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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

**CENTER FOR BIOLOGICAL DIVERSITY
and AUDUBON SOCIETY OF PORTLAND,**

Plaintiffs,

v.

DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior; **MARTHA WILLIAMS**, in her official capacity as Director of the U.S. Fish and Wildlife Service; and **U.S. FISH AND WILDLIFE SERVICE**,

Defendants.

Case No. 23-cv-00150-AN

**MOTION FOR SUMMARY
JUDGMENT AND
MEMORNADUM IN SUPPORT**

Request for Oral Argument

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs, the Center for Biological Diversity and the Audubon Society of Portland (collectively the “Conservation Groups”), hereby move for summary judgment on their claims alleging that Defendants’ determination to list the streaked horned lark (“Lark”) as a threatened rather than endangered species contravenes the best

available science and is arbitrary and capricious, Complaint, ECF 1, ¶¶ 89–94, in violation of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2), and that the Defendant’s 4(d) Rule violates the ESA and APA because it does not provide for the conservation of the Lark and is arbitrary and capricious. Complaint, ¶¶ 95–100. This motion is supported by the accompanying memorandum, the concurrently filed declarations, and the administrative record lodged by Defendants. In compliance with LR 7-1, the parties made a good faith effort through personal conferences to resolve this dispute and have been unable to do so.

Respectfully submitted this 19th day of October 2023.

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Introduction

With critically small populations, the streaked horned lark (“Lark”) stands on the brink of extinction. Yet despite this, and significant ongoing threats including habitat loss and those associated with small and isolated populations, the U.S. Fish and Wildlife Service (“Service”) determined that the Lark did not warrant listing as an endangered species under the Endangered Species Act (“ESA”). Instead, the Service listed the Lark as a threatened species, which allowed the agency to promulgate a regulation, known as a “4(d) Rule,” that exempts agricultural activities, including those that result in the loss of Lark habitat and the direct destruction of nests, from the otherwise blanket prohibition on harming, harassing, or killing Larks, known under the ESA as “take.”

But neither the Service’s determination that the Lark is threatened rather than endangered, nor its reasons for exempting agricultural activities from the prohibition on take, stand up to scrutiny. In particular, the Service failed to grapple with the fact that most of the Lark’s populations are critically small, in many cases fewer than ten pairs of birds, and at immediate risk of blinking out of existence, throughout all of its range.

Despite the Lark’s dire status and the many threats facing it—including urban sprawl, agriculture, lack of natural disturbance such as flooding to restore its habitat, air strikes, sea-level rise, and more—the Service also failed to analyze in any meaningful way whether the Lark is endangered in a “significant portion of its range,” as required by the ESA. Instead, the agency engaged in a perfunctory analysis, not required by the statute, where it concluded that the Lark does not face a “concentration of threats” in any portion of its range despite clear evidence of known and unique threats facing the species in the three regions in which it is still found: the Willamette Valley, the Pacific Coast and Columbia River, and the South Puget Lowlands.

The Service’s arbitrary refusal to list the Lark as endangered allowed the agency to issue the 4(d) Rule excepting all routine agricultural practices from the prohibition of take of the Lark, even though agricultural practices, such as mowing, are known to harm or kill adult Larks, destroy nests, and crush eggs and newborn Larks. This Rule was justified in large part by the Lark’s use of grass seed farms but applies equally to all crops, including those that provide no benefit to the Lark. Indeed, converting a grass seed field to another crop, in effect destroying habitat for the Lark, would be included in this exception.

The ESA requires 4(d) rules, however, to further the “conservation” of the species they are supposed to protect, requiring the Service to justify its assertion that the 4(d) Rule will ultimately benefit the Lark despite its known harms. The Service claimed the 4(d) Rule would benefit the Lark by encouraging farmers to maintain grass seed farms and to take voluntary action to protect the Lark. But even though the 4(d) Rule has, in similar form, been in place for a decade, there is zero evidence in the record that the Service’s 4(d) Rule has done, or will do, anything to conserve even a single Lark, let alone bring the Lark “to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3) (ESA definition of “conservation”). To the contrary, efforts to recruit farmers in the conservation of the Lark and to conserve grass seed farms—the purported rationales for the 4(d) Rule—have been entirely unsuccessful.

As such, both the Service’s determination to list the Lark as a threatened rather than endangered species and the Service’s 4(d) Rule are contrary to the best available science, unsupported by the record, and arbitrary and capricious in violation of the ESA and the Administrative Procedure Act (“APA”). Plaintiffs, the Center for Biological Diversity and Audubon Society of Portland (collectively “Conservation Groups”), therefore ask this Court to

order the Service to issue a new listing determination for the Lark within one year of this Court's order and to vacate the 4(d) Rule's exception from take for agricultural practices.

Legal Background

The purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). In enacting the ESA, Congress spoke “in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

None of the protections of the ESA are available, however, unless a species is listed as either “endangered” or “threatened.” An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range[.]” 16 U.S.C. § 1532(6). A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). “The term ‘species’ includes any subspecies of fish or wildlife or plants[.]” *Id.* § 1532(16).

Whether a species is endangered or threatened “throughout all” of its range is separate and distinct from the question of whether a species is endangered or threatened in a “significant portion of its range.” *Def. of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001). The ESA does not define what constitutes a “significant portion” of a species’ range. However, in 2014, the Service and the National Marine Fisheries Service promulgated a “Final Policy on the Phrase ‘Significant Portion of Its Range’ in the [ESA’s] Definitions of ‘Endangered Species’ and ‘Threatened Species.’” 79 Fed. Reg. 37,578 (July 1, 2014). According to this policy, much of

which has been judicially overturned,¹ the Service determines “whether the threats are geographically concentrated in some way.” *Id.* at 37,586. If the Service finds that threats occur uniformly throughout the range of a species, no further “significant portion” analysis is conducted.

The Service determines whether a species is “endangered” or “threatened” on the basis of one or more of five statutorily prescribed factors: “(A) the present or threatened destruction, modification, or curtailment of a species’ habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting a species’ continued existence.” 16 U.S.C. § 1533(a)(1)(A)–(E); *see also* 50 C.F.R. § 424.11(c). The agency must list a species if “any one or a combination” of these factors demonstrates that the species is threatened or endangered. 50 C.F.R. § 424.11(c). Accordingly, in making the listing determination, the ESA requires the Service to consider the listing factors both individually and in combination. *Ctr. for Biological Diversity v. Everson*, 435 F. Supp. 3d at 81. The Service must make listing determinations “solely on the basis of the best scientific ... data available.” 16 U.S.C. § 1533(b)(1)(A).

Once a species is listed under the ESA, an array of statutory protections applies. For example, the Service must designate “critical habitat” for the listed species, *id.* § 1533(a)(3), and

¹ *See Ctr. for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) (rejecting the policy’s definition of “significant” because it rendered “the SPR language of the ESA superfluous by limiting it to situations in which it is unnecessary”); *see also Ctr. for Biological Diversity v. Everson*, 435 F. Supp. 3d 69, 93 (D.D.C. 2020) (rejecting the policy’s position that the Service need not determine whether a species is endangered in a significant portion of its range if a species is threatened throughout all of its range because “the policy renders the ‘endangered in a significant portion of its range’ basis for listing superfluous” in such instances).

“develop and implement” recovery plans for the listed species, *id.* § 1533(f). Additionally, Section 9 of the statute prohibits various activities including the unauthorized “take” of all endangered species. *Id.* § 1538(a). “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.* § 1532(19). In turn, “harm” has been defined by regulation to encompass “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

The ESA’s take provisions, however, do not automatically apply to species listed as threatened. 16 U.S.C. § 1538(a)(1). Instead, Section 4(d) provides that the Service “shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species,” and “may” by regulation extend any of the prohibitions of Section 9 to threatened species. *Id.* § 1533(d) (emphasis added). The statute defines 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 chapter are no longer necessary.” *Id.* § 1532(3).

