already-listed threatened species.” 44 Fed. Reg. at 44756.

48. The Center, along with other groups, filed a lawsuit in federal court challenging the blanket rule rescission, as well as other ESA regulatory changes. *See Ctr. for Biological Diversity, et al. v. Bernhardt, et al.*, No. 4:19-cv-05206, 2020 WL 4188091 (N.D. Cal. Aug. 21, 2019). The rescission was remanded without vacatur after the Biden Administration took office. *Ctr. for Biological Diversity v. Haaland*, 641 F. Supp. 3d. 835, 842 (N.D. Cal. 2022).

49. On June 22, 2023, the Service issued a proposed rule to reinstate the blanket rules. *See U.S. Fish and Wildlife Service, Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 88 Fed. Reg. 40742 (June 22, 2023).

50. In the preamble to the proposed rule reinstating the blanket rules, the Service explained that the “first reason” for the proposed reinstatement was “biological,” and the Service reaffirmed its earlier, longstanding position “that applying those prohibitions in the ‘blanket rules’ upon the listing of threatened species will [] help prevent further declines of the species and further the conservation purposes of the Act.” 88 Fed. Reg. at 40744.

51. The “second reason” was practical. According to the Service, “[f]or purposes of implementation and enforcement, it is easier to explain and comprehend threatened species protections if they are modeled after the section 9 prohibitions—with which agency staff and the public are widely familiar.” 88 Fed. Reg. at 40744–45.

52. The Center commented in support of the proposed rule to reinstate the blanket rules and restore many of the ESA’s regulatory protections that the first Trump Administration removed, and more than 21,000 Center supporters also submitted comments regarding the proposed changes.

53. The Service issued a final rule reinstating the blanket rules on April 5, 2024. 89 Fed. Reg. at 23920.

54. In the preamble to the final rule, the Service reaffirmed that extending the section 9 prohibitions to threatened species by default is the “superior choice” in providing for the conservation of such species. 89 Fed. Reg. at 23920.

55. According to the Service, the blanket rules allow it to rely on the prohibitions in section 9 of the ESA to conserve threatened species where it determines that those protections are appropriate in lieu of devoting agency resources to crafting species-specific 4(d) rules. 89 Fed. Reg. at 23921. This results in less confusion, less duplication of regulatory text, a lower risk of error in transposing regulatory text, and reduced administrative costs. *Id.*

56. The Service also highlighted the blanket rules' important role as a safeguard in the event that the Service failed to promulgate species-specific 4(d) rules at the time of listing a species as threatened. In these instances, according to the Service, the blanket rules would operate to "ensure[] that there is never a lapse in threatened species protections." 89 Fed. Reg. at 23921.

57. On March 10, 2025, Rocky Mountain Elk Foundation and the Property and Environment Research Center initiated this lawsuit challenging the Service's reinstatement of the blanket rules.

The Service's 2026 Revisions to Its ESA Section 4(d) Implementing Regulations

58. On November 21, 2025, the Service issued a proposed rule once again rescinding the blanket rules for species newly listed or reclassified as threatened after the effective date of the final rule. 90 Fed. Reg. at 52587.

59. In the background of the proposed rule, the Service noted the direction of President Trump's Executive Order 14154, "Unleashing American Energy,"

issued on his first day in office, 90 Fed. Reg. at 52588, which directed all agencies to review agency actions “that impose an undue burden on the identification, development, or use of domestic energy resources,” and to consider “suspend[ing], revis[ing], or rescind[ing] all agency actions” that conflict with this national objective. 90 Fed. Reg. 8353, 8354 (Jan. 29, 2025); *see also* 90 Fed. Reg. 8433 (Jan. 29, 2025) (publishing President Trump’s January 20, 2025 Executive Order 14156, declaring a “National Energy Emergency”). The Service also noted Interior Secretary Doug Burgum’s Secretarial Order 3418, which administered the provisions of Executive Order 14154 by directing Assistant Secretaries within the Department to “take steps, as appropriate, to suspend, revise, or rescind” specific actions, including the 2024 reinstatement of the blanket rules, Sect. Order. 3418, p. 3 (Feb. 3, 2025), Executive Order 14219, “Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative,” 90 Fed. Reg. 10583 (Feb. 25, 2025), and this pending litigation. 90 Fed. Reg. at 52588.

60. The Service identified two rationales for its proposed rescission. First, citing *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Service asserted the blanket rules “do not match the ‘single, best meaning’ of the statute.” 90 Fed. Reg. at 52589.

61. Second, the Service claimed that rescinding the blanket rules “is a superior choice from a policy perspective” because it “reduces burdens on the Service and regulated entities alike and allows for the Service to better protect threatened species” and “brings the Service in line with [National Marine Fisheries Service’s] longstanding practice of developing species-specific 4(d) rules.” 90 Fed. Reg. at 52589.

