

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

PUYALLUP TRIBE OF INDIANS,

No. 26-cv-05788

Plaintiff,

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

v.

NATIONAL MARINE FISHERIES
SERVICE and UNITED STATES FISH
AND WILDLIFE SERVICE,

Defendants.

INTRODUCTION

1. The Puyallup Tribe of Indians challenges the joint decision by the National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (USFWS) (collectively, Services) to rescind their longstanding definitions of the term “harm” under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* This rescission defies the well-established, not to mention commonsense, truth that just as spearing and shooting kills or injures listed fish and wildlife, so too do activities that destroy or degrade the habitat upon which they rely to shelter, feed, migrate, reproduce, and rear their young. The Services’ rescission subverts the purpose and text of the ESA, longstanding agency practice, and Supreme Court precedent. It must be set aside.

2. In 1973, Congress enacted the ESA, which remains “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ultimate goal of the ESA is to recover endangered and threatened species to the point where they no longer need ESA protection. 16 U.S.C. §§ 1531(b), 1532(3). In both the statutory text and legislative history, Congress made plain that habitat destruction and degradation is a principal threat to imperiled species and enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” *Id.* § 1531(b).

3. In support of the ESA’s goals, Congress made it “unlawful for any person” to “take” listed fish or wildlife species within the United States, territorial seas, or high seas. *Id.* §§ 1538(a)(1), 1533(d). The ESA defines the term “take” to mean “to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19) (emphasis added). Congress intended this prohibition against take of listed fish

1 and wildlife to be interpreted broadly to include “every conceivable way in which a person can
2 ‘take’ wildlife.” S. Rep. No. 93-307, at 7 (1973).

3 4. For over fifty years, the USFWS has interpreted and defined “harm” to include
4 “significant habitat modification or degradation where it actually kills or injures wildlife by
5 significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”
6 50 C.F.R. § 17.3; 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975); 46 Fed. Reg. 54,748, 54,748
7 (Nov. 4, 1981).

8 5. In 1995, the Supreme Court upheld USFWS’ definition of “harm,” explaining
9 that the definition comported with “an ordinary understanding of the word.” *Babbitt v. Sweet*
10 *Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 697 (1995) (hereinafter “*Sweet*
11 *Home*”). Moreover, the Supreme Court concluded that “the broad purpose of the ESA
12 supports” the definition, and that a 1982 amendment to the Act “strongly suggests that
13 Congress understood [the Act] to prohibit indirect as well as deliberate takings.” *Id.* at 698–
14 700.

15 6. In 1999, NMFS promulgated a substantively matching definition of “harm,”
16 which includes “significant habitat modification or degradation which actually kills or injures
17 fish or wildlife by significantly impairing essential behavioral patterns, including, breeding,
18 spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102; 64 Fed. Reg. 60,727,
19 60,727 (Nov. 8, 1999).

20 7. In the 1854 Treaty of Medicine Creek, 10 Stat. 1132, Art. III, the Tribe reserved
21 its “right of taking fish,” which encompasses a right to take all species of finfish and shellfish
22 found within the Tribe’s traditional fishing areas. *E.g., United States v. Washington*, 157 F.3d
23 630, 643 (9th Cir. 1998). In the nearly two centuries since the Treaty was signed, as detailed

1 below, several of the species for which the Tribe reserved fishing rights by treaty have
2 experienced such precipitous declines as to require listing under the ESA. Habitat destruction
3 and modification has been a major driver of these listings.

4 8. On July 14, 2026, the Services repealed their respective regulatory definitions
5 of “harm.” Rescinding the Definition of “Harm” Under the Endangered Species Act, 91 Fed.
6 Reg. 43,300 (July 14, 2026) (“Rescission”). For the first time since the ESA’s enactment, the
7 Services have called into question the axiomatic principle that listed fish and wildlife are
8 harmed—i.e., taken—when they are killed or injured as a result of significant modification and
9 degradation of their habitat. In the Rescission, the Services explicitly adopt an interpretation
10 explicated by Justice Scalia in dissent to *Sweet Home*, which would purport to make it lawful
11 to kill or injure listed fish and wildlife through destruction or degradation of their habitat
12 modification merely because the harm is indirect.

13 9. The Rescission frustrates the very purpose of the ESA “to provide a means
14 whereby the ecosystems upon which endangered species and threatened species depend may be
15 conserved.” 16 U.S.C. § 1531(b). It will cause regulatory confusion regarding the ESA’s
16 requirements, unlawfully reduce protections for habitat of listed species in agency decisions,
17 and disturb the decades-long reasonable reliance interests of Tribes, States, regulated entities,
18 and others. Moreover, it will cause further interference with the Tribe’s Treaty-reserved fishing
19 rights.

20 10. The complete reversal of the Services’ longstanding position is not supported by
21 any rational legal interpretation of the ESA or any meaningful analysis of the reliance interests
22 described in the public comments. The Rescission, including the new interpretation adopted
23 therein, violates the plain language and overarching purpose of the ESA, lacks any reasoned

1 basis, and is arbitrary, capricious, and contrary to law under the Administrative Procedure Act
2 (APA), 5 U.S.C. §§ 551 *et seq.*

3 11. Despite the severe environmental implications of this radical shift in policy and
4 interpretation, the Services did not engage in any review under the National Environmental
5 Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, even though the Rescission will have
6 significant impacts on the human environment and is not compelled by statute. No categorical
7 exclusion exempting the Services from NEPA review is available because the Rescission raises
8 extraordinary circumstances.

9 12. Likewise, the Services violated Section 7 of the ESA, 16 U.S.C. § 1536, by
10 failing to consult regarding the impacts of the Rescission on imperiled species and their critical
11 habitat, ignoring the critical mandate designed to ensure federal agencies avoid actions that are
12 likely to jeopardize listed species or impair the habitat needed for their survival and recovery.

13 13. To remedy these violations, the Tribe seeks an order from this Court declaring
14 the Rescission unlawful, vacating the Rescission, prohibiting reliance on the Rescission, and
15 reinstating the regulatory definitions of “harm” that guided the Services’ administration of the
16 ESA for over fifty years.

17 JURISDICTION AND VENUE

18 14. This action is brought under the APA, 5 U.S.C. §§ 701-706, and the ESA, 16
19 U.S.C. § 1540(g)(1).¹ This Court has subject matter jurisdiction under 28 U.S.C. § 1331
20

21 ¹ Pursuant to 16 U.S.C. § 1540(g)(1), the Tribe will provide 60 days’ notice of its intent to sue
22 the Services for failure to consult on the rescission in violation of ESA Section 7(a)(2), 16
23 U.S.C. § 1536(a)(2). If the Services fail to provide a satisfactory response, the Tribe will take
appropriate steps to amend this Complaint to include this claim at the conclusion of the 60-day
period.

(Federal Question) and 28 U.S.C. § 1362 (Indian Tribes). The relief requested herein is authorized by 28 U.S.C. § 2201 (Declaratory Relief) and § 2202 (Injunctive Relief).

15. Venue is proper in the U.S. District Court for the Western District of Washington under 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3), as Plaintiff Puyallup Tribe of Indians resides within the Western District of Washington and many of the consequences of the Services' violations of law giving rise to the Tribe's claims occur or will occur in this district.