Factual Background

A. The Lark

The Lark is a subspecies of horned lark that is endemic—i.e., it exists nowhere else on Earth—to the Pacific Northwest west of the Cascades. AR00315. Extirpated from the northern and southern portions of its range, the Lark is now found in only three regions: (1) the South Puget Lowlands in Washington, (2) the Pacific Coast and Lower Columbia River in Washington and Oregon, and (3) the Willamette Valley in Oregon. AR00316. Larks are small, ground-dwelling birds. AR00315. Generally pale brown with yellow washes on the male’s face, adults

“have a black bib, black whisker marks, black ‘horns’ (feather tufts that can be raised or lowered), and black tail feathers with white margins.” AR00315.



AR00054

Larks form pairs in the spring; the nesting season begins in mid-April and ends in late August with peaks in May and early June. AR00315. Following an initial nesting attempt in April, Larks often attempt to re-nest in late June or early July. AR00315.

Historically, Larks thrived in relatively flat, open areas that were maintained by flooding, fire, and sediment transport dynamics. AR00315. However, the historic conditions that maintained these habitats have been interrupted by flood control, dams, and fire suppression. AR00315. Lacking the conditions that previously created and maintained their habitat, Larks

now significantly rely on large, open areas created by anthropogenic (i.e., human-caused) disturbance, such as grass seed fields. AR00315.

However, “[w]hile the [L]ark has benefited from creation of these ‘replacement’ habitats, anthropogenic modification and use of these sites expose [L]arks to disturbances, particularly during the breeding season, which may kill or injure all life stages of the bird.” AR00265. These replacement habitats, such as grass seed fields, are also being lost as they are “converted to other uses, including industrial and residential development, as well as different crop types,” which do not provide suitable Lark habitat. AR00282.

Larks are also threatened by “[I]and management activities and their relative effects ..., including airport management activities and aircraft strikes, military training and activities, certain restoration actions, certain agricultural practices, and the placement of dredged materials.” AR00266. “Other stressors affecting the survival of [L]arks at the population level including recreation and trainings at civilian airports.” AR00266.

As a result of these threats, Larks are in a highly depleted state and now the very fact that so few Larks remain threatens the subspecies, as it is impacted by the negative effects inherent in extremely small population sizes. With much of its population now found at sites with few breeding pairs—often less than ten, *see* AR00239–40, AR00241–42, AR00243—the Lark’s populations “are more vulnerable ... to genetic effects that plague small populations, collectively known as small population effects.” AR00325. “These effects can include genetic drift, founder effects (over time, an increasing percentage of the population inheriting a narrow range of traits), and genetic bottlenecks leading to increasingly lower genetic diversity, with consequent negative effects on adaptive capacity and reproductive success.” AR00325. Small populations are also “at

risk of random environmental events ... such as ice storms and flooding ... that could have catastrophic consequences.” AR00042.

The Lark’s numbers are also far below those determined by biologists to be “minimally viable.” To assess the ability of a species to survive, conservation biologists consider what constitutes a species’ “minimum viable population” (“MVP”). AR00315. The average MVP for the taxonomic groups Aves (which encompasses all birds) and Passerines (which encompasses Larks) “has been identified as 5,269 and 6,416 individuals, respectively.” AR00315.

The MVP for Larks specifically is “most likely larger than the [Lark’s] current abundance.” AR00315. The Service has set a minimum “rangewide population target of 5,725 individuals.” AR00316. “The current rangewide population estimate for the [Lark] is substantially below” this target as “[t]he most recent rangewide population estimate for [Larks] is 1,170 to 1,610 individuals.” AR00247. The only available rangewide trend data, provided by the North American Breeding Bird Survey, also “indicates a 6.52 percent decline for the subspecies between 2005 and 2015.” AR00318.

On a region-by-region basis, the Service has set the MVP at 700 Larks for the South Puget Lowlands, 525 Larks for the Pacific Coast and Lower Columbia River, and 4,500 Larks for the Willamette Valley. AR00070. But all of the regional populations are far below these targets. *Compare* AR00318 *with* AR00070. In 2019, only 121–127 breeding pairs were surveyed in the South Puget Lowlands, 97 pairs in the Pacific Coast and Lower Columbia River, and 165 pairs in the Willamette Valley. AR00317. Two of the seven sites surveyed in the South Puget Lowlands had fewer than ten breeding pairs in 2019, AR00239–40, and none of the Pacific Coast populations in 2019 were known to have more than ten breeding pairs. AR00241. Of the 18 sites surveyed on the Lower Columbia River in 2019, only two sites had more than ten breeding pairs,

14 had fewer than five breeding pairs, and two sites recorded no breeding pairs. AR00241. Similarly, of the nine sites surveyed in the Willamette Valley in 2019, five sites had fewer than ten breeding pairs. AR00243.

B. The Lark's Initial Listing Under the ESA

The Service first identified the Lark as in need of ESA listing in 2001. 66 Fed. Reg. 54,808 (Oct. 30, 2001). In 2002, Plaintiff Center for Biological Diversity (“Center”) and other conservation organizations submitted a formal listing petition to the Service. Petition to List Streaked Horned Lark (*Eremophila alpestris strigata*) as a Federally Endangered Species (Dec. 10, 2002).² Among other threats, the Petition stressed that “[i]n the Willamette Valley it is estimated that more than 99% of the native grassland has been lost” to agriculture and other human impacts, and that in order for the Lark to persist on the agricultural lands that have displaced the birds’ natural habitat, it is essential that efforts be made to lessen adverse effects during the active breeding season. *Id.* at 11.

Following submission of the Petition, the Service repeatedly determined that the Lark faced “imminent threats of a high magnitude” due to the “continued loss of suitable lark habitat, risks to the wintering populations,” “plans for development,” and other activities that are “imminent threats to the species.” *See, e.g.*, Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 71 Fed. Reg. 53,756, 53,761 (Sept. 12, 2006). Although the Service assigned the Lark the highest possible “listing priority,” *id.*, the agency took no action to list the Lark until it was sued by the Center for failing to make ESA

² Available at https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/petition/646.pdf.

listing decisions regarding the Lark and other species in a timely manner. *See In re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377 (EGS), MDL Docket No. 2185 (D.D.C. 2010).

In October 2012, the Service finally proposed listing the Lark under the ESA. AR00002. Despite painting a bleak picture of the Lark's status at that time and the myriad threats to its continued existence, the Service proposed to list the Lark as threatened rather than endangered. AR00002. Subsequently, despite expert peer reviewers and other commentors expressing concern over the Service's proposal to not list the Lark as endangered, in October 2013, the Service published a final regulation listing the Lark as threatened. *See generally* AR00001–53. The Service concurrently published a 4(d) rule that omitted protections urged by peer reviewers and other commentors and exempted all routine agricultural activities in the Willamette Valley—where most Larks occur—from the ESA's prohibition on killing or otherwise taking Larks, including during the breeding season. AR00050–53.

The Center challenged the 2013 Final Listing Determination and 4(d) Rule in the District of Oregon in 2018. *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, No. 3:18-cv-359-MO (D. Or. 2018). The Center argued that the Service's refusal to list the Lark as endangered and the 4(d) Rule were contrary to the ESA and arbitrary and capricious. Following summary judgment briefing and oral argument, the court (Judge Mosman) ruled that the Service had acted arbitrarily and capriciously in its analysis of whether the Lark was endangered in a significant portion of its range because the court found that the Service had failed to explain how it had reached its determination that the Lark's South Puget Sound population was not endangered. *See* Ex. A, Transcript at 44–45. The Court also remanded the 4(d) Rule for further consideration along with the listing decision. *Id.* at 45–46.