62. The Service also noted that rescinding the blanket rules “would result in no immediate changes” to currently-listed threatened species subject to the blanket rules, and also that “[f]or every species” newly listed or reclassified as threatened in the future, it would issue a species-specific 4(d) rule “as necessary and advisable to provide for the conservation of that species.” 90 Fed. Reg. at 52589.

63. In addition to rescinding the blanket rules, the Service proposed a new regulatory requirement that any species-specific 4(d) rule’s necessary and advisable determination include a consideration of economic impacts. 90 Fed. Reg. at 52589.

64. In the preamble to the proposed rule, the Service explained its belief that the new economic impact analysis requirement was justified as a “reasonable interpretation” that is “contemplated by the statute” and will “help clarify” the existing statutory language. 90 Fed. Reg. at 52589. The Service further claimed

that the analysis is necessary to address a district court opinion declaring illegal the Service's species-specific 4(d) rule for the lesser prairie chicken because the Service did not consider economic impacts when adopting the rule. *Id.* (citing *Kansas Natural Res. Coal. v. U.S. Fish & Wildlife Serv.*, 780 F. Supp. 3d 650 (W.D. Tex. 2025)).

65. The Center submitted comments opposing the Service's proposal to rescind the blanket rules and to add an economic impact analysis requirement to species-specific rules and raising the agency's need to comply with NEPA.

66. On July 21, 2026, the Service issued its final rule once again rescinding the blanket rule option for species newly listed or reclassified as threatened after the effective date of the final rule and adding the new regulatory provisions requiring economic analyses for all future such 4(d) rules. *See generally*, 91 Fed. Reg. 45723.

67. The final rule mirrored the proposed rule and its numerous flaws and offered only a cursory explanation for its regulatory revisions.

68. The preamble reiterated that the rescission of the blanket rules, like the first rescission in 2019, was driven by the Trump Administration's deregulatory agenda. *See* 91 Fed. Reg. at 45728, 45732 (describing E.O. 14154, E.O. 14219, and Secretarial Order 3418 as the "impetus" for the rule and stating that the revised regulations were "a consequence of these actions and orders"). The

Service again referred to the rescission as “a superior choice from a policy perspective” so the agency “thoughtfully” considers protections, 91 Fed. Reg. at 45724, despite the Service determining for more than 40 years whether the blanket or species-specific rules should apply and the Service’s opposite finding only two years ago. *See* 89 Fed. Reg. at 23921 (2024 final rule reinstating blanket rules option, stating the Service “find[s] reinstating the ‘blanket rule’ option to be a superior choice”).

69. The Service relied on consistency and ease of enforcement as grounds for the blanket 4(d) rule, 88 Fed. Reg. at 40744–45, but in rescinding it failed to address how these concerns would be addressed going forward.

70. The Service failed to adequately respond to comments regarding the negative impacts of the blanket rules rescission to threatened species, instead continuing to point to the purported benefits of species-specific 4(d) rules to conserving species and reducing regulatory burdens. 91 Fed. Reg. at 45726, 45727. But the Service has *always had* the option of developing species-specific 4(d) rules when necessary and advisable for the conservation of threatened species instead of defaulting to the blanket rule option and considered the species’ specific needs in deciding which option to use. The stated benefits are thus illogical and the Service has offered no valid or good reason, consistent with the ESA, for the reversal of its longstanding blanket rules regulatory regime. Further, it did not respond to

comments addressing the lost conservation benefits that the blanket rules provided to threatened species.

71. The Service’s rationale for the regulations requiring consideration of economic impacts for species-specific 4(d) rules is based on a single district court decision and an “increase [in] transparency in our rulemaking process.” 91 Fed. Reg. at 45731. In adopting this requirement, the Service ignored the statutory language and structure, failed to adequately respond to comments, and otherwise failed to address the errors in the district court’s opinion.

72. In addition, the Service did not analyze the impacts of its regulatory revisions under NEPA. The Service claimed that NEPA analysis was not required because a category exclusion applies to the revisions. 91 Fed. Reg. at 45735–36.

Impacts of the Regulatory Revisions

73. The Service’s regulatory revisions are likely to have significant impacts on numerous species, including species listed or reclassified as threatened after the revision’s adoption as well as species currently listed as threatened.

74. The revisions implicate more than 30 species that FWS has currently proposed to list as threatened under the ESA, as well as species for which the Service is in the process of revising or finalizing species-specific 4(d) rules, including two species found in Montana, the wolverine and grizzly bear.