PARTIES

I. PLAINTIFF

16. The Plaintiff in this action is the Puyallup Tribe of Indians. The Puyallup Tribe of Indians is a sovereign, federally recognized Indian tribe whose reservation is located in and in areas around Tacoma, Washington. The Tribe is signatory to the 1854 Treaty of Medicine Creek with the United States in which the Tribe reserved its "right of taking fish at usual and accustomed grounds and stations." Treaty of Medicine Creek, 10 Stat. 1132, Art. III; Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. §§ 1773 *et seq.* (Pub. L. No. 101-41, 103 Stat. 83 (June 21, 1989)). Puyallup's usual and accustomed areas (U&A) include but are not limited to the Puyallup River watershed, Commencement Bay and surrounding waters of Puget Sound, and additional inland fresh waters. The vast majority of the waters in which Puyallup reserved its fishing rights through the Treaty of Medicine Creek lie outside of Puyallup's reservation. The Tribe co-manages the fisheries along with the Washington Department of Fish and Wildlife.

17. As the United States Supreme Court has long recognized, the Tribe's right to fish at traditional fishing places is "not much less necessary to the existence of the Indians than

1 the atmosphere they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905). Members
2 of the Puyallup Tribe of Indians and their ancestors have resided and fished in and around the
3 Puyallup River watershed, Commencement Bay, and surrounding areas of Puget Sound for
4 thousands of years. Harvesting fish, shellfish, and other aquatic species remains fundamental to
5 the Tribe’s subsistence, spiritual and cultural identity, and economy today. The Tribe maintains
6 a robust fishery and fishing culture, harvesting both finfish, including salmonids, and shellfish.
7 In addition, the Tribe conducts fisheries throughout its U&A to obtain fish for ceremonial use
8 for its people (including funerals, weddings, and honoring and gifting observances, as well as
9 other practices). Subsistence harvests from the Tribe’s U&A are a key element of the diet of
10 many tribal members, and commercial harvest remains essential for the livelihood of many
11 Puyallup members. Protection of habitat throughout the species’ range is essential to protecting
12 the Tribe’s rights under the Treaty of Medicine Creek to harvest and eat finfish, shellfish, and
13 other aquatic life. Since time immemorial, the Tribe has been a steward of the freshwater,
14 marine, and terrestrial environments upon which the Puyallup people have depended for their
15 economic, subsistence, religious, spiritual, and ceremonial livelihoods.

16 18. All anadromous fish, including salmon, steelhead, and bull trout listed under the
17 ESA, that spawn in and return to the Tribe’s U&A require healthy habitat throughout their
18 ranges. Clean water, cool temperatures, and other essential habitat features are essential to
19 support listed salmonid’s ability to spawn, forage, and migrate throughout their life cycles. The
20 Tribe invests substantial resources in its fishery management and water quality programs. The
21 Tribe’s biologists regularly work in coordination with federal, state, and other tribes’ resource
22 agencies to preserve and enhance the region’s fish resources, including efforts to prevent harm
23 to salmonids that results from habitat destruction or degradation. Protecting the Tribe’s Treaty

1 fishing rights requires ensuring that habitat modification and degradation, including in marine
2 benthic, eelgrass, nearshore, estuary, and freshwater stream environments, does not kill or
3 injure the listed species. The Tribe has taken an important leadership role in working to
4 maintain and recover salmonid stocks in the region.

5 19. In accordance with the Treaty of Medicine Creek, the Tribe's members reserved
6 the right to fish for all species of Pacific salmon (including Chinook, coho, sockeye, pink, and
7 chum) and trout (including steelhead and bull trout). Unfortunately, because Puget Sound
8 Chinook salmon, Puget Sound steelhead, bull trout, and Southern Resident killer whales
9 (which rely on Chinook salmon as the preferred prey for their diet) have been listed as
10 endangered or threatened, the Tribe has not been able to fully exercise its treaty fishing right,
11 both due to the listings themselves, as a result of the declining populations, and the harvest
12 restrictions with respect to unlisted species that are necessary to protect the listed fish. *See*,
13 *e.g.*, Four Chinook Salmon ESU Listing, 64 Fed. Reg. 14,308 (Mar. 24, 1999); Puget Sound
14 Steelhead Listing, 72 Fed. Reg. 26,722 (May 11, 2007); Bull Trout Listing, 64 Fed. Reg.
15 58,910 (Nov. 1, 1999); Southern Resident Killer Whale Listing, 70 Fed. Reg. 69,903 (Nov. 18,
16 2005). Although Tribal members were able to harvest year-round in the past, they are now only
17 able to fish a few weeks per year, and the Tribe's fisheries are restricted to certain species and
18 for short periods of time (days or even hours) in certain areas. Such restrictions profoundly
19 affect the Tribe's members' ability to exercise their treaty fishing rights. In order to limit such
20 interference, the Tribe prioritizes work to maintain and recover salmon stocks in the region,
21 including protecting the habitats that listed salmonid species depend on throughout their life
22 cycles.

20. The Tribe is involved in habitat protection and restoration in at least three major roles: funding and participating in scientific study and fisheries management; funding and carrying out habitat restoration efforts; and participating in processes resulting from implementation of Sections 7 and 10 of the ESA, 16 U.S.C. §§ 1536, 1539, which authorize incidental take that would otherwise be unlawful under Section 9 of the ESA, 16 U.S.C. § 1538.

21. The Tribe submitted comments opposing the Services' proposed rescission of the harm definitions and requested government-to-government consultation on May 19, 2025. *See* Letter from Bill Sterud, Chairman, Puyallup Tribe of Indians, to Doug Burgum, Sec., U.S. Dep't of the Interior, and Howard Lutnick, Sec., U.S. Dep't of Commerce (Comment ID FWS-HQ-ES-2025-0034-213042) (May 19, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-213042>. The Tribe is concerned with the conservation of imperiled species, including those they reserved their right to harvest in perpetuity under the Treaty of Medicine Creek. Protecting fish habitat from destruction, modification, and degradation can arrest the decline and help increase the production of threatened and endangered fish, which can result in fewer restrictions on Tribal fisheries and greater harvest by Tribal fishers. For many listed species of importance to the Tribe, including Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout, the listings have been necessitated due to habitat modification and degradation. *See infra* ¶¶ 25–27. Moreover, jeopardy determinations and the amount of incidental take that must be mitigated is largely based on the expected loss and modification of habitat. *E.g.*, ESA Section 7(a)(2) Biological Opinion for 2024-2025 Puget Sound Chinook Harvest Plan, https://repository.library.noaa.gov/view/noaa/61406/noaa_61406_DS1.pdf. The Services' Rescission will injure the Tribe by removing essential protections for listed fish

species upon which the Tribe relies and to which the Tribe reserved its fishing rights by treaty in 1854, among other injuries. The Tribe's Treaty, cultural, spiritual, educational, dietary, and commercial interests, among others, have been, are being, and, unless the requested relief is granted, will continue to be adversely and irreparably injured by the Rescission and by the Services' express adoption of Justice Scalia's dissenting interpretation. These are actual, concrete injuries, traceable to the Services' conduct, that would be redressed by the requested relief of reinstating the harm definitions. The Tribe has no adequate remedy at law.

II. DEFENDANTS

22. Defendant National Marine Fisheries Service (NMFS), also known as NOAA Fisheries, is an office of the National Oceanic and Atmospheric Administration (NOAA) within the U.S. Department of Commerce charged with administering the ESA with regard to threatened and endangered marine species.