C. The Service’s Decision on Remand

Following remand, the Service conducted a new species status assessment (“SSA”)³ which again found that the Lark faces myriad threats and that its population numbers are well below the Service’s targets for a viable population. AR00080–165. Nonetheless, on April 13, 2021, the Service again proposed maintaining the listing of the Lark as a threatened rather than an endangered species. *See generally* AR00166–187 (“Proposed Rule”). The Service also proposed *expanding* the 4(d) Rule’s blanket exemption for agricultural activities to the entirety of the species’ range (and not just the entire Willamette Valley). *Id.*

The Service’s own hand-picked expert peer reviewers, along with other commenters, again objected to the Service’s refusal to list the Lark as an endangered species, as well as the 4(d) Rule’s sweeping exceptions. *See* AR00190–205 (comments on the Proposed Rule submitted by Mr. Bob Altman); AR00211–00215 (comments on the Proposed Rule signed by Mr. Joe Liebezeit); AR08034–8038 (Mr. Liebezeit’s comments on the draft SSA); AR08039–8056 (Mr. Altman’s comments on the draft SSA). Nevertheless, following the Proposed Rule and comments, the Service updated the SSA and then, on April 13, 2022, finalized its determination that the Lark is a threatened rather than endangered species—i.e., it is not presently in danger of extinction despite its regional and rangewide population numbers being far below the Service’s own MVPs for the subspecies—throughout all or a portion of its range. AR00309–38 (“Threatened Determination”).

³ According to the Service, “the SSA Framework,” which is not mentioned in the ESA itself, “results in the development of a report that is intended to provide biological support for the decision of whether or not to list the [L]ark as threatened or endangered This SSA report does not result in a decision by the Service on whether this taxon should be proposed for listing as a threatened or endangered species under the Act. Instead, this SSA report provides a review of the available information strictly related to the biological status of the [L]ark.” AR00229.

In the updated SSA,⁴ the Service provided what it said was the best available science regarding the Lark accompanied by the agency’s assessment of the Lark’s current and future viability. AR00220–308. In this assessment, the Service acknowledged that the Lark “has been extirpated from British Columbia, and the Umpqua and Rogue Valleys of Oregon[,]” and is “now found only at scattered sites in the South Puget Lowlands, the Pacific Coast, the Lower Columbia River, and the Willamette Valley.” AR00222. The Service also acknowledged the “steep decline in the quantity, quality, and distribution of suitable habitat for the [L]ark.” AR00222. In addition to habitat loss, the Service noted that the Lark’s continuing viability was threatened by “the ongoing loss and degradation of suitable habitat, military training, land management activities and related effects, recreation, and aircraft strikes.” AR00222.

Similarly, in its final Threatened Determination, the Service acknowledged that the best available science indicated that only an estimated 1,170–1,610 Larks remained rangewide—far fewer than the 5,725 the Service had determined were needed for the Lark to be considered minimally viable. AR00315–16. Despite these dire numbers, the Service asserted that Lark populations had increased since 2013, AR00317, even though the Service admitted that the available data was insufficient to establish population trends and that the only rangewide survey data suggested that Lark populations had declined by 6.52 percent between 2005 to 2015. AR00318.

Ultimately, the Service found that “the subspecies is not currently in danger of extinction” throughout all of its range. AR00331. The agency reached this conclusion “[d]espite the ongoing influence of ... [the] loss of preferred habitats ... as a result of successional changes

⁴ Unless stated otherwise, hereafter, “SSA” refers to the SSA prepared by the Service in March, 2022. *See* AR00220–00308.

in plant species composition and encroachment of woody vegetation; invasion of beach grasses; conversion of suitable habitat into unsuitable habitat through changes in land use; changes in agricultural practices from crops that mimic preferred habitat[,] ... land management activities ... [and] other human activities, including agricultural activities, airport management activities and related airstrikes, military training and related activities, the placement of dredged materials, and recreation[.]” AR00330–331.

Following the court’s prior ruling that the Service had failed to support its determination that the Lark was not endangered in the South Puget Lowlands despite painting the Lark’s condition there in extremely bleak terms, Ex. A, Transcript, at 44–46, the Service again found that the Lark does warrant an endangered listing based on its status in a “significant portion of its range.” But this time, the agency adopted a new rationale: it “considered whether the threats [facing the Lark] are geographically concentrated in any portion of the species’ range such that the threats presently affect enough individuals in an area to influence the resiliency of a population.” AR00331. The agency then stated that while the various threats facing the subspecies varied across its range, “there is no portion of the range where there is currently a concentration of threats relative to other areas in the range.” AR00332. Because, according to the Service, “there are no portions of the species’ range where the species has a different status from its rangewide status,” the Service thus determined that “no portion of the species’ range provides a basis for determining that the species is in danger of extinction in a significant portion of its range.” AR00332.

The Service also reaffirmed its support for a sweeping 4(d) Rule that allows Larks to be killed, injured, and otherwise taken on agricultural lands in the absence of any efforts by landowners to minimize or mitigate such harms (e.g., by making even rudimentary efforts to

avoid mowing active Lark nests). AR00333–338. The Service’s primary revision to the prior 4(d) rule was to expand the authorization for taking Larks beyond the Willamette Valley of Oregon, so that anyone engaged in any “agricultural activities” in any portion of the Lark’s dwindling range may kill, injure, or otherwise take Larks with impunity. *See* AR00333 (explaining that “[t]he exception for incidental take for certain agricultural activities on non-Federal lands applies throughout the range of the subspecies in Oregon and Washington, rather than only the Willamette Valley of Oregon”).

Standard of Review

The APA provides the standard of review in lawsuits challenging the Service’s ESA listing decisions. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). Under the APA’s standard, a court must hold unlawful and set aside “agency actions found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)(A)). Agency actions are “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, 43 (1983) (“*State Farm*”).

This Court’s review is “a substantial inquiry,” requiring “a thorough, probing, in-depth review.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (cleaned up). Even when the Service acts within its area of competence, a court “need not defer to the agency when the agency’s decision is without substantial basis in fact, and there must be a

rational connection between the facts found and the determinations made.” *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009).

Argument

As noted, the ESA requires the Service to list a species as “endangered” if it is “in danger of extinction throughout all *or* a significant portion of its range.” 16 U.S.C. § 1532(6) (emphasis added). Accordingly, if the best available science demonstrates that a species is in danger of extinction *either* in all of its range or in any “significant portion” thereof, listing the species as endangered is mandatory. *See, e.g., Ctr. for Biological Diversity v. Jewell*, 248 F. Supp. 3d at 957 (explaining that the Service’s listing decisions must “ensur[e] that the ‘significant’ and ‘all’ language of the ESA [definition of endangered] will retain independent meaning”). In refusing to list the Lark as endangered, the Service has made arbitrary findings both as to the Lark’s status throughout all of its range and in portions of its range where its survival is especially tenuous.

When considering whether the Lark is endangered throughout all of its range, the Service failed to address the negative effects inherent in small populations when assessing the Lark’s current status despite the Lark’s estimated population being far below what the Service itself considers minimally viable and most populations being very small. Against this backdrop, the Service’s justifications for concluding that it is not endangered throughout all of its range—that “the species [allegedly] retains multiple populations in high and moderate condition across all representative regions, those populations occur in a variety of habitat types, and no threat at its existing or imminent level could plausibly change that state of affairs[,]” AR00331—are not supported by the best available science, or, in the case of their population thresholds for high and moderate condition populations, any science at all.

The Service also failed to analyze in any meaningful way whether the Lark is endangered in a significant portion of its range. The agency's cursory assertion that the Lark does not face a biologically meaningful concentration of threats in any portion of its range is contradicted by the Service's own assessment of the threats facing the species in the Willamette Valley, the Pacific Coast, and the South Puget Lowlands.

The Service's arbitrary refusal to list the Lark as endangered allowed the agency to largely re-issue the prior 4(d) Rule authorizing the unlimited incidental take of Larks from agricultural practices, now throughout the Lark's range. The 4(d) Rule, however, violates the plain language of the ESA because it fails to further the "conservation" of the Lark. 16 U.S.C. § 1533(d). Indeed, despite the sweeping 4(d) Rule being in place for over 10 years, there is no evidence in the record that it has done, or will do, anything to conserve even a single Lark, let alone bring the Lark "to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. § 1532(3) (ESA definition of "conservation"). As such, the 4(d) Rule demonstrably does not provide for the conservation of the Lark, is neither necessary nor advisable and is arbitrary and capricious, in violation of the ESA.

