

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

SWINOMISH INDIAN TRIBAL
COMMUNITY and SQUAXIN ISLAND
TRIBE, federally recognized Indian
Tribes;

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE and UNITED STATES FISH
AND WILDLIFE SERVICE

Defendants.

No.

COMPLAINT

INTRODUCTION

1. The Swinomish Indian Tribal Community (“Swinomish”) and Squaxin Island Tribe (“Squaxin”) (collectively, “the Tribes”) challenge the decision of the National Marine Fisheries Service (“NMFS”) and the United States Fish and Wildlife Service (“FWS”) (collectively, “the Services”) to fully rescind the regulatory definition of the term “harm” under the Endangered Species Act (“ESA”). The final rule, “Rescinding the Definition of ‘Harm’ Under the Endangered Species Act,” 91 Fed. Reg. 43300 (July 14, 2026), is arbitrary,

1 capricious, and contrary to law, in violation of the Administrative Procedure Act, National
2 Environmental Policy Act, and Endangered Species Act.

3 2. The definition of harm is legally significant because it is part of the statutory
4 definition of “take.” 16 U.S.C. § 1532(19). ESA Section 9 and rules issued under ESA
5 Section 4(d) prohibit “take” of members of a species listed as threatened or endangered. 16
6 U.S.C. § 1538(a)(1). The “take” prohibition is the central enforcement mechanism of the
7 ESA and has been instrumental in the protection and recovery of imperiled wildlife for over
8 50 years.

9 3. Since 1975, the Services have maintained a regulatory definition of harm that
10 prohibits killing or injuring protected species by degradation of their habitat. The rescinded
11 NMFS regulation, 50 CFR § 222.102, provided that the term “harm” means “an act which
12 actually kills or injures fish or wildlife. Such an act may include significant habitat
13 modification or degradation which actually kills or injures fish or wildlife by significantly
14 impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating,
15 feeding or sheltering.” The FWS definition, 50 CFR § 17.3, is closely similar.

16 4. The rescinded definitions of “harm” make sense, are consistent with scientific
17 consensus that species require habitat to survive, and reflect the plain language meaning of
18 “harm.” Polluting water, cutting down trees, or draining and filling wetlands in such a way
19 that “actually kills or injures” members of an ESA-listed species undoubtedly “harms” that
20 wildlife.

21 5. The rescinded definition is also consistent with the overall statutory scheme.
22 When Congress passed the ESA in 1973, Congress recognized the primary driver of species
23 extinction as “economic growth and development untempered by adequate concern and

1 conservation.” 16 U.S.C. § 1531(a)(1). Congress likewise recognized the foundational
2 importance of protecting the habitat of threatened and endangered species in order to stop
3 species loss. Indeed, the first listed purpose of the Act is “to provide a means whereby the
4 ecosystems upon which endangered species and threatened species depend may be
5 conserved.” 16 U.S.C. § 1531(b).

6 6. Up until today, the Services had effectively and consistently applied the
7 regulatory definition of “harm” for more than 50 years across nine Presidential
8 administrations. During that time Congress never provided a revised definition of “take” or
9 “harm,” even though Congress was plainly aware of the Services’ definition and otherwise
10 substantively amended the ESA in 1978, 1982, 1988, and 2004. Indeed, the 1982
11 amendments introduced “Habitat Conservation Plans” in ESA Section 10, 16 U.S.C. §
12 1539(a)(2), which Congress premised on an understanding that degradation of the habitat of
13 ESA-listed species constitutes unlawful “harm” and thus “take” of those species.

14 7. The Services’ longstanding definition of “harm” was upheld by a 6-3 majority
15 of the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,
16 515 U.S. 687 (1995) (“*Sweet Home*”). In *Sweet Home*, the Services and Department of
17 Justice defended the traditional interpretation of “harm” as consistent with the text and
18 purpose of the ESA and decisively won. In the past thirty years, federal courts have cited
19 *Sweet Home* in more than 5,000 decisions, and the majority opinion remains good law.