23. Defendant United States Fish and Wildlife Service (USFWS), an agency of the U.S. Department of the Interior, is charged with administering the ESA with regard to threatened and endangered terrestrial and freshwater species.

BACKGROUND

I. THE IMPORTANCE OF HABITAT TO LISTED SPECIES IN PUGET SOUND

24. The overwhelming consensus of the scientific community is that habitat degradation is the leading cause of species loss, and that species recovery is only possible through habitat protection and restoration. Habitat modification and degradation—including, among others, habitat loss, fragmentation, and isolation—impact threatened and endangered species in profound ways. Habitat loss can disrupt essential ecological functions such as breeding, feeding, and sheltering of threatened and endangered species. Members of species

1 experiencing habitat loss, fragmentation, and degradation may be disturbed in their day-to-day
 2 movements, such as nesting, foraging, and migrating. For many, adverse modification and
 3 degradation of habitat is the very reason for the species' listing as endangered or threatened
 4 under the ESA.

5 25. When listing the Puget Sound Chinook salmon Evolutionary Significant Unit
 6 (ESU) as threatened, NMFS observed habitat degradation was a contributing cause of the
 7 species' decline:

8 [A] substantial amount of habitat throughout the Puget Sound region has been
 9 degraded or blocked by dams and other barriers. In general, upper tributaries
 10 have been negatively affected by forest practices and lower tributaries and
 11 mainstem rivers have been impacted by agriculture and/or urbanization. Diking
 for flood control, draining and filling of freshwater and estuarine wetlands, and
 sedimentation due to forest practices and urban development are cited as
 problems throughout the ESU.

12 64 Fed. Reg. at 14,318 (citation omitted). The listing also included "Take Guidance," to
 13 provide public notice of potential actions that NMFS believed could potentially harm, injure,
 14 or kill the listed species. *Id.* The top listed causes of take were associated with habitat
 degradation:

15 Activities that NMFS believes could potentially harm, injure or kill chinook
 16 salmon in the listed ESUs and result in a violation of section 9 of the ESA
 17 include, but are not limited to: (1) land-use activities that adversely affect
 chinook salmon habitat in this ESU (e.g., logging, grazing, farming, road
 construction in riparian areas, and areas susceptible to mass wasting and surface
 erosion); (2) destruction or alteration of chinook salmon habitat in the listed
 18 ESUs, such as removal of large woody debris and "sinker logs" or riparian
 shade canopy, dredging, discharge of fill material, draining, ditching, diverting,
 19 blocking, or altering stream channels or surface or ground water flow[.]

20 *Id.* at 14,326. In 2005, when NMFS reaffirmed the species' threatened status, it quoted
 21 USFWS' harm definition (50 C.F.R. § 17.3) in full and repeated the habitat degrading activities
 22 identified in the 1994 listing as the top likely causes of "take." Final Listing Determinations for
 23

1 16 ESUs of West Coast Salmon, and Final 4(d) Protective Regulations for Threatened
 2 Salmonid ESUs, 70 Fed. Reg. 37,160, 37,196 (June 28, 2005).

3 26. NMFS made similar observations regarding the effect of habitat destruction and
 4 modification when listing Puget Sound steelhead as threatened, stating:

5 The principal factor for decline for Puget Sound steelhead is the present or threatened
 6 destruction, modification, or curtailment of its habitat or range. Barriers to fish passage
 7 and adverse effects on water quality and quantity resulting from dams, the loss of
 8 wetland and riparian habitats, and agricultural and urban development activities have
 9 contributed and continue to contribute to the loss and degradation of steelhead habitats in
 10 Puget Sound....We concluded that existing regulatory mechanisms inadequately protect
 11 steelhead habitats as evidenced by the historical and continued threat posed by the loss
 12 and degradation of nearshore, estuarine, and lowland habitats due to agricultural
 13 activities and urbanization.

14 72 Fed. Reg. at 26,732.

15 27. USFWS likewise identified habitat alteration, including “land and water
 16 management activities that degrade bull trout habitat,” as driving the need for listing all
 17 populations of bull trout within the coterminous United States as threatened in 1999. 64 Fed.
 18 Reg. at 58,921. For Puget Sound bull trout specifically, USFWS noted that “[a]quatic habitat in
 19 the Nisqually, Puyallup, and Green rivers has been variously degraded by logging, agriculture,
 20 road construction, and urban development.” *Id.* at 58,914. In providing take guidance, the
 21 agency indicated many types of habitat alteration could constitute take:

22 Destruction or alteration of riparian or lakeshore habitat and adjoining uplands of
 23 waters supporting bull trout by timber harvest, grazing, mining, hydropower
 development, road construction or other developmental activities that result in
 destruction or significant degradation of cover, channel stability, substrate
 composition, temperature, and migratory corridors used by the species for
 foraging, cover, migration, and spawning.

Id. at 58,929.

28. Decades after these ESA listings, habitat destruction and alteration remain a
 major cause for concern with respect to the survival and recovery of listed species in Puget

1 Sound. For instance, estuarine and nearshore habitats are especially important for the listed
2 juvenile salmon, providing rearing areas that support growth and improving marine survival.
3 But over seventy percent of Puget Sound’s historic tidal wetlands have been lost or degraded
4 due to physical alterations, including shoreline armoring, diking, channelization, and tide gate
5 infrastructure. These modifications reduce habitat quality and connectivity, thereby limiting
6 juvenile salmon access to productive environments and reducing the number of adult salmon
7 that return to spawning grounds. In addition, listed Southern Resident killer whales primarily
8 rely on salmon, and in particular Chinook salmon, for their food supply. Thus, habitat
9 degradation has direct and indirect effects—both short-term and cumulatively—on the
10 Southern Resident killer whale prey supply and overall population viability. 70 Fed. Reg. at
11 69,910.

12 **II. ENDANGERED SPECIES ACT**

13 29. In 1973, Congress enacted the Endangered Species Act in recognition of the
14 fact that many of the nation’s species had “been rendered extinct as a consequence of
15 economic growth and development untampered by adequate concern and conservation” and
16 other species had been “so depleted in numbers that they are in danger of or threatened with
17 extinction.” 16 U.S.C. § 1531(a)(1)–(2). The ultimate goal of the ESA is the recovery of
18 endangered and threatened species to the point where they no longer need ESA protection. *Id.*
19 §§ 1531(b), 1532(3). In both the statutory text and legislative history, Congress recognized the
20 essential relationship between habitat and threatened and endangered species, stating the very
21 purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered
22 species and threatened species depend may be conserved.” *Id.* § 1531(b).

30. A species comes under the protection of the ESA when the Secretary of the Interior or the Secretary of Commerce, acting through the Services, lists the species as either “endangered” or “threatened” under Section 4 of the statute. *See id.* § 1533. A species is “endangered” when it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is “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); *see also id.* § 1533(c). One of the factors for listing is “the present or threatened destruction, modification, or curtailment of its habitat or range.” *Id.* § 1533(a)(1)(A).

31. Section 9 of the ESA makes it “unlawful for any person” to “take” any endangered fish or wildlife species within the United States, territorial seas, or high seas. *Id.* § 1538(a)(1). Pursuant to the Services’ authority under Section 4(d) of the ESA, *id.* § 1533(d), the Services have promulgated regulations that apply the take prohibition to certain threatened fish species, including threatened species of West Coast salmon and steelhead. *E.g.*, 50 C.F.R. § 223.203. The ESA defines the term “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The take prohibition is to be interpreted broadly to include “every conceivable way in which a person can ‘take’ wildlife,” including substantial impacts from habitat modification or degradation. *E.g.*, S. Rep. No. 93-307, at 7 (1973); *Sweet Home*, 515 U.S. at 696–708.