75. The revisions also implicate hundreds of threatened species currently protected by the blanket rules, including species found in Montana like the piping plover, yellow-billed cuckoo, Spalding's catchfly, and rufa red knot, as well as species that may be downlisted from endangered to threatened or otherwise reclassified. According to the Service, it intends to review current species' section 4(d) protections in conjunction with the status reviews required under ESA section 4(c)(2). 91 Fed. Reg. at 45725. Not only might these species be stripped of all or some of their section 9 protections, but any protections they receive will likely be weakened by economic considerations.

76. The Service is in the middle of the statutorily-prescribed process for making listing determinations for numerous species, including species found in Montana such as the Arctic grayling, Yellowstone bison, and pinion jay. Even under the blanket rule regulatory regime, the Service has long had a significant backlog in making ESA listing decisions. For any species that the Service decides to list as threatened, the process of finalizing the listing decisions and 4(d) protections may take even longer due to the removal of the blanket rule option and requirement to consider economic impacts, and the revisions will only worsen the existing backlog. *See* 91 Fed. Reg. at 45726 (acknowledging that rescinding the blanket rules and requiring the Service to instead promulgate species-specific 4(d) rules "may require additional Service resources at the time of listing"). Further, the

resulting species-specific 4(d) rules would likely be weaker than the protections that would have been afforded by the default blanket rule option.

77. In addition, while the Service claims that it intends to issue species-specific 4(d) rules concurrently with final listing or downlisting decisions, the Service notes that it has the discretion to promulgate 4(d) rules “at any time after listing or reclassification.” 90 Fed. Reg. at 52589; *see also* 91 Fed. Reg. at 45725. This may result in threatened species receiving no 4(d) protections at all upon listing, a situation the blanket rules helped avoid. *See* 89 Fed. Reg. at 23921 (explaining that the blanket rules “ensure[] that there is never a lapse in threatened species protections”).

CROSSCLAIMS

FIRST CROSSCLAIM

Violation of the ESA and APA: The Rescission of the Blanket Rules Is Not the Best Reading of the ESA and Is Arbitrary, Capricious, and Contrary to the ESA

78. The Center re-alleges and incorporates the allegations in all preceding paragraphs by reference.

79. The Service’s rescission of the blanket rules is contrary to the text, purpose, and structure of the ESA.

80. Like the first rescission in 2019, issued to reduce regulatory burdens, the Service has issued this second rescission in response to direction in Executive Order 14154 and Interior Secretarial Order 3418 to eliminate “undue burdens” on

energy production. 90 Fed. Reg. at 52588–89; *see also* 83 Fed. Reg. at 35176 (proposed rule for first rescission); 91 Fed. Reg. at 45728, 45732 (describing E.O. 14154, E.O. 14219, and Secretarial Order 3418 as the “impetus” for the rule and stating that the revised regulations were “a consequence of these actions and orders”).

81. The Service’s rescission of the blanket rules for the primary purpose of meeting the current Administration’s deregulatory agenda or otherwise is not the “best reading” of ESA section 4(d) pursuant to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). 90 Fed. Reg. at 52589.

82. Requiring the issuance of more, instead of fewer, regulations does not comport with deregulation. The Service’s rationale has no basis in the ESA’s text or structure and is directly contrary to the ESA’s purpose of conserving threatened species, 16 U.S.C. § 1531(b), and affording listed species “the highest of priorities.” *Tenn. Valley Auth.*, 437 U.S. at 194; *see also* 16 U.S.C. § 1532(3) (defining “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which” the ESA’s protections are no longer necessary); *id.* § 1533(d) (ESA section 4(d), directing that the Service “shall issue such regulations as [it] deems necessary and advisable to provide for the *conservation*” of threatened species) (emphasis added). The Service’s unsupported assertion that the blanket rules rescission is the

“best reading” of section 4(d) is contrary to the ESA and arbitrary and capricious. 5 U.S.C. § 706(2)(A).

83. Further, the rescission rests upon factual findings and conclusions contradictory to those that underlaid the Service’s longstanding blanket rule regulatory regime, including but not limited to those articulated by the Service in its 2024 reinstatement of the blanket rules, and the Service has failed to adequately justify its change and why its previous findings underlying the blanket rule no longer apply.

84. The Service’s reasons for rescinding the blanket rules are irrational, unsupported, and counter to evidence before the agency. The agency has failed to explain and/or offer an adequate and well-reasoned justification for its decision to require the promulgation of more rules in lieu of maintaining the option of automatically extending by default the protections afforded endangered species to threatened species.

85. The Service’s failure to articulate a rational connection between the facts found and the choice made and to provide an adequate justification for the elimination of the blanket rules, its reliance on factors that Congress did not intend for it to consider, and its lack of a rational basis for the final rule renders the rescission of the blanket rules arbitrary, capricious, an abuse of discretion, or not in accordance with law, within the meaning of the APA, 5 U.S.C. § 706(2)(A).