20 8. Nonetheless, the Services now rescind the definition of “harm,” abandoning the
21 ESA’s plain language and statutory context, 50 years of consistent application, best available
22 science, and Supreme Court precedent. The Services’ final rule summarily concludes that
23 they have suddenly deemed the Supreme Court’s longstanding majority opinion in *Sweet*

1 *Home* illegal. The Services further state that “[i]n light of their determination of illegality,
2 the Services have determined that the best path forward is to rescind the regulatory definition
3 entirely— instead of keeping part of it—and to refrain from implementing a replacement
4 definition.” 91 Fed. Reg. 43302.

5 9. While not promulgating a new regulatory definition into the Code of Federal
6 Regulations, the Services through the final rule “herein adopt” “the role and meaning of the
7 term ‘harm’ within the larger definition of ‘take’ [that] was expertly explicated by Justice
8 Scalia in his *Sweet Home* dissent.” 91 Fed. Reg. 43302. Based on that rationale, “[t]he
9 Services conclude that ‘take’ applies only to an ‘affirmative act[] ... directed immediately
10 and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and
11 accidentally cause[s] injury to a population of animals.” 91 Fed. Reg. 43306 (*citing* 515
12 U.S. at 719–20 (Scalia, J., dissenting)).

13 10. In other words, the Services have decided that the losing position in *Sweet*
14 *Home* now reflects the only legally permissible reading of the statute, even though the
15 arguments the Services now support were rejected by the majority of the Supreme Court.
16 The Services’ new interpretation of the term “harm” is limited to direct, intentional actions,
17 such as shooting an animal, and does not apply to degradation or destruction of ESA-listed
18 species’ habitat that kills or injures members of that species.

19 11. The Services’ new narrow interpretation of the statute is a radical and arbitrary
20 reversal without supporting rationale. Historic fish spawning and rearing habitat has been
21 drastically reduced from habitat destruction and conversion, and habitat degradation is a
22 primary driver of the decline of salmon stocks in the Puget Sound region.
23

1 12. The Services' new definition of "harm" will diminish and allow damage to
2 ESA-listed species' habitat and is likely to reduce the requirement for regulated parties to
3 provide habitat protection as mitigation for incidental take. These changes in turn will
4 diminish the populations of ESA-listed species and impede recovery.

5 13. The loss of long-standing protection for the habitat of ESA-listed salmon
6 species will injure the Tribes and their members. The Tribes and their members cherish the
7 native ecosystems of which they have been a part for thousands of years. Like ESA-listed
8 salmon, Tribal members value and rely upon cold, clear water, intact estuaries and
9 floodplains, and mature forests. Harm to those previously protected habitats will harm the
10 Tribe and its members.

11 14. The injury to ESA-listed species caused by the Services' new definition of
12 "harm" injures the Tribes and their members' interest in fishing for salmon. The Tribes and
13 their members have subsisted on salmon for thousands of years, and salmon are central to
14 their diet, economy, lifeways, culture, and ceremonies. The decision will reduce habitat
15 availability and quality for ESA-protected salmon, which in turn will reduce stocks of listed
16 and non-listed fish and diminish the Tribe's fishing opportunities.

17 15. The Services' rescission and new definition is a lose/lose for the Tribes: in the
18 Services' view, it will be unlawful for the Tribes to unintentionally catch a protected fish, but
19 lawful for a developer to drain or degrade all the water that same fish needs to survive.

20 16. The challenged decision states that "in issuing an incidental take permit, the
21 Secretary of the Interior will no longer consider the effects of a proposed action on the
22 species' habitat, nor will the permit contain terms and conditions requiring permittees to take
23 into account habitat modification and degradation when executing the permitted take." 91

1 Fed. Reg. 43304. The Tribes will also be deprived of their ability to participate in permitting
 2 processes under ESA Section 10 that are brought about by the need for parties to obtain
 3 incidental take permits to degrade ESA-listed species' habitat, which the Services no longer
 4 view as necessary.

5 17. The rule rescission violates the Administrative Procedure Act because it is
 6 arbitrary, capricious, and contrary to law. The failure to engage in government-to-
 7 government consultation with the Tribes, despite clear policies requiring such consultation
 8 and sacred trust obligations to the Tribes, was arbitrary and capricious.

9 18. Despite the radical shift in policy and complete reversal of legal interpretation
 10 with dire environmental implications, the Services did not engage in any review under the
 11 National Environmental Policy Act ("NEPA") or consultation under ESA Section 7 prior to
 12 issuance of the final decision. These failures violated NEPA and the ESA.