32. Notwithstanding the Section 9 “take” prohibition, the Services can provide exemptions from liability for incidental take. For non-federal applicants, ESA Section 10 authorizes the issuance of permits “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). Under the 1982 amendments to the ESA, “incidental take permits” (ITPs) may be issued once (1) an applicant

1 has submitted to the Services a “conservation plan” that describes, among other things, the
2 impact of the anticipated taking, the planned steps to minimize and mitigate those impacts, the
3 available funding to take those steps, and the alternatives to the taking that were considered by
4 the applicant, *id.* § 1539(a)(2)(A); and (2) the Services conclude that the applicant will
5 minimize and mitigate the impacts of the incidental take “to the maximum extent practicable,”
6 that there is adequate funding for the habitat conservation plan, and that the taking “will not
7 appreciably reduce the likelihood of the survival and recovery of the species in the wild,” *id.* §
8 1539(a)(2)(B). The Services have issued hundreds of ITPs since Congress created the
9 incidental take permit program in 1982, enabling non-federal actors to engage in activities that
10 cause incidental take while balancing the survival needs of listed species.

11 33. ESA Section 7(a)(2) governs federal agency actions, including those that may
12 result in incidental take. That provision directs “[e]ach Federal agency” to consult with NMFS
13 or USFWS (depending on which agency has jurisdiction over the species) to “insure that any
14 action authorized, funded, or carried out” by the Services “is not likely to jeopardize the
15 continued existence of any endangered species or threatened species or result in the destruction
16 or adverse modification of habitat of such species.” *Id.* § 1536(a)(2).

17 34. Agency “action” under Section 7 broadly includes “all activities or programs of
18 any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the
19 United States or upon the high seas,” specifically including “the promulgation of regulations,”
20 “the granting of licenses” and “permits,” and “actions directly or indirectly causing
21 modifications to the land, water, or air.” 50 C.F.R. § 402.02.

22 35. “Jeopardize the continued existence of” is defined as engaging in an action that
23 “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of

1 both the survival and recovery of a listed species in the wild by reducing the reproduction,
2 numbers, or distribution of that species.” *Id.*

3 36. “Destruction or adverse modification” is defined as “a direct or indirect
4 alteration that appreciably diminishes the value of critical habitat as a whole for the
5 conservation of a listed species.” *Id.*

6 37. Section 7(a)(2) requires each federal action agency to determine whether its
7 actions “may affect” any endangered or threatened species or designated critical habitat. *Id.*
8 § 402.14(a). If the action agency determines that its proposed action is “not likely to adversely
9 affect” any listed species or critical habitat, the consulting agency (i.e., NMFS and/or USFWS)
10 must concur in writing. *See id.* § 402.13(c). If the consulting agency does not concur—or if the
11 action agency determines in the first instance that its proposed action is “likely to adversely
12 affect” listed species or critical habitat—the action agency must formally consult with one or
13 both of the consulting agencies to ensure it does not violate the Section 7(a)(2) prohibition on
14 “jeopardy” and “destruction or adverse modification.” *Id.* § 402.14(a), (b)(1).

15 38. Formal Section 7 consultation results in a “Biological Opinion” prepared by the
16 consulting agency, which describes the proposed action’s expected impact on listed species
17 and critical habitat and the consulting agency’s opinion on whether the action is “[I]ikely to
18 jeopardize the continued existence of a listed species or result in the destruction or adverse
19 modification of critical habitat.” 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(1)(iii),
20 (iv)(A). Each agency must “use the best scientific and commercial data available” in fulfilling
21 the requirements of Section 7(a)(2). 16 U.S.C. § 1536(a)(2).

22 39. Similar to Section 10, Section 7 establishes a process for authorizing federal
23 actions that will incidentally take—but not jeopardize the continued existence of—ESA-listed

1 species. For such actions, the consulting agency must provide the action agency with a
 2 statement that specifies the expected impact of such taking and prescribes reasonable and
 3 prudent measures to minimize such impact and terms and conditions to implement such
 4 measures. *Id.* § 1536(b)(4). Any incidental taking that complies with the terms and conditions
 5 of the incidental take statement (ITS) is not prohibited by the ESA. *Id.* § 1536(o)(2).

6 40. The Services themselves are not exempt from the Section 7(a)(2) consultation
 7 requirement. When NMFS or USFWS is both the action agency and the consulting agency, as
 8 in this case, they must engage in intra-Service (internal) consultation. *See* U.S. Fish & Wildlife
 9 Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* 1-5 to 1-6,
 10 App'x E (1998), [https://www.fws.gov/sites/default/files/documents/endangered-species-](https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf)
 11 [consultation-handbook.pdf](https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf).

12 **III. NATIONAL ENVIRONMENTAL POLICY ACT**

13 41. Congress enacted the National Environmental Policy Act for these purposes:
 14 “To declare a national policy which will encourage productive and enjoyable harmony between
 15 man and his environment; to promote efforts which will prevent or eliminate damage to the
 16 environment and biosphere and stimulate the health and welfare of man; [and] to enrich the
 17 understanding of the ecological systems and natural resources important to the Nation[.]”
 18 42 U.S.C. § 4321. To carry out the national environmental policy, Congress declared that “it is
 19 the continuing responsibility of the Federal Government to use all practicable means,
 20 consistent with other essential considerations of national policy, to improve and coordinate
 21 Federal plans, functions, programs, and resources to the end that the Nation may...fulfill the
 22 responsibilities of each generation as trustee of the environment for succeeding generations;
 23 ...attain the widest range of beneficial uses of the environment without degradation, risk to

1 health or safety, or other undesirable and unintended consequences; ... [and] preserve
 2 important historic, cultural, and natural aspects of our national heritage, and maintain,
 3 wherever possible, an environment which supports diversity and variety of individual choice.”

4 *Id.* § 4331(b).

5 42. To ensure that the environmental consequences of federal actions are known
 6 *before* they are approved, NEPA requires that “all agencies of the Federal Government,”
 7 including the Services, prepare a “detailed statement” for all “major Federal actions
 8 significantly affecting the quality of the human environment” that fully evaluates, among other
 9 things, the environmental impacts of the proposed action and a reasonable range of alternatives
 10 to the proposed action, including alternatives that would have lesser adverse environmental
 11 consequences. *See id.* § 4332(2)(C). An agency must “make use of reliable data and
 12 resources,” *id.* § 4332(2)(E), and “ensure the professional integrity, including scientific
 13 integrity, of the discussion and analysis in [its] environmental document,” *id.* § 4332(2)(D).

14 43. NEPA establishes procedures to determine the level of environmental review
 15 required. Environmental impact statements (EISs) must be prepared for proposed agency
 16 actions that have “a reasonably foreseeable significant effect on the quality of the human
 17 environment.” *Id.* § 4336(b)(1). A more streamlined environmental assessment (EA) may be
 18 completed to determine whether a proposed agency action will have significant effects (in
 19 which case an EIS must be completed), and if the agency finds it will not have significant
 20 effects, to set forth the basis for that finding. *Id.* § 4336(b)(2).