SECOND CROSSCLAIM

Violation of the ESA and APA: The Economic Impact Analysis Requirement for Species-Specific Rules Is Arbitrary, Capricious, and Contrary to the ESA

86. The Center re-alleges and incorporates the allegations in all preceding paragraphs by reference.

87. The Service’s new regulations inserting economic considerations into 4(d) rule development are contrary to the ESA and arbitrary and capricious.

88. Section 4(d) of the ESA makes no reference to economic impacts, instead directing that the Service shall issue “protective regulations” it “deems necessary and advisable to provide for the *conservation*” of threatened species. 16 U.S.C. § 1533(d) (emphasis added). Thus, adding a requirement that the Service consider economic impacts when developing section 4(d) rules is contrary to the ESA’s text.

89. Requiring economic analyses in the development of section 4(d) rules is also contrary to the Act’s structure and purpose. The economic analysis requirement will result in less protective species-specific 4(d) rules that are insufficient to conserve threatened species, create additional delays in the Service’s backlogged listing process, and undermine the Service’s reliance on the best available scientific information.

90. In addition to being contrary to the ESA’s text, structure, and purpose, the Service has not offered any valid rationale or justification for adding an

economic impact analysis requirement when issuing species-specific 4(d) rules, nor can it given that the regulations are contrary to the plain language of the statute. The Service's regulations are arbitrary, capricious, an abuse of discretion, or not in accordance with the ESA, within the meaning of the APA, 5 U.S.C. § 706(2)(A).

THIRD CROSSCLAIM

Violation of NEPA and the APA: The Service's Reliance on a Categorical Exclusion and Failure to Prepare an EA or EIS Is Arbitrary, Capricious, and Contrary to NEPA

91. The Center re-alleges and incorporates the allegations in all preceding paragraphs by reference.

92. The Service is subject to NEPA, and its revisions to its ESA section 4(d) implementing regulations are major federal actions that significantly affect the human environment within the meaning of NEPA.

93. The Service determined that the NEPA categorical exclusion at 43 C.F.R. § 46.210(i) applies to its regulatory revisions. 91 Fed. Reg. at 45735–36; *see also* 43 C.F.R. § 46.210(i) (NEPA categorical exclusion for “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case”).

The Service further found that extraordinary circumstances do not apply to the rulemaking. 91 Fed. Reg. at 45736. For these reasons, the Service did not prepare an EA/Finding of No Significant Impact or EIS for its revisions.

94. These determinations were in error. The revisions are not administrative, financial, legal, technical, or procedural in nature; rather, they remove substantive protections for threatened species and interject new, substantive considerations into the decision-making process for developing species-specific 4(d) rules. Further, the revisions are not broad, speculative, or conjectural, but instead will have actual, concrete impacts on threatened species.

95. Moreover, even if the revisions fall within a categorical exclusion, the revisions will have significant environmental effects and require additional NEPA analyses due to the presence of extraordinary circumstances. *See* 43 C.F.R. § 46.205(c); *see also* 43 C.F.R. § 46.215(g) (list of Department of Interior extraordinary circumstances, including where a proposed action may have significant impacts to species listed under the ESA).

96. The Service's determinations that its regulatory revisions qualify for a NEPA categorical exclusion and that extraordinary circumstances do not exist, and its failure to produce an EIS or EA, are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," within the meaning of the APA, 5 U.S.C. § 706(2)(A).

CROSSCLAIMS PRAYER FOR RELIEF

The Center respectfully requests that:

1. Declare that the Service's final rule rescinding the Endangered Species Act "blanket" 4(d) rules violates the Endangered Species Act, and that the agency acted arbitrarily, capriciously, in abuse of its discretion, and contrary to law in its promulgation of that rule;
2. Declare that the Service's final rule requiring the agency to conduct an economic impact analysis prior to promulgating a species-specific 4(d) Rule violates the Endangered Species Act, and that the agency acted arbitrarily, capriciously, in abuse of its discretion, and contrary to law in its promulgation of that rule;
3. Declare that the Service acted arbitrarily, capriciously, in abuse of its discretion, and contrary to law in not completing an EA or EIS assessing the effects of its regulatory revisions under NEPA;
4. Hold unlawful and vacate the portion of the final rule rescinding the blanket 4(d) rules, and reinstate the blanket rules;
5. Hold unlawful and vacate the portion of the final rule requiring the Service to conduct an economic impact analysis prior to promulgating a species-specific Endangered Species Act section 4(d) rule;
6. Award Cross-claimant its reasonable fees, costs, and expenses,

including attorneys' fees; and

7. Grant Cross-claimant such further and additional relief as the Court may deem just and proper.

DATED this 21st day of July, 2026.

Respectfully submitted,

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