13 19. The Tribes request that the Court declare the challenged rule unlawful and
 14 vacate and set aside the agency action.

15 **PARTIES**

16 20. Plaintiff Swinomish Indian Tribal Community is a federally recognized Indian
 17 nation organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C.
 18 § 5123, and is located on the Swinomish Reservation on Fidalgo Island in Skagit County of
 19 the State of Washington. The Tribe's mailing address is 11404 Moorage Way, La Conner,
 20 WA 98257.

21 21. Since time immemorial, Swinomish and its predecessors have been stewards of
 22 the aquatic, marine, and terrestrial environments upon which the Swinomish peoples have
 23 depended for their economic, subsistence, religious, spiritual, and ceremonial livelihoods.

1 Pacific Salmon and other marine resources have played a central role in the daily lives of
2 Tribal members.

3 22. The Swinomish Reservation is located at the mouth of the Skagit River, the
4 largest river system draining to Puget Sound, and the only river in the continental United
5 States that still has all species of Pacific salmon and steelhead spawning, rearing and
6 foraging in its waters.

7 23. Swinomish is a present-day political successor-in-interest to certain tribes and
8 bands that signed the Treaty of Point Elliott, 12 Stat. 927 (1855), a treaty with the United
9 States that established the Swinomish Reservation and that reserved to Swinomish other
10 rights including without limitation the “right to take fish at their usual and accustomed
11 grounds and stations.” *United States v. Washington*, 459 F. Supp. 1020, 1039, 1041, 1084
12 (W.D. Wash. 1978). Swinomish’s usual and accustomed grounds extend throughout the
13 Northern Puget Sound to Canadian border, the Skagit River and its tributaries, and the
14 Samish River and its tributaries. *See United States v. Washington*, 459 F. Supp. at 1049. The
15 species listed as threatened or endangered in these waters include Puget Sound Chinook
16 salmon, Puget Sound steelhead, bull trout, and Southern Resident killer whales.

17 24. As detailed in the declaration of Senator Tandy Wilbur filed in support of this
18 Complaint, Swinomish’s culture and economy rely on fishing. The regulatory definition of
19 the term “harm” that protects habitat of listed salmonids and Southern Resident killer whales
20 helps provide for consistent enforcement and helps protect Swinomish’s Treaty fisheries.

21 25. ESA-listed species in Swinomish’s region are culturally significant and greatly
22 valued by the Tribe and its members as part of the native ecosystem of which the Tribe has
23 been a part for thousands of years. The rescission of the definition of “harm” and adoption

1 of the narrow definition from the *Sweet Home* dissent harms Swinomish’s strong interest in
2 the protection and recovery of ESA-listed aquatic and terrestrial species.

3 26. The rule change also causes economic injury to the Tribe and its members’
4 because failing to prevent “take” of ESA-listed species in the form of habitat degradation
5 will result in diminished populations of ESA-listed salmon stocks. The rule change inhibits
6 species recovery, and recovery would allow the Tribe to once again fish for currently ESA-
7 listed fish, such as Puget Sound Chinook salmon. The rule change will also affect
8 Swinomish’s ability to catch other treaty-resource fish both because fewer Chinook means
9 less incidental take available when it fishes for mixed stock fisheries, and because non-ESA
10 listed species depend on the same habitats as listed species.

11 27. Swinomish has invested significant resources in the recovery of listed species
12 through scientific research and habitat restoration that will be undermined by the federal
13 government allowing takes in the form of habitat degradation. The permitting processes
14 associated with regulated entities obtaining incidental take authorization also provide
15 Swinomish with important procedural rights. Regulated parties seek authorization for
16 otherwise prohibited “take” by applying for permits under ESA Section 10 and ESA Section
17 7. During those processes, the Tribe often participates in government-to-government
18 consultation with the Services, provides robust scientific input and comment, and is able to
19 advocate for effective mitigation.

20 28. In addition, Swinomish has an interest in the rule change because it is regulated
21 under the ESA as a project proponent. For example, Swinomish started one of the first
22 Tribally run ports in the country. The Swinomish Port Authority recently carried out a project
23 to build a boat ramp and short-term parking lot and replace moorage facilities.