21 **IV. HISTORY OF THE “HARM” DEFINITION**

22 44. The regulation of “take” is a fundamental element of the programs established
 23 under Sections 7, 9, and 10 of the ESA. As indicated above, in the ESA, Congress defined

1 “take” to include the word “harm.” 16 U.S.C. § 1532(19) (“The term ‘take’ means to harass,
 2 harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any
 3 such conduct.”). For half a century, the Services unwaveringly regulated significant habitat
 4 modification or degradation that poses significant adverse consequences for listed fish and
 5 wildlife as a form of “harm” constituting “take” under these programs. Until now, no
 6 administration had ever questioned this fundamental precept of biology.

7 45. Two years after the ESA’s enactment, in 1975, USFWS first promulgated a
 8 definition for the word “harm”:

9 “Harm” in the definition of “take” in the Act means an act or omission which
 10 actually injures or kills wildlife, including acts which annoy it to such an extent
 11 as to significantly disrupt essential behavioral patterns, which include, but are
 not limited to, breeding, feeding or sheltering; significant environmental
 modification or degradation which has such effects is included within the
 meaning of “harm[.]”

12 40 Fed. Reg. at 44,416.

13 46. In 1981, USFWS clarified the “harm” definition “on the grounds that the
 14 existing language could be construed as prohibiting the modification of habitat even where
 15 there was no injury to the listed endangered or threatened wildlife.” 46 Fed. Reg. at 54,748. To
 16 “obviate any such erroneous application,” *id.*, USFWS slightly modified the “harm” definition
 17 to make clear that to constitute “harm,” and therefore “take,” the habitat destruction must
 18 “actually kill[] or injure[] wildlife”:

19 “Harm” in the definition of “take” in the Act means an act which actually kills
 20 or injures wildlife. Such act may include significant habitat modification or
 degradation where it actually kills or injures wildlife by significantly impairing
 essential behavioral patterns, including breeding, feeding or sheltering.

21 *Id.* at 54,750. For 45 years, until the Services’ July 14, 2026, Rescission, this definition
 22 remained in the Code of Federal Regulations (50 C.F.R. § 17.3).
 23

1 47. Congress amended the ESA a year later to add the Section 10 incidental take
2 program. The amendment expressly established Congress’s intent for “take” to encompass
3 more than just deliberate and intentional impacts. Indeed, the very purpose of the provision is
4 to allow the Services to issue permits for takings that are “incidental to, and not the purpose of,
5 the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). Section 10 only
6 exists because the ESA’s take prohibition extends to those takings that are not deliberate or
7 intentional, and the legislative history from 1982 explicitly states that “harm,” as used in the
8 “take” definition, “may occur as a result of habitat modification.” S. Rep. No. 97-418, at 26
9 (1982).

10 48. In 1995, the Supreme Court upheld USFWS’ definition of “harm” in *Babbitt v.*
11 *Sweet Home Chapter of Cmty. for a Great Oregon*, 515 US 687 (1995). The Court held that
12 the “text and structure of the Act, its legislative history, and the significance of the [post-
13 enactment] 1982 amendment” all supported the definition. *Sweet Home*, 515 U.S. at 695. The
14 Court concluded that the “ordinary understanding of the word ‘harm’” (i.e., “to cause hurt or
15 damage to: injure”) did not “suggest in any way that only direct or willful action that leads to
16 injury constitutes ‘harm,’” *id.* at 697, and that “harm” must have independent meaning from
17 the other words contained in the “take” definition, or else it would be surplusage, *id.* at 698.
18 Congress’s broad intent to provide comprehensive protection for listed species and its 1982
19 amendment establishing the incidental take permit program—suggesting that “Congress
20 understood [Section 9] to prohibit indirect as well as deliberate takings”—further supported the
21 definition. *Id.* at 698–701. Moreover, the legislative history made clear that “Congress intended
22 ‘take’ to apply broadly to cover indirect as well as purposeful actions” and that “Congress had
23 habitat modification directly in mind” when it added Section 10, further confirming the

1 soundness of the definition. *Id.* at 704–708. The *Sweet Home* Court explicitly rejected the
 2 interpretation—proffered by the dissent and the D.C. Court of Appeals in the opinion below
 3 (which the Services have now adopted)—that “harm” was limited to activities associated with
 4 hunting and deliberate killing as inconsistent with the ESA, concluding the interpretation was
 5 based on a flawed premise, disregarded contradictory statutory text, and misapplied the
 6 *noscitur a sociis* interpretive canon. *Id.* at 701–02.

7 49. NMFS formally promulgated its definition of “harm” in 1999 following the
 8 listings of Pacific salmon and steelhead to dispel any doubt that “NMFS also interprets harm to
 9 include habitat destruction.” 64 Fed. Reg. at 60,727. NMFS clarified its harm definition was
 10 consistent with that of USFWS, emphasizing that its regulation was “not a change in existing
 11 law” and only serves to “provide[] clear notification to the public that habitat modification or
 12 degradation may harm listed species and, therefore, constitutes a take under the ESA as well as
 13 ensuring consistency between NMFS and [USFWS].” *Id.*

14 50. NMFS’ definition is nearly identical to USFWS’ definition:

15 *Harm* in the definition of “take” in the Act means an act which actually kills or
 16 injures fish or wildlife. Such an act may include significant habitat modification
 17 or degradation which actually kills or injures fish or wildlife by significantly
 impairing essential behavioral patterns, including, breeding, spawning, rearing,
 migrating, feeding or sheltering.

18 50 C.F.R. § 222.102.

19 51. As NMFS noted nearly thirty years ago, the “harm” definition “is supported by
 20 the broad purpose of the ESA to conserve endangered and threatened species.” 64 Fed. Reg. at
 21 60,727.

22 52. Understanding habitat degradation that actually injures or kills listed species
 23 constitutes unlawful “take,” the Services have relied on the “harm” definitions when listing

species as threatened and endangered, negotiating long-term mitigation plans, and issuing incidental take authorizations pursuant to ESA Section 7, 16 U.S.C. § 1536 (federal agency actions) and ESA Section 10, *id.* § 1359 (private actions). Indeed, it is their policy “to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9” and “activities that will be considered likely to result in violation also will be identified in as specific a manner as possible.” Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions, 59 Fed. Reg. 34,272, 34,272 (July 1, 1994). As detailed above, *supra* ¶¶ 25, 27, forms of habitat modification are frequently listed as activities considered likely to result in a take violation.

IV. THE SERVICES’ RESCISSION OF THE “HARM” DEFINITION

53. In the spring of 2025, after 50 years of consistently defining “harm” to include significant habitat modification or degradation that actually kills or injures listed fish and wildlife, the Services did an about-face and jointly proposed to fully rescind the definitions of “harm” from 50 C.F.R. § 17.3 (USFWS regulation) and 50 C.F.R. § 222.102 (NMFS regulation). Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16,102 (Apr. 17, 2025) (“Proposed Rule”). The Services received more than 357,000 comments on the Proposed Rule. These comments, representing Tribal, state, regulatory, and environmental interests, overwhelmingly opposed the Proposed Rule. In addition to expressing concerns that the Services ignored their statutory responsibilities under the ESA and NEPA, many presented scientific, legal, and cultural arguments against the rescission, including extensive scientific evidence that the rescission would have negative consequences for listed species. Many of the comments, such as those from Tribes, States, and those involved in the habitat restoration field, described important reliance interests and treaty rights that would be

1 disturbed by rescission of the “harm” definitions. Many federally recognized tribes requested
 2 government-to-government consultation with the Services regarding their concerns about the
 3 Proposed Rule and all were denied.