I. The Conservation Groups Have Article III Standing to Challenge the Threatened Determination and 4(d) Rule

The Conservation Groups have standing to bring this suit on behalf of their members, whose interests in the Lark are harmed by the Service's Threatened Determination and 4(d) Rule. To satisfy Article III's standing requirements, a plaintiff must demonstrate that (1) it is injured, (2) the injury is fairly traceable to the challenged action, and (3) a court order could redress that injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Since the Conservation Groups are suing on behalf of their members, they must satisfy three additional prerequisites: "(1) their members must otherwise have had standing to sue on their own behalf; (2) the interests at stake

must be germane to the organizations' purposes; and (3) neither the claim asserted nor the relief requested must require the participation of individual members in the lawsuit." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002).

The Conservation Groups' members have aesthetic, professional, recreational, and personal interests in looking for and observing the Lark in its natural habitat. *See* Declaration of Noah Greenwald, ¶¶ 4–6 (detailing his interest in the Lark); Declaration of Joe Liebezeit, ¶¶ 5–13 (detailing his interest in the Lark). These interests are harmed by the Service's failure to list the Lark as endangered because "[a] threatened listing does not provide the species with the stricter statutory protections it needs to survive, flourish, and procreate in their natural environment and habitats." Liebezeit Decl. ¶ 14; Greenwald Decl. ¶ 6. An order from this Court requiring the Service to reconsider whether the Lark warrants listing as an endangered species or to reconsider the 4(d) Rule's exception for agricultural practices would redress those injuries. Liebezeit Decl. ¶ 14; Greenwald Decl. ¶ 7; *see also Badgley*, 309 F.3d at 1171–73 (finding plaintiff organizations had standing to sue on behalf of their members over the Service's failure to comply with the requirements of Section 4 of the ESA for several species).

The Conservation Groups' members therefore "have standing to sue in their own right." The interests at stake are also germane to the Conservation Groups' purposes of protecting imperiled species and their habitats, including the Lark, *see* Liebezeit Decl. ¶¶ 3–4, 14; Greenwald Decl. ¶¶ 2–3, and "neither the claim asserted nor the relief requested requires the individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). The Conservation Groups thus have standing to sue on behalf of their members.

II. The Service’s Determination That the Lark is “Threatened” Rather Than “Endangered” in “All” of its Range is Contrary to the Best Available Science and is Arbitrary and Capricious

The Service’s determination that the Lark is not currently “in danger of extinction” throughout all of its range, 16 U.S.C. § 1532(6), is arbitrary and capricious because the Service ignored the significant negative effects inherent to the Lark’s small population sizes when considering the Lark’s current status, despite the agency’s prior recognition of the Lark’s “inherent vulnerability ... due to small population sizes and isolation of small populations.” AR00044. The justifications the Service does give for finding that the Lark is threatened rather than endangered are premised on faulty assumptions, contrary to the best available science and the opinion of expert peer reviewers.

A. In Refusing to List the Lark as Endangered, The Service Failed to Address the Risks Posed By Extremely Small Population Size.

In refusing to list the Lark as endangered, the Service ignored one of the largest threats facing the subspecies—“those often associated with small populations, such as low genetic diversity and reduced recruitment.” AR00065; *see also* AR00065 (noting in the Draft Recovery Plan that “[c]urrent threats to the [L]ark are mainly those associated with small population, and can be alleviated with a larger self-sustaining rangewide population that is less susceptible to environmental and demographic stochasticity”). As explained by Mr. Altman—one of the Service’s hand-picked peer reviewers and a leading expert on the Lark⁵—“the absence of small population size as *a primary stressor* is a glaring omission. Its absence *invalidates* any conclusions that do not recognize the multiple potential consequences of population declines or

⁵ *See* AR08047–50; AR00190 (detailing Mr. Altman’s decades of experience studying the Lark); AR00221 (the Service thanking Mr. Altman for his “valuable review” of the SSA).

extirpations that are either enhanced in likelihood or exacerbated in rate with small populations.” AR08054 (Mr. Altman’s peer review comments on the SSA) (emphasis added).

As the Service acknowledged outside of its assessment of the Lark’s current status, “populations that are small, isolated by habitat loss or fragmentation, or impacted by other factors are more vulnerable to extirpation by natural, randomly occurring events . . . , and to genetic effects that plague small populations, collectively known as small population effects.” AR00325. “These effects can include genetic drift, founder effects (over time, an increasing percentage of the population inheriting a narrow range of traits), and genetic bottlenecks leading to increasingly lower genetic diversity, with consequent negative effects on adaptive capacity and reproductive success.” AR00325. Small populations are also “at risk of random environmental events . . . such as ice storms and flooding . . . that could have catastrophic consequences.” AR00042.

Indeed, genetic analysis of Larks in the South Puget Lowlands “has shown that [Larks] have suffered a loss of genetic diversity due to a bottleneck in population size, the effect of which may be exacerbated by continued small population size.” AR00263. Many sites with low populations also have skewed male sex ratios, which “is currently a concern range-wide, especially at coastal sites, some of the smaller breeding areas in the South Puget Lowlands region, and along the lower Columbia River.” AR00263. Indeed, small population size impacts the Lark across its range. Of the 37 populations monitored in 2019, 23 of them—over 60 percent—have fewer than ten observed breeding pairs. *See* AR00239–40, AR00241, AR00243.

Despite noting the dire threats associated with extremely small population sizes, the Service fails to actually assess how these threats are affecting the Lark’s *current viability*—the central question in determining whether the Lark is “in danger of extinction” now rather than

becoming so in the foreseeable future. Instead, while erroneously asserting that “small population size does not influence populations on its own,” the Service failed to incorporate the negative effects inherent to small populations into its analysis of the Lark’s current condition. AR00330–31, *see also* AR00324 (“Table 4. Summary of factors influencing regional populations”); *see also* AR00311 (failing to analyze the impact of small population sizes on the Lark after the issue was explicitly raised by commenters).

The Service’s failure to connect the dots—to take the negative genetic and other effects associated with small population size and analyze how they are currently impacting the Lark’s tiny, remaining populations—“fail[s] to consider an important aspect of the problem[.]” *State Farm*, 436 U.S. at 43. The Service cannot “brush[] the small population size/low genetic diversity issue aside[.]” *Def. of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1006 (D. Mont. 2016). The Service’s failure to actually analyze the negative effects of small population sizes when considering whether the Lark is in danger of extinction now, instead of becoming so in the foreseeable future, renders the Threatened Determination arbitrary and capricious, especially considering the Service’s prior recognition in its 2013 threatened determination of the Larks’ “inherent *vulnerability* ... due to small population sizes and isolation of small populations.” AR00044 (emphasis added); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 246 F. Supp. 3d 1272, 1281 (N.D. Cal. 2017) (setting aside the Service’s determination that the coastal marten did not warrant listing because the Service “failed to recognize that the evidence showed a small and declining California marten population”).

B. The Assumptions Underlying the Service’s Threatened Determination Are Contrary to the Best Available Science and the Agency’s Own Record

Having failed to expressly consider how the effects of very small population sizes are currently putting the Lark “in danger of extinction,” the Service may assert that it did so

implicitly when it determined that the Lark allegedly maintains multiple resilient populations rangewide. Indeed, the cornerstone of the Service's determination that the Lark is threatened rather than endangered throughout its range is the agency's assertion that the Lark remains resilient because it "retains multiple populations in high and moderate conditions across all representative regions[.]"⁶ AR00331. In reality, the record reflects that few, if any, of the Lark's remaining small populations are truly resilient, and the Service's "high" or "moderate" condition labels have no basis in the best available science.