1 29. The project is subject to ESA Section 9, as well as ESA Section 7's consultation
2 requirements. Because NMFS and FWS determined the project was likely to result in
3 incidental take and other adverse effects to ESA-listed species and critical habitat, the
4 agencies required Swinomish to provide mitigation. The mitigation measures included
5 removal of pile, creosote and debris from waters adjacent to the Port, planting riparian
6 vegetation, and installing stormwater buffers. The Tribe also had to provide a riparian
7 enhancement project in an area that would be protected for up to 40 years.

8 30. While the Tribe supports providing the mitigation, the Services' new definition
9 creates uncertainty for Swinomish regulated activities. The Tribe believes the statutory
10 definition of "take" still prohibits habitat degradation, but the Services' new regulatory
11 rescission and definition contend the opposite.

12 31. Plaintiff Squaxin Island Tribe is a federally recognized Indian nation organized
13 pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5123, and is
14 located on the Squaxin Island Reservation in Mason County of the State of Washington.
15 Squaxin's mailing address is 10 SE Squaxin Lane, Shelton, WA 98584.

16 32. The Squaxin Island Tribe, also known as the People of the Water, are
17 descendants of the maritime people who have lived, hunted, fished, and gathered along the
18 shores of the southernmost inlets of the Salish Sea for thousands of years. Squaxin's cultural
19 and economic well-being depend upon the health and sustainability of Pacific Salmon and
20 other freshwater and marine resources, which play a central role in the daily lives of Tribal
21 members.

22 33. The Squaxin Island Tribe's Reservation lands and water encompass Squaxin
23 Island, including its tidelands and submerged lands, and off-Island Reservation lands and

1 waters. The Tribal Center is located on a peninsula in Totten Inlet, between the outlets of
2 Little Skookum and Kennedy Creeks. Squaxin fishes in the shallow bays, estuaries, inlets
3 and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining
4 into those inlets. The species listed as threatened or endangered in these waters includes
5 Puget Sound Chinook salmon, Puget Sound steelhead, bull trout, Southern Resident killer
6 whales, and marbled murrelet.

7 34. Squaxin is a present-day political successor-in-interest to certain tribes and
8 bands that signed the Treaty of Medicine Creek, 10 Stat. 1132 (1854) (“Treaty of Medicine
9 Creek” or “Treaty”), a Treaty with the United States that established the Squaxin Island
10 Reservation and that reserved to Squaxin other rights including without limitation the “right
11 of taking fish at usual and accustomed grounds and stations.” *See generally United States v.*
12 *Washington*, 384 F.Supp. 312, 378 (W.D. Wash. 1974); *United States v. Washington*, 459
13 F.Supp. 1020 (W.D. Wash. 1978).

14 35. As detailed in the declaration of Joseph Peters filed in support of this
15 Complaint, Squaxin’s culture and economy rely on fishing. The rescinded definition of the
16 term “harm” to listed salmonids and Southern Resident killer whales helped provide for
17 consistent enforcement and helps protect the Squaxin’s Treaty fisheries. The permitting
18 processes associated with regulated entities obtaining incidental take authorization provide
19 Squaxin with important procedural rights.

20 36. The rescission of the definition of “harm” and associated reinterpretation of the
21 ESA injures Squaxin and its members.

22 37. An order from this Court setting aside the challenged agency action would
23 redress the Tribes’ injuries.

1 38. Defendant National Marine Fisheries Service is an agency of the U.S.
2 Department of Commerce. The Department has delegated to NMFS its responsibility for
3 administering the ESA with regard to threatened and endangered marine species, including
4 threatened Puget Sound Chinook salmon, Puget Sound steelhead, and Southern Resident
5 killer whales.

6 39. Defendant United States Fish and Wildlife Service is an agency of the U.S.
7 Department of the Interior. The Department has delegated to FWS its responsibility for
8 administering the ESA with regard to threatened and endangered terrestrial and freshwater
9 species, including threatened bull trout.

10 40. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and
11 1362 because this action is brought by federally recognized Indian tribes and the matter in
12 controversy arises under the laws of the United States.

13 41. The Administrative Procedure Act authorizes courts to review agency actions
14 and to hold unlawful and set aside final agency actions, findings, and conclusions that are
15 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5
16 U.S.C. § 706(2)(A).