4 54. The Services finalized the Rescission on July 14, 2026. Rescinding the
 5 Definition of “Harm” Under the Endangered Species Act, 91 Fed. Reg. 43,330 (July 14, 2026).
 6 Much as they had in the Proposed Rule, 90 Fed. Reg. at 16,104, in order to justify the sudden
 7 retreat from their half century-old harm definition, the Services erroneously claimed they were
 8 “compelled” to rescind the harm definitions under the Supreme Court’s holding in *Loper*
 9 *Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and their constitutional obligation to
 10 “take Care that the Laws be faithfully executed,” U.S. Const., art. II, section 3. 91 Fed. Reg. at
 11 43,301, 43,307. Because the *Sweet Home* Court evaluated the harm definition under the
 12 then-controlling *Chevron* doctrine, which required judicial deference to reasonable agency
 13 interpretations of ambiguous statutory terms, the Services proclaimed that *Loper Bright* forced
 14 them to rescind the regulatory definitions of “harm” and effectuate what they consider to be
 15 “the single, best meaning of the statute”—Justice Scalia’s dissent in *Sweet Home*. *Id.* at 43,301.

16 55. In *Loper Bright*, the Supreme Court overruled the *Chevron* doctrine. The Court
 17 concluded that the APA “codifies for agency cases...that courts decide legal questions by
 18 applying their own judgment” and “command[s]...that ‘the reviewing court’—not the agency
 19 whose actions it reviews—is to ‘decide *all* relevant questions of law’ and ‘interpret...statutory
 20 provisions.’” *Loper Bright*, 603 U.S. at 391–92, 398 (quoting 5 U.S.C. § 760). The Court held
 21 that even ambiguous statutes “must...have a single, best meaning,” after applying all relevant
 22 interpretive tools, such that deference to agencies has no place in statutory interpretation. *Id.* at
 23 400. In doing so, the Court verified that statutory interpretation, including resolution of

1 statutory ambiguities in APA cases, was the province of judges armed with “the traditional
2 tools of statutory construction,” not “political actors” armed with “individual policy
3 preferences.” *Id.* at 399–400, 403–04.

4 56. Confusing their own role with the role of the judiciary under *Loper Bright*, the
5 Services concluded that the longstanding definition of “harm,” though upheld by the Supreme
6 Court in *Sweet Home*, does “not match the single, best meaning of the statute.” 91 Fed. Reg. at
7 43,301. Instead, the Services concluded that “single, best meaning” could be found in Justice
8 Scalia’s dissenting opinion, *id.*, which relied on a historical understanding that the word
9 “‘take,’ when applied to wild animals, means to reduce those animals, by killing or capturing,
10 to human control,” such that all the verbs within Congress’s statutory definition of “take,”
11 including “harm,” “should be construed to require an ‘affirmative act[]...directed immediately
12 and intentionally against a particular animal,” *id.* (alteration in original) (quoting *Sweet Home*,
13 515 U.S. at 717, 719–20 (Scalia, J., dissenting)). The Services did not explain why the
14 dissent’s construction of a different term entirely represented the “single, best meaning” of
15 “harm” as opposed to the majority opinion’s interpretation, nor why it should control even
16 though the *Sweet Home* Court explicitly rejected it, nor why it should supplant Congress’s own
17 definition of the term.

18 57. The Services also disregarded the *Loper Bright* Court’s caution that the Court
19 did “not call into question prior cases that relied on the *Chevron* framework” and that “[t]he
20 holdings of those cases that specific agency actions are lawful...are still subject to statutory
21 *stare decisis* despite our change in interpretive methodology,” *Loper Bright*, 603 U.S. at 412,
22 as well as the Court’s reminder that the federal courts have always indicated that “very great
23 respect” is “warranted when an Executive Branch interpretation was issued roughly

1 contemporaneously with enactment of the statute and remained consistent over time,” as is the
 2 case here, *id.* at 385–86 (citing *Edwards’ Lessee v. Darby*, 25 U.S. 206 (1827); *United States v.*
 3 *Dickson*, 40 U.S. 141 (1941)). Instead, while acknowledging the existence of *Loper Bright’s*
 4 holding regarding *stare decisis*, they ultimately rendered it meaningless claiming that because
 5 the *Sweet Home* Court did not say the Services’ longstanding “harm” definition was the “only
 6 possible such reading”—which would be strange indeed in a case employing an interpretive
 7 methodology specifically designed to address ambiguity—the *Services* could determine its
 8 “illegality,” 91 Fed. Reg. at 43,302, precisely what political actors are not equipped to do under
 9 *Loper Bright*.

10 58. The Services concluded that codification of a new “freestanding” definition to
 11 replace the longstanding “harm” definition in the final Rescission was “unnecessary,” asserting
 12 that the ESA supplies all the definition that is needed both because “take” is defined in the
 13 statute and because “the role and meaning of the term ‘harm’ within the larger definition of
 14 ‘take’ was expertly explicated by Justice Scalia in his *Sweet Home* dissent—an interpretation
 15 which we have herein adopted[.]” *Id.* Thus, while the Services did not promulgate a new rule
 16 defining “harm,” they explicitly adopted the interpretation of “harm” that they intend to control
 17 going forward—a “novel” dissenting construction that the *Sweet Home* Court explicitly
 18 rejected. *Id.*; *Sweet Home*, 515 U.S. at 701–702 & n.15. The Services are clear that their “best
 19 interpretation of the ESA...does not permit agencies to factor in habitat modification or
 20 degradation in the context of section 9 prohibited take.” 91 Fed. Reg. at 43,310.

21 59. The Services included no scientific rationale for the Rescission, nor did they
 22 cite any scientific research to support it, nor did they show that it would be beneficial or even
 23 neutral with respect to preventing extinction or promoting recovery. The Services did not

1 engage at all with the extensive scientific record showing that the Rescission would have
2 negative consequences for listed species, recognizing only that the Rescission would reduce
3 habitat protection measures but with no analysis of the effect of that reduction on listed species
4 like Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout. *Id.* at 43,304–05. The
5 Services gave only cursory attention to the significant reliance interests set forth in public
6 comments, asserting that any reliance interests were “outweighed by the constitutional interest”
7 and dismissing sovereign reliance interests in the “harm” definition’s role in larger
8 conservation frameworks as “policy disagreements.” *Id.* at 43,308–09. The Services concluded
9 that the Rescission had “no tribal implications,” but neither analyzed the effects of the
10 Rescission on tribes’ ability to exercise their treaty-protected fishing rights nor granted
11 multiple federally recognized tribes’ requests for government-to-government consultation for
12 them to explain the tribal implications. *See id.* at 43,312, 43,315–16.