To reach its determination, the Service categorized each of the Lark's 42 local populations' resiliency as "high," "moderate," "low," or "extirpated." AR00268–76. The Service categorized a population as having "high" resiliency ("the ability ... to withstand disturbances of varying magnitude and duration," AR00222) if regular surveys detected more than 20 breeding pairs in the South Puget Lowlands, 15 breeding pairs on the Pacific Coast, 20 breeding pairs on the Lower Columbia River, and 25 breeding pairs in the Willamette Valley. AR00271, AR00325. The Service considered a population to have "moderate" resiliency if regular surveys detected 10–20, 7–15, 10–20, or 15–25 breeding pairs for the respective regions. AR00271, AR00325.

But these numbers are entirely arbitrary and lack any support in the record. As Mr. Liebezeit, another of the Service's own expert peer reviewers of the SSA, pointed out, the Service's arbitrarily chosen "high" and "moderate" breeding pair ranges have no basis in science, nor did the Service provide any justification for them. *See* AR08034 (Mr. Liebezeit's peer review of the SSA noting that SSA does not "say where these numbers came from nor describe the

⁶ The Service (and this memorandum) uses the term "population" in three different context: "rangewide" when referring to all Larks across the range, "regional" when referring to "any of the three distinct regions," and "local" to refer to the "numerous breeding sites or areas of habitat to which individuals return each year." AR00230–31.

rationale for selecting them”). The Service’s finding provides no explanation for why the number of Larks needed for a “resilient” population would fluctuate from region to region, and the Service’s ranges also conflict with the prior “minimum targets” for the Willamette Valley region set by the Service, in coordination with the Washington and Oregon Departments of Fish and Wildlife and a group of species experts, in the Draft Recovery Plan to ensure “population size[s] sufficient to withstand foreseeable long-term threats.” AR00069–70. There, the Service had previously determined that highly resilient local populations would include sites with more than 50 pairs in the Willamette Valley Region. AR00070.

Based on those criteria (≥ 50 pairs), only one population in the Willamette Valley, the Corvallis Municipal Airport, has “high” resiliency. *See* AR00243. Yet the Service categorized both the Corvallis Municipal Airport and Baskett Slough National Wildlife Refuge populations as also having “high” resiliency, AR00276, despite the Baskett Slough population having only between 17 to 35 recorded breeding pairs. AR00243. Such an unexplained inconsistency contravenes the ESA’s best available science standard and flunks the minimum requirements of non-arbitrary decision-making under the APA. *See Humane Soc’y of the United States v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) (holding that “[d]ivergent factual findings . . . raise questions as to whether the agency is fulfilling its statutory mandates impartially and competently,” and that “[a] satisfactory explanation is therefore required”) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)).

Further, the Service’s assertion that such miniscule populations have “high” resiliency is not only unsupported and counterintuitive but also contrary to the best available science in the record. According to Hannah Anderson of the Center for Natural Lands Management, who analyzed what would constitute an MVP of Larks for the Service, AR00538, the “effective

population size necessary to avoid inbreeding depression in the short-term” is more than 100 animals and more than 1,000 are needed to “maintain evolutionary potential in perpetuity.” AR00543. The *only* surveyed site with evidence of local populations greater than 100 birds is the Corvallis Municipal Airport population. *See* AR00239–40 (estimated Lark number in the South Puget Lowlands), AR00241–42 (estimated Lark numbers in the Pacific Coast and Lower Columbia River), AR00243 (estimated Lark numbers in the Willamette Valley).

And the Corvallis Municipal Airport population is the exception that proves the rule. The Service defines resiliency as “having sufficiently large populations for the species to withstand stochastic events (arising from random factors)[,]” such as “extreme weather events.” AR00230. An example of one such event occurred in the winter of 2013–14 where severe winter weather is thought to have led to a population crash at the Corvallis Municipal Airport from approximately 80 breeding pairs to just 23 breeding pairs—a loss of 57 (or more than 70 percent) of the breeding pairs in a single winter. AR00243–44. Although the Corvallis Municipal Airport population was able to rebound, AR00244, there is no basis in the record for finding that other, smaller populations that the Service has defined as having “high resiliency”—e.g., those with only 15 to 25 breeding pairs to begin with—could sustain such losses. In fact, as the peer reviewers made clear to the Service, no other Lark population rangewide could sustain such losses. AR08045. Absent any justification in the record for the Service’s categorization of “high” and “moderate” populations, and in the face of the best available science (including the best anecdotal evidence) that the Lark requires more than 50 breeding pairs to be resilient, the Service’s primary justification for finding that the Lark is threatened rather than endangered throughout its range falls away.

The Service also categorized populations as having “high” or “moderate” resiliency if they have increasing or stable population trends, “movement between local populations/regions,” sufficient suitable habitat, and beneficial disturbance regimes to maintain suitable habitat. AR00271–72, AR00325–26. Again, however, the Service’s assignment of assumptions to different populations is not supported by the record. Although the Service asserts that “local populations appear to have increased,” AR00317, since the Lark was listed as threatened in 2013, it elsewhere “acknowledge[s] [that] there are no clear trends to indicate if the current regional and rangewide population is increasing or decreasing.” AR00318.

The Service’s attempt to “present a rosier picture than reality” with illusory population increases was called out by Mr. Altman, who explained to the agency that any purported anecdotal increases noted by the Service are likely due, not to increased populations, but instead to increased survey effort over time. AR08047. He also noted that the majority of Lark populations (63.9 percent) occur on private lands in the Willamette Valley “for which there are no site-specific population data.” AR08049. Continuing, Mr. Altman noted that the regionwide population data that *is* available is the North American Breeding Bird Survey data which indicated “a large and statistically significant annual decline” in the Willamette Valley. AR08049.

The Service, however, effectively disregarded the Breeding Bird Survey data “indicat[ing] a 6.52 percent decline for the subspecies between 2005 and 2015.” AR00318. The Service attempts to discount this data by suggesting (without support) that the Lark’s condition may have improved since listing in 2013 and that the Breeding Bird Survey data does not reflect this. AR00318. But as the Service acknowledges, the data since listing, while not definitive, certainly does not refute the Breeding Bird Survey data reflecting a significant decline from an already precarious population. In such circumstances, where the best available information may

not be as conclusive as the Service would prefer, the Service cannot ignore such information but instead “*must* [] still rely on it” in making a listing decision under the ESA’s best available science standard. *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (emphasis added); *see also Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009) (“If the science on population . . . trends is undeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence.”); *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068–69 (9th Cir. 2018) (finding the Service’s failure to meaningfully address a documented decreasing population rendered the agency’s decision not to list the arctic grayling arbitrary and capricious). The Service’s failure to rely on the Breeding Bird Survey data, but to instead speculate that populations may be increasing despite the available data, is contrary to the ESA’s best available science standard. *Cf. Bennet v. Spear*, 520 U.S. 154, 176 (1997) (“The obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.”).

Nor is there any reason to generally assume “movement between local populations/regions,” AR00325, because, as the Service has noted in the SSA, Larks “exhibit high nest site fidelity.” AR00234. Instead, as the Service noted elsewhere in its Threatened Determination, although Larks “can move between sites, and there are a few instances of detections at previously unoccupied locations, . . . recolonization appears *very low* and difficult to predict.” AR00331 (emphasis added). Absent specific information in the record regarding recolonization of sites, this factor cannot contribute to the Lark’s resiliency. *See also* AR08036 (Mr. Liebezeit’s peer review comments on the SSA noting that “recolonization of new sites is actually pretty rare and typically has occurred opportunistically rather and via concerted efforts

to attract larks to new areas”). The Service’s assumption of movement between populations, in direct tension with its findings elsewhere, is arbitrary and capricious. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 246 F. Supp. 3d at 1282–85 (finding that the Service’s assertion of movement between coastal marten populations was contradicted by the best available science in the record, rendering the Service’s determination that the coastal marten did not warrant listing arbitrary and capricious); *see also Ctr. for Biological Diversity v. Zinke*, 900 F.3d at 1070 (finding the Service’s determination that the arctic grayling did not warrant listing because of its ability to access cold water refugia was arbitrary and capricious when the evidence in the record demonstrated that such refugia were inaccessible).