17 42. Under 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 2201-2202, this Court has
18 authority vacate and set aside agency action, and to issue declaratory and other necessary and
19 proper relief.

20 43. Venue in this district is appropriate under 28 U.S.C. § 1391(e) because the
21 Tribes reside in this district, a substantial part of the events or omissions giving rise to this
22 case occurred in this district, and the Defendants are federal agencies. The Swinomish
23 Indian Tribal Community government is based on its Reservation located within Skagit

1 County, and claims in this case arise in Skagit County. The Tribes believe assignment to a
2 judge in Seattle is appropriate. *See* LCR 3(e)(1).

3 44. The Tribes are providing notice to the Services that they intend to sue the
4 Services for violations of the ESA, based on the Services' failure to carry out required
5 consultation under ESA Section 7. If those concerns are not resolved, the Tribes intend to
6 amend this Complaint after 60 days or more to include the ESA claims.

7 **FACTS**

8 **The Tribes**

9 45. The Tribes' members exercise their Treaty fishing rights for sustenance, cultural
10 purposes, and for their livelihoods as commercial fishers. Salmon is considered a way of life
11 for the Tribes' members. The Tribes' members have always and will always fish for salmon.

12 46. The Tribes are adjudicated co-managers of Washington fisheries along with the
13 Washington Department of Fish and Wildlife and in this capacity work to ensure protection
14 and restoration of fishery habitats and resources. For decades, the Tribes have also been
15 engaged in self-regulation of their own fisheries.

16 47. Judge Boldt in *United States v. Washington* understood the importance of
17 salmon to the Tribes, and this was best exemplified when he said that the right to fish at their
18 traditional fishing places was "not much less necessary to the existence of the Indians than
19 the atmosphere they breathed." 384 F. Supp. 312, 331 (W.D. Wash. 1974) (quoting *United*
20 *States v. Winans*, 198 U.S. 371, 381 (1905)).¹

21
22 ¹ The Tribes reference their respective Treaty rights as context and to demonstrate standing.
23 The Tribes do not assert treaty rights claims in this case. The Tribes explicitly reserve any and
all claims to or arising from the Tribes' respective treaty rights, including but not limited to
claims of treaty interference and federally reserved fishing rights. Adjudication of the existence

1 48. Fishing is the primary means of subsistence of many of the Tribes' members as
2 their livelihood and culture have been based on fishing since time immemorial.

3 49. The act of fishing, circulation of harvest within the community, the dietary
4 dependence upon the fishery's harvest, and the importance of salmon and other species to the
5 Tribes' cultural and spiritual life, give treaty fishing rights a value that transcends normal
6 economic dependence on fishing.

7 50. In years past, the Tribes' members were able to fish for all the species of
8 salmon: Chinook, sockeye, pink, coho, and chum. Unfortunately, where before Tribal
9 members used to be able to harvest year-round, now they are only able to fish a few weeks
10 per year. These limitations are due to two main factors: limited salmon runs, and tight
11 restrictions on fishing imposed by the Services under the ESA to limit harm to listed species.

12 51. The Services regulate and limit the Tribes' fisheries pursuant to statutes
13 including the ESA by restricting the amount of impact tribal fisheries can have on listed
14 species. Fisheries are often restricted to short periods of time (days or even hours) in certain
15 areas. The Tribes carefully record impacts to listed species and stop or relocate their
16 fisheries once thresholds are met.

17 52. For the past fifty years, the regulation of the Tribes' fisheries has been paired
18 with protection of fish habitat. The Services have enforced ESA Section 9 to prohibit habitat
19 degradation that impairs, injures or kills a member of a species listed as threatened or
20 endangered. Over time, this has helped slow the decline or in some instances restore stocks

21
22 or extent of the Tribes' federal rights is not at issue in this judicial review proceeding, and
23 adjudication of such rights would exceed the permissible scope of this judicial review
proceeding.

1 of ESA-listed fish, which results in fewer restrictions on Tribal fisheries and greater harvest
 2 by Tribal fishers. Habitat protection also benefits production of non-listed fish, which are
 3 caught as adults by Tribal fishers.

4 **The Importance of Habitat Protection and Restoration**

5 53. There is strong scientific consensus that habitat loss is