13 60. With respect to NEPA compliance, the Services wrongly asserted that the
14 Rescission is a “nondiscretionary action” and thus exempted themselves from NEPA review
15 under 42 U.S.C. § 4336(a)(4), which waives environmental review requirements for
16 non-discretionary actions over which an agency “does not have authority to take environmental
17 factors into consideration in determining whether to take the proposed action.” *Id.*; *see also* 91
18 Fed. Reg. at 43,316. Alternatively, the Services asserted, again wrongly, that the Rescission
19 qualified for the USFWS’ categorical exclusion (which NMFS adopted) for “[p]olicies,
20 directives, regulations, and guidelines: that are of an administrative, financial, legal, technical
21 or procedural nature; or whose environmental effects are too broad, speculative, or conjectural
22 to lend themselves to meaningful analysis and will later be subject to the NEPA process, either
23 collectively or case-by-case” (43 C.F.R. § 46.210(i)) because the Rescission will have “no

1 significant individual or cumulative effect on the quality of the human environment.” *Id.* at
2 53,316. Nowhere do the Services describe or evaluate the environmental impacts of the
3 Rescission, nor do they provide any meaningful description of the basis for their determination
4 that “the extraordinary circumstances listed in 43 CFR 46.215 do not apply to the direct effects
5 of the proposed action.” *Id.*

6 61. With respect to ESA Section 7 compliance, the Services assert that the
7 Rescission does not require them to consult, arguing that “the plain language, structure, and
8 purposes of the ESA...[do] not place a consultation obligation on the Services’ administration
9 of the [ESA].” *Id.* Thus, the Services engaged in no Section 7(a)(2) consultation.

10 62. Imminent illegal habitat destruction will result from the Rescission. The
11 Rescission and the Services’ newly adopted interpretation, which “does not permit agencies to
12 factor in habitat modification or degradation in the context of section 9 prohibited take,” *id.* at
13 43,310, will have immediate effect on pending Section 7 consultation decisions for federal
14 projects and ITP applications for non-federal projects where take has been anticipated from
15 habitat degradation and destruction, as well as on the Services’ perceived monitoring and
16 enforcement obligations for existing ITPs and ITSs. The Services will no longer prescribe
17 reasonable and prudent measures or alternatives to minimize the impact of habitat-related
18 takings or the terms and conditions necessary to implement such measures. *See* 16 U.S.C.
19 § 1536(b)(4)(C)(ii), (iv). And the Services have even explicitly stated that if a “permittee is
20 mitigating only for habitat impacts that were considered prohibited as take when their permit
21 was issued, the permittee may choose to return their permit in order to not have to continue
22 expending resources to mitigate.” 91 Fed. Reg. at 43,305.

63. The Rescission will also cause regulatory confusion by signaling that—for the first time in the Services’ over fifty-year administration of the ESA—the Services will no longer require ITPs for any modification or degradation of listed species’ habitat, or otherwise treat modification or destruction of habitat as “take” under the ESA. Entities that heretofore would have been required to obtain ITPs for proposed actions that threatened habitat modification and destruction that actually kills or injures listed fish and wildlife will no longer, according to the Services, need to comply with the regulatory process to avoid and reduce the resulting impacts on listed species, including by preparing conservation plans that minimize and mitigate the impacts of the incidental take “to the maximum extent practicable.” 16 U.S.C. § 1539(a)(2)(B). The same is true for ITSs. Moreover, notwithstanding the Services’ suggestion that ITPs and ITSs finalized before the effective date of the Rescission “will not be required to be reevaluated under this final rule,” 91 Fed. Reg. at 43,302, the continuing legal validity of existing ITPs and Section 7 consultations will be in question, and permittees may well decide they no longer need to abide by the terms and conditions of their existing ITPs and ITSs regarding conservation measures.

FIRST CLAIM FOR RELIEF

Violation of the Endangered Species Act and Administrative Procedure Act: Arbitrary and Capricious, Contrary to Law, and Failure of Rational Decisionmaking

64. The Tribe re-alleges and incorporates by reference each allegation set forth in this Complaint.

65. The ESA prohibits “take,” including “harm” that involves actual killing or injury of imperiled species resulting from habitat modification or degradation. 16 U.S.C. §§ 1532(19), 1539(a)(1)(B).

66. Under the APA, a “reviewing court shall...hold unlawful and set aside” federal agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2).

67. When promulgating a rule, the Services must articulate a satisfactory explanation for their action, including a rational connection between the facts found and the choice made. A regulation is arbitrary and capricious where “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 of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

68. An agency changing course must show “that the new policy is permissible under the statute [and] that there are good reasons for it.” *Fed. Commc’ns Comm’n v. Fox Television Stations*, 556 U.S. 502, 515 (2009). “An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *State Farm*, 463 U.S. at 42.

69. The Services failed to articulate a satisfactory explanation or rational justification for the Rescission. The Services rescinded a 50-year definition of “harm,” which had been upheld by the Supreme Court in *Sweet Home* as reasonable and consistent with the ESA. In its place, the Services adopted a statutory construction proffered by the dissenting opinion in *Sweet Home*, which the majority explicitly rejected as inconsistent with the statutory text, structure, and legislative history. The Services had no rational justification for their

1 decision to adopt the sole statutory construction of “harm” that the Supreme Court had already
2 explicitly rejected.

3 70. Further, the Services subverted the holdings of *Loper Bright*. Rather than
4 respect the Supreme Court’s holding that only the judiciary—and not political actors that may
5 be motivated by political policy preferences—is equipped to determine the meaning of
6 ambiguous statutory terms, the Services took it upon themselves to conclude that the definition
7 of “harm” was “illegal” despite the fact that it had been upheld by the Supreme Court, was
8 promulgated contemporaneously with the statute, and had been consistent for half a century.
9 Moreover, the Services employed a previously unheard-of—and nonsensical—test for a prior
10 court decision employing the *Chevron* interpretive methodology to be entitled to *stare decisis*:
11 not only would a court need to have found an agency interpretation of an ambiguous statutory
12 term “reasonable” under the *Chevron* doctrine, but it would *also* have needed to determine that
13 the interpretation was “the only possible...reading” of the ambiguous statutory term. *See* 91
14 Fed. Reg. at 43,301.

15 71. The Services’ Rescission of the harm definitions is arbitrary, capricious, an
16 abuse of discretion, and otherwise not in accordance with law, in violation of the ESA and the
17 APA. 5 U.S.C. § 706(2).

18 SECOND CLAIM FOR RELIEF – NEPA VIOLATION

19 Violation of the National Environmental Policy Act and Administrative Procedure Act: 20 Failure to Prepare an Environmental Impact Statement/Environmental Analysis and Invalid Use of Categorical Exclusion

21 72. The Tribe re-alleges and incorporates by reference each allegation set forth in
22 this Complaint.
23

1 73. NEPA requires an agency undertaking a “major Federal action[] significantly
2 affecting the quality of the human environment” to prepare a “detailed statement” on the
3 environmental impacts of its action and reasonable alternatives. 42 U.S.C. §§ 4332(2)(C),
4 4336(b)(1). Even where an agency’s undertaking “does not have a reasonably foreseeable
5 significant effect on the quality of the human environment, or if the significance of such effect
6 is unknown,” the agency must evaluate the impact of its action in an environmental
7 assessment. *Id.* § 4336(b)(2).

8 74. The Rescission abandoned a Supreme Court-approved, statutorily-based, and
9 longstanding definition of the term “harm,” which protected listed fish and wildlife from
10 habitat destruction that actually killed or injured listed species for the first time in the history of
11 the Endangered Species Act. The Services instead chose to interpret the term “harm” in a way
12 that “does not permit agencies to factor in habitat modification or degradation in the context of
13 section 9 prohibited take.” 91 Fed. Reg. at 43,310. The Services’ action “has a reasonably
14 foreseeable significant effect on the quality of the human environment.” 42 U.S.C.
15 § 4336(b)(1). Nevertheless, the Services failed to evaluate the Rescission in an environmental
16 impact statement or even an environmental assessment.