The Service’s assertion of resiliency due to sufficient suitable habitat, and beneficial disturbance regimes to maintain suitable habitat, AR00325–26, also cannot be squared with the agency’s overall conclusion that “[t]he primary driver of the status of [the Lark] has been the scarcity of large, open spaces with very early seral stage plant communities with low-statured vegetation and substantive amounts of bare or sparsely vegetated ground.” AR00330; AR00330 (“The [Lark] has been affected through loss of preferred habitats ... as a result of successional changes in plant species composition and encroachment of woody vegetation; invasion of beach grasses; conversion of suitable habitat into unsuitable habitat through changes in land use; and changes in agricultural practices from crops that mimic preferred habitats (i.e., grass seed farms) to crops that diminish habitat suitability (i.e., hazelnut orchards and blueberry farms).”).

As explained by Mr. Altman, the Service’s skewed outlook results in part from the fact that its assessment of the Lark’s status in the Willamette Valley—which “drives the status of [the Lark] both now and into the future,” AR08052—ignores the overwhelming majority of the Valley and instead focuses on a small unrepresentative sliver, i.e., “four municipal airports, three

wildlife refuges, two natural areas, and one on private land.” AR00245. But as Mr. Altman commented on the Proposed Rule, “[t]he [L]ark population increase among these sites over the last five years is five pairs—with intensive monitoring and efforts to protect nest[s],” which “points out how slow and likely tenuous those increases can be despite concerted effort and resources, and that the absence of those conservation measures, which is the case throughout most of the Willamette Valley, is likely to provide the opposite results.” AR00193. The Service partially acknowledged that the nature of these sites may bias its analysis when it admitted that “the limited surveys of accessible sites *may not accurately reflect the trend in the whole region.*” AR00318 (emphasis added).

Yet by focusing on these sites the Service effectively ignores nearly 70 percent of the Lark’s rangewide population on private lands in the Willamette Valley, AR08049, where “the current rate of land use change indicates the quantity and quality of habitats used by [L]arks w[ill] decrease as habitat is lost to development, as well as changes to crop types grown on individual farms.” AR00284. As a result, “[a]ny local populations that are currently in high or moderate condition would decline if directly impacted by changes in land use or management actions.” AR00284. Thus, the Service has arbitrarily relied on a few isolated populations that, based on the best available science, likely do not reflect the Lark’s status in the majority of its range, to conclude that it is not in danger of extinction now. Simply put, there is no “rational connection between the facts found”—that the Lark has barely increased in a few areas with intensive management—and the “choice made”—that the Lark is not endangered throughout its entire range where it faces ongoing habitat loss and fragmentation. *State Farm*, 463 U.S. at 43.

In the end, none of the Service’s justifications for concluding that the Lark retains multiple populations in high and moderate conditions across all representative regions is borne

out by the record. As a result, the basis for the Service's Threatened Determination falls away, leaving it arbitrary and capricious, and contrary to the best available science, in violation of the ESA. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d at 1068 (“[I]n ignoring available data [the Service] acted in an arbitrary and capricious manner.”).

III. The Service's Finding That the Lark is Not Endangered in a Significant Portion of Its Range is Arbitrary and Not Supported by the Best Available Science

In addition to considering whether the Lark is endangered throughout all of its range, the Service must also determine whether the subspecies is endangered in a “significant portion” of its range. On remand and for the second time, the Service shirks this responsibility. This time, the Service approached the significant portion of its range analysis for the Lark by asking “whether there is any portion of the species' range for which both (1) the portion is significant and (2) the species is in danger of extinction in that portion.” AR00331. “Depending on the case,” the Service may choose to “address the ‘significance’ question’ or the ‘status’ question first[,]” because if the Service answers either question in the negative, then it does “not need to evaluate the other question for that portion of the species' range.” AR00331.

With the Lark, the Service only addressed the “status” question.⁷ AR00331. To do so, the Service “consider[ed] information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.” AR00331. “Thus, for [the Lark, the Service] considered whether the threats are

⁷ Because the Service only considered the “status” question, the Conservation Groups do not address whether any portion of the Lark's range is “significant” either. If this Court agrees with the Conservation Groups that the Service's analysis of the “status” question is arbitrary and capricious and contrary to the best available science, the “significance” question will be one for the Service to address on remand.

geographically concentrated in any portion of the species' range such that the threats presently affect enough individuals in an area to influence the resiliency of a population." AR00331.

After listing the numerous threats facing the Lark, the Service found that "[w]hile the influence of these factors varies somewhat across the range, *there is no portion of the range where there is currently a concentration of threats relative to other areas in the range.*" AR00332 (emphasis added). As a result, because, according to the Service, "there are no portions of the species' range where the species has a different status from its rangewide status, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range." AR00332.

This cursory conclusion is contradicted by the record, which clearly shows threats concentrated in portions of the Lark's range in such a way that "influence[s] the resiliency of a population." AR00331. For instance, the Service identified agriculture conversion and urbanization as serious threats in the Willamette Valley, where most of the Lark's remaining population remains. AR00252–253. With the decline in its native habitat, the Lark is now often found on grass seed fields in the Willamette Valley. AR00334. However, grass seed farming is in rapid decline with the Service noting that "[d]emand for grass seed and the overall acreage of grass seed harvested in Oregon has declined." AR00321. In place of grass seed, growers have switched to crops "such as wheat, stock for nurseries and greenhouses, grapes, blueberries, and hazelnuts." AR00321.

As noted by the Service, "[t]hese other crop types do not have the low-statured vegetation and bare ground preferred by the [L]ark." AR00321. Overall, between 2007 and 2017, the quantity of grass and other seed farms in the Willamette Valley decreased by 26 percent. AR00282. This decline is likely to continue with the Service recognizing that "[t]he continued

decline of the grass seed industry in the Willamette Valley due to the variable economics of agricultural markets will likely result in a continued conversion from grass seed field to other agricultural types, and fewer acres of suitable habitat for [L]arks.” AR00321. As a result, Mr. Altman opined that “the only reasonable conclusion is that it is highly likely that the [L]ark population over the entire Willamette Valley (not just the select monitoring sites skewed to the positive) is declining.” AR00193; *see also supra* at 26–27 (addressing the selective nature of the Service’s monitoring in the Willamette Valley).

The Willamette Valley also faces a concentrated threat of development with the Service noting that “[a]bout 96 percent of the Willamette Valley is privately owned, and it is both the fastest growing area in Oregon and the most densely populated.” AR00252. Ultimately, the Willamette Valley’s population is predicted to double in the next 50 years. AR00320–21. This “[p]opulation growth will result in increased construction and road development, further impacting the remaining prairies and oak woodlands.” AR00252.

The combination of agricultural conversion and urbanization within the Willamette Valley clearly constitute “concentrated threats” particularly impacting the Lark’s resiliency within that portion of its range. But the Service never considers this factor in the significant portion of its range analysis. *See* AR00331–32. Without doing so, the Service could not reasonably determine “whether the threats are geographically concentrated in any portion of the species’ range such that the threats presently affect enough individuals in an area to influence the resiliency of a population.” AR00331.

The Service therefore runs afoul of Ninth Circuit precedent requiring it to “at least explain [its] conclusion that the area in which the species can no longer live is not a ‘significant portion of its range.’” *Def. of Wildlife v. Norton*, 258 F.3d at 1145–46. Lacking a “substantial

basis in fact,” and failing to make “a rational connection between the facts found and the determinations made[,]” the Service’s significant portion of its range analysis is arbitrary and capricious, and contrary to law. *Ariz. Cattle Growers’*, 606 F.3d at 1163.

The Service commits the same error with the other regional populations that are facing threats different in kind and degree from other populations. For instance, the Service in the SSA found that very small population size presents a particular threat in the South Puget Lowlands, the Pacific Coast, and the Lower Columbia River. Specifically, “[c]oastal populations in the Pacific Coast and Lower Columbia River region and local populations in the northern portion of the South Puget Lowlands region are at greatest risk due to their small size and instability.” AR00290. Regarding the South Puget Lowlands in particular, “[s]tudies in Washington have found that [Larks] have lower fecundity and nest success than other northwestern horned lark subspecies,” and “measures of reproductive success were lower for [Larks] than for other ground-nesting birds at the same prairie sties.” AR00263. The Service found that the Lark’s low reproductive success could not be attributed to poor habitat because “other bird species have much higher nest success rates in the same habitat suggest[ing] that inbreeding depression may be playing a role in the decline of [L]arks in the South Puget lowlands[.]” AR00263. Additionally, “[r]ecent analysis indicated a declining female population trend” in South Puget Sound. AR00240. Ultimately, the SSA stated that “[t]he combination of low genetic variability, small and rapidly declining local populations, high breeding site fidelity, and no observed migration into the South Puget Lowlands regional population suggests that in the future, if influences remain the same, the South Puget Lowlands regional population could eventually become extirpated.” AR00264; *see also* AR00039 (noting, in the 2013 threatened determination, that the same factors “suggest[] that the South Puget Sound population could become extirpated

in the near future”). The Service also noted that “[l]ocal populations in the Pacific Coast and Lower Columbia River region are particularly susceptible to recreation impacts.” AR00285.

At no point in its significant portion of its range analysis, however, does the Service explain why the unique, concentrated threats facing these populations and the South Puget Lowlands population in particular, do not satisfy the agency’s own “significant portion of its range” standard. The Service’s “omission with respect to a significant legal issue[,]”—whether the Lark is indeed in danger of extinction in the South Puget Lowlands, or the Pacific Coast and Lower Columbia River, and whether those regions are significant such that the Lark is in danger of extinction in a significant portion of its range—“raised by the factual circumstances [is] itself . . . a sufficient basis for remanding th[is] case to the [Service] to consider the question.” *Def’s. of Wildlife v. Norton*, 258 F.3d at 1146 (finding the Service’s failure to consider whether the flat-tailed horned lizard’s habitat on private lands constituted a significant portion of its range or whether the lizard may face unique threats in different portions of its range rendered the Service’s determination that the lizard did not warrant listing arbitrary and capricious).

The situation here is closely analogous to another recent case in which a court rejected the Service’s “simple statement that there were no concentrated threats” warranting a significant portion of the range analysis. *See Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 488 F. Supp. 3d 1219, 1232 (M.D. Fla. 2020). In that case, the species status assessment had recognized that the species at issue was facing far graver threats from climate change and associated sea-level rise in certain portions of the species range compared with others. *Id.* The court held that this “warranted more explanation than the . . . simple statement that there were no concentrated threats” and that “[o]n remand, [the Service] should explain why threats are uniform across the range notwithstanding non-uniform rates of inundation [resulting from sea-

level rise]. Otherwise, the Court is unable to conclude whether the agency considered ‘an important aspect of the problem.’” *Id.* (quoting *State Farm*, 463 U.S. at 43).

Essentially the same flaw afflicts the Service’s analysis here. The agency’s Threatened Determination and SSA, along with the agency’s own peer reviewers, leave no doubt that various threats are more severe in certain portions of the Lark’s range than others. Yet based on an erroneous (and at least unsubstantiated) assertion that “there is no portion of the range where there is currently a concentration of threats relative to other areas in the range,” AR00332, the Service has engaged in a cursory significant portion of its range analysis that does not even begin to consider the significance of these areas for purposes of an endangered listing. The Service’s failure to meaningfully address the specific concentration of threats facing the Lark in the Willamette Valley, Pacific Coast, Lower Columbia River, and South Puget Lowlands renders the Threatened Determination’s significant portion of its range analysis arbitrary and capricious, and in violation of the ESA.

IV. The Service’s 4(d) Rule Does Not Provide for the Conservation of the Lark and is Arbitrary, Capricious, and in Violation of the ESA.

As explained, when the Service lists a species as threatened rather than endangered, the ESA’s prohibitions on unauthorized take do not automatically apply to such species. Rather, “the [Service] shall issue such regulations as [it] deems necessary and advisable to provide for the conservation of [a threatened] species.” 16 U.S.C. § 1533(d). While this provision grants some discretion to the Service to determine what regulations are “necessary and advisable,” “the extent of the [Service]s’ discretion ... is limited by the requirement that the regulations [it] is to issue must provide for the *conservation* of threatened species.” *Sierra Club v. Clark*, 755 F.2d 608, 612–13 (8th Cir. 1985). In the end, the sole purpose of any 4(d) rule is “to provide for the conservation of [a threatened] species;” in other words, “to use...*all methods and procedures*

which are necessary to bring any ... threatened species to the point at which the [ESA's protections]...are no longer necessary." 16 U.S.C. §§ 1532(3), 1533(d) (emphasis added).

Accordingly, if the record does not reflect how a particular regulation is helping or will help "conserve" a threatened species—i.e., recover it to the point where it may be delisted—then the 4(d) Rule does not accord with the plain language or overriding purpose of the ESA.

Here, the Service's wholesale exemption of "routine agricultural practices" in the Willamette Valley since 2013, and now across the Lark's range, from the prohibition on killing, injuring, or otherwise taking Larks—without any limitations or restrictions, even during the active nesting season—fails to provide for the conservation of the Lark. The Service has long recognized that agricultural practices are a threat to the Lark. AR00045–46. As the Service admits, agricultural practices can and do "harm or kill" adult Larks, destroy nests, and crush eggs and newborn Larks. AR00334. These harms intensify during the breeding season and are particularly prevalent on grass seed fields, which attract breeding Larks. AR00112, AR00312. Accordingly, the Service recognizes land management activities as one of the "primary factors currently influencing" Lark conservation. AR00320. Yet instead of trying to limit the harms of these practices *in any manner*, the 4(d) Rule foregoes the ESA's safeguards entirely. This is the opposite of the "conservation" that the ESA, and Section 4(d) in particular, mandate.

The Service tries to downplay the harms associated with agricultural practices, but the agency's explanation distorts the evidence and underscores the arbitrary and capricious nature of its rule. The Service claims that grass seed harvest "in late June or early July" is "after the primary part of the nesting season" and therefore poses little conservation risk. AR00335. Yet, by the Service's own admission, Larks regularly nest "in late June or early July," AR00315, and the studies cited by the Service consistently identify this time as being *during* peak breeding, not

after it. *See* AR02036 (noting “the April-July peak breeding period”); AR02599 (identifying “non-peak breeding” as “before...mid-April, the first week of June, and...early August”); AR07642 (characterizing “May through July” as “the peak of the breeding season”). Indeed, in the SSA, the Service admits that “the timing of mowing is critical to determine whether [mowing] is harmful or beneficial to [Lark]s[,]” because “[m]owing during the active breeding season (*mid-April to late July*) can destroy nests, crush eggs or nestlings, or flush fledglings or adults, which may result in reproductive failure.” AR00254 (emphasis added). As a result, the studies relied on by the Service recommend limiting disturbance to Larks during late June and early July. *See* AR02052 (showing 6 out of 10 nests as active in late June to early July); AR07579 (showing that the first eggs did not hatch until June 20); AR02607 (showing egg-laying spikes in mid-June); AR02598 (calling for minimal disruption “from early March until early August”); AR07590 (advising reducing disturbance until August 15). The Service’s attempt to obscure these costs of its 4(d) Rule rather than acknowledge them is arbitrary and capricious. *See State Farm*, 463 U.S. at 56 (rejecting agency conclusion as arbitrary and capricious where “every indication in the record points the other way”).

The record thus establishes that exempting agricultural practices has clear costs for Lark conservation, costs that must be outweighed by conservation benefits if the 4(d) Rule is to serve its statutory purpose. However, despite a decade’s worth of data in the Willamette Valley, the record contains no evidence that the rule has resulted in *any* conservation benefits, let alone enough to outweigh its harms.

The Service’s primary reason for exempting agricultural activities from the prohibition on take is that “maintenance and continued farming of ... private lands (primarily grass seed farms) in the Willamette Valley creates and provides suitable habitat conditions throughout the Valley,

and is therefore crucial to maintaining the Willamette Valley [Lark] population.” AR00334. The Service therefore claims that the blanket exemption of agricultural practices is necessary to incentivize grass seed farmers to not convert their lands to crops that do not provide Lark habitat so as to avoid any ESA liability. AR00335. This rationale is entirely unsupported by the record and otherwise arbitrary and capricious.

As an initial matter, the Service’s blanket exemption does not even prohibit the very thing it is intended to incentivize: the conversion of grass seed farms to other crops that do not provide suitable Lark habitat. Instead, the 4(d) Rule applies to all “[a]gricultural (farming) practices” including “[p]lanting, harvesting, rotation, mowing, tilling, discing, burning, and herbicide application to crops[.]” AR00338; *see also* 50 C.F.R. § 17.41(a)(2)(C). The Service could have easily limited the exception from the prohibition on taking Larks to agricultural practices associated with grass seed farming in order to incentives farmers to maintain their grass seed farms and not convert them to other crops. But nothing in the 4(d) Rule prevents a farmer from shifting his crops away from grass seed farming.

In any case, after ten years of the agricultural exemption having been in place in the Willamette Valley, the Service offers no evidence that the 4(d) rule has contributed to the maintenance of suitable Lark habitat. *Id.* Indeed, the loss of habitat—specifically grass seed farms—that the 4(d) Rule is allegedly designed to avert has persisted since the 4(d) Rule came into effect in 2013: over 50,000 acres of suitable habitat have disappeared due to the conversion of grass seed to other crops, a decline that the Service attributes to “the variable economics of agricultural markets.” AR00321; *compare* AR00050 (approx. 420,000 acres of grass seed in the Willamette Valley in 2013) *with* AR00321 (approx. 364,355 acres in 2019).

The Service has not even attempted to show that this ongoing decline was slowed by its 4(d) rule and instead openly projects that it will continue, regardless of the agricultural exemption, due to “[t]he continued decline of the grass seed industry[.]” AR00321. Thus, the record is not only devoid of evidence that the 4(d) Rule has helped to maintain habitat, but it strongly suggests that for a decade now, the Service has allowed, among other adverse impacts, the unmitigated crushing of active nests of a threatened (if not endangered) species without any compensating conservation benefit to show for it. The Service cannot simply insist that its agricultural exemption promotes conservation while ignoring the utter lack of any evidence that it has done so over the past ten years. Its attempt to do so—and, worse, to expand the exemption beyond the Willamette Valley—is the essence of arbitrary and capricious action. *See State Farm*, 463 U.S. at 47–48 (holding that the agency acted arbitrarily and capriciously where, in deciding whether to employ a measure, the agency ignored evidence regarding its effectiveness).

The Service also claims that the 4(d) Rule will “provide positive incentives for [landowners] to voluntarily report and conserve” Larks. AR00335. Again, there is no evidence in the record to support this assertion. Instead, the record reveals that the Service and its partners spent multiple years and \$175,000 trying to engage the owners of working farmlands in voluntary conservation. AR00194. Among these efforts, an expert retiree from the Service’s Partners Program, a program that specializes in engaging landowners in conservation, conducted outreach and attended “numerous meetings” but could not get a single landowner to come forward to voluntarily report and conserve Larks. AR00948. The Service and its partners then funded an entire Lark Conservation Specialist, a biologist whose core job for over two years was to engage landowners in conservation. AR00194. Despite the Specialist’s persistent efforts, there are *still* “no conservation measures in place for private lands in the Willamette Valley,”

AR00125, and no evidence that landowners have voluntarily reported or worked to preserve Larks because of the 4(d) Rule.

Moreover, the record specifically demonstrates that the blame for these failures is attributable to the lack of incentives under the 4(d) Rule. As Mr. Altman noted in his comments summarizing his and the Service's efforts to promote Lark conservation on private lands in the Willamette Valley, "[t]here was simply no incentive for actions by the producers who *already had a take exemption under the 4(d) rule* to engage with the federal government[.]" AR00194 (emphasis added). The Service's 4(d) Rule is therefore arbitrary and capricious because it is predicated on the claim that voluntary conservation will succeed under the 4(d) Rule when the record shows (and explains why) it has repeatedly failed in that regard. *See State Farm*, 463 U.S. at 43 (holding that agency action is arbitrary and capricious where the agency "offered an explanation for its decision that runs counter to the evidence").

In short, the Service has had a ten-year trial run of its 4(d) Rule and has nothing to show for it. In view of its known costs to Lark nesting and survival and empirically non-existent benefits, the only rational conclusion is that the 4(d) Rule inhibits conservation instead of providing for it: the 4(d) Rule maintains a dangerous status quo in which the killing and injuring of Larks and destruction of active nests on agricultural lands persists in exchange for "benefits" that are at best negligible and at worst nonexistent. The 4(d) Rule therefore cannot reasonably be said to "provide for the conservation of" the Lark, and the Service's decision to reissue (and expand) its failed agricultural exemption in flagrant defiance of the evidence was arbitrary and capricious and in violation of the ESA. *State Farm*, 463 U.S. at 43.

Remedy

If this Court finds in favor of the Conservation Groups, this Court should remand the Service's decision not to list the Lark as endangered while leaving the threatened listing in place pending a new listing determination from the Service on remand. *See Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (explaining that courts may remand without vacating agency action when doing so would avoid "environmental harm").

The Court should also order the Service to issue a new listing determination for the Lark within one year of this Court's order. Such an order would be within this Court's authority to grant, as Congress explicitly granted district courts the authority "to order the Secretary to perform such act or duty ... under section 4 which is not discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). The order would also be consistent with similar past orders setting deadlines for action on remanded ESA decisions. *See, e.g., Tucson Herpetological Soc'y*, 566 F.3d at 874 (noting a district court order requiring the Service to reinstate a proposed listing rule within sixty days and to issue a final decision within twelve months); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 965 (D. Or. 2007) (remanding decision to withdraw the proposed listing rule and ordering the agency to issue a new final listing rule within sixty days).

Such an order would accord with Congress' intent when it imposed strict deadlines on completing listing determinations so that imperiled species would receive life-saving protections in a timely fashion. These deadlines require the Service to conclude the listing process within two years when starting with a blank slate. *See* 16 U.S.C. § 1533(b)(3)(A)–(B), (b)(6)(A). Here, having recently updated the SSA, the Service will hardly be starting from a blank slate. Twelve months should give the agency enough time to issue a new finding.

This Court should also vacate the 4(d) Rule’s exception of take caused by agricultural practices. 50 C.F.R. § 17.41(a)(2)(iv)(C). Partial vacatur can be appropriate if “sufficient to prevent the harms flowing” from the agency’s unlawful action. *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. 22-15259, 2023 U.S. App. LEXIS 11031, at *10 (9th Cir. May 5, 2023) (partially vacating an agency’s authorization of livestock grazing to elevate harms to those living within the grazing allotments). Here, partial vacatur of the agricultural practices exception, the only portion of the 4(d) Rule challenged by the Center in this action, while leaving the rest of the 4(d) Rule intact, is sufficient to prevent the harms flowing from the exception (e.g., “[m]owing during the active breeding season” which “can destroy nests, crush eggs or nestlings, or flush fledglings or adults, [and] which may result in reproductive failure[.]” AR00254) and will cause the least disruption.⁸

Conclusion

For the foregoing reasons, this Court should grant the Conservation Groups’ Motion for Summary Judgment.

Dated this 19th day of October 2023.

Respectfully submitted,

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⁸ In lieu of the harmful blanket coverage provided by the agricultural practices exception, private landowners may apply for an “habitat conservation plan” that would allow activities, such as agricultural practices, to proceed as long as they “minimiz[e] effects to the species[.]” AR00313; *see also* 16 U.S.C. § 1539(a)(2)(B)(ii) (authorizing the Service to issue a permit authorizing a certain amount of “incidental take” if various strict criteria are satisfied, including that the permittee will, amongst other requirements, “to the maximum extent practicable, minimize and mitigate the impacts of such taking”).

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