17 75. The Services erroneously asserted that the Rescission is “a nondiscretionary
18 action with respect to which such agency does not have authority to take environmental factors
19 into consideration” and therefore exempt from NEPA. *Id.* § 4336(a)(4). The Rescission is
20 discretionary, and the Services’ contention that the ESA compels the Rescission is unfounded.
21 Even if, for the sake of argument, the Services had properly interpreted the ESA, they failed to
22 evaluate alternatives to the Rescission as required by NEPA, including abiding by statutory
23 *stare decisis* principles as discussed in *Loper Bright*.

76. The Services also erroneously asserted, in the alternative, that the Rescission qualifies for a categorical exclusion from NEPA analysis reserved 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); NOAA NEPA Guidance at App’x E, E-14. However, the Rescission will have concrete impacts on listed species and is not of a merely “administrative, financial, legal, technical, or procedural nature.” 43 C.F.R. § 46.210(i). The effects of the Rescission are not too broad, speculative, or conjectural to analyze, and the effects will not be subject to the NEPA process later. The referenced categorical exclusion is inapplicable.

77. No categorical exclusion is available to the Services because the Rescission presents extraordinary circumstances. The Department of the Interior (in which USFWS resides) has determined that extraordinary circumstances exist for actions that “[h]ave significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.” 43 C.F.R. § 46.215(g). NMFS has described extraordinary circumstances as including “considerable adverse effects on species or habitats protected by the Endangered Species Act.” NOAA Policy and Procedures for Compliance with NEPA at 9 (2025), <https://www.noaa.gov/sites/default/files/2025-06/2025NOAANEPAProcedures.pdf>. The effects of the Rescission on species currently—and proposed to be—listed and protected under the ESA are significant and adverse. Other extraordinary circumstances that apply to the Rescission are highly uncertain and potentially significant environmental effects, precedential

1 effect for future actions, and a potential violation of Federal law or requirements imposed for
 2 protection of the environment. *See* 43 C.F.R. § 46.215; NOAA NEPA Guidance at 9. Each of
 3 those extraordinary circumstances would be independently sufficient to prohibit the Services’
 4 reliance on a categorical exclusion.

5 78. The Services’ failure to analyze the environmental effects of the Rescission or
 6 examine a reasonable range of alternatives in an EIS, or even an EA, when promulgating the
 7 Rescission under a false claim of nondiscretionary action and improper use of a categorical
 8 exclusion violated NEPA and the APA. 5 U.S.C. § 706(2).

9 PRAYER FOR RELIEF

10 WHEREFORE, the Tribe respectfully requests that this Court:

11 A. Declare that the Services violated the APA, NEPA, and the ESA when they
 12 issued the Rescission;

13 B. Vacate the Rescission;

14 C. Reinstate the harm definitions previously set forth at 50 C.F.R. §§ 17.3 and
 15 222.102;

16 D. Enjoin the Services from applying the Rescission and require them to apply,
 17 utilize, and follow the harm definitions previously in force

18 E. Grant such orders and/or injunctive relief as the Tribe may request to ensure
 19 that threatened and endangered species and their habitat do not suffer irreparable harm pending
 20 resolution of the merits of this case;

21 F. Award the Tribe its reasonable fees, expenses, costs, and disbursements,
 22 including attorneys’ fees associated with this litigation under the citizen suit provision of the
 23

1 ESA, 16 U.S.C. § 1540(g)(4), Equal Access to Justice Act, 28 U.S.C. § 2412, or any other
2 applicable law;

3 G. Grant the Tribe such additional relief as the Court determines is just and proper.
4

5 Respectfully submitted this 14th day of July, 2026.
6

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8 s/Laura Boyer
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

PUYALLUP TRIBE OF INDIANS



(b) County of Residence of First Listed Plaintiff Pierce
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See Attachment

DEFENDANTS

NATIONAL MARINE FISHERIES SERVICE and
UNITED STATES FISH AND WILDLIFE SERVICE

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury - Medical Malpractice PERSONAL INJURY ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 740 Railway Labor Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Employee Retirement Income Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 835 Patent - Abbreviated New Drug Application ☐ 840 Trademark ☐ 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 375 False Claims Act ☐ 376 Qui Tam (31 USC 3729(a)) ☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit (15 USC 1681 or 1692) ☐ 485 Telephone Consumer Protection Act ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 448 Education PRISONER PETITIONS Habeas Corpus: ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 USC §§ 701-706

Brief description of cause:

Plaintiff challenges the federal defendants' final agency action to rescind a regulatory definition under the Endangered Species Act

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
0.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Not yet assignedDOCKET NUMBER 2:26-cv-02473, 2:26-cv-02474

DATE

Jul 14, 2026

SIGNATURE OF ATTORNEY OF RECORD

/s/ Jane G. Steadman

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

ATTACHMENT

Puyallup Tribe of Indians v. National Marine Fisheries Service et al.

Jane Steadman, WSB #44395

Laura Boyer, OSB # 261755*

Kanji & Katzen, P.L.L.C.

811 1st Ave., Suite 640

Seattle, WA 98104

(206) 344-8100

jsteadman@kanjikatzen.com

lboyer@kanjikatzen.com

** Pro hac vice application pending*

Lisa A. Anderson, WSB #27877

Puyallup Tribe of Indians

3002 Duct Cho Street

Tacoma, WA 98404

(253) 573-7852

Lisa.Anderson@PuyallupTribe-nsn.gov

Attorneys for Puyallup Tribe of Indians

Western District of Washington

Civil Action No. 26-cv-05788

Signature of Clerk or Deputy Clerk

for the

PUYALLUP TRIBE OF INDIANS.

Plaintiff(s)

V.

NATIONAL MARINE FISHERIES SERVICE and
UNITED STATES FISH AND WILDLIFE SERVICE.

Defendant(s)

Civil Action No. 26-cv-05788

To: *(Defendant's name and address)* U.S. FISH AND WILDLIFE SERVICE
1849 C Street NW
Washington, DC 20240

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff’s attorney, whose name and address are:

Jane G. Steadman
Kanji & Katzen, P.L.L.C.
811 1st Avenue, Suite 640
Seattle, WA 98104

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

for the

PUYALLUP TRIBE OF INDIANS.

Plaintiff(s)

V.

NATIONAL MARINE FISHERIES SERVICE and
UNITED STATES FISH AND WILDLIFE SERVICE.

Defendant(s)

Civil Action No. 26-cv-05788

To: *(Defendant's name and address)* CHARLES NEIL FLOYD
FIRST ASSISTANT U.S. ATTORNEY
c/o Civil Process Clerk
U.S. Attorney's Office for the Western District of Washington
1201 Pacific Avenue, Suite 700
Tacoma, WA 98402-4305

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jane G. Steadman
Kanji & Katzen, P.L.L.C.
811 1st Avenue, Suite 640
Seattle, WA 98104

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

for the

PUYALLUP TRIBE OF INDIANS.

Plaintiff(s)

V.

NATIONAL MARINE FISHERIES SERVICE and
UNITED STATES FISH AND WILDLIFE SERVICE.

Defendant(s)

Civil Action No. 26-cv-05788

To: *(Defendant's name and address)* TODD BLANCHE
ACTING U.S. ATTORNEY GENERAL
U.S. Department of Justice
Office of the Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff’s attorney, whose name and address are:

Jane G. Steadman
Kanji & Katzen, P.L.L.C.
811 1st Avenue, Suite 640
Seattle, WA 98104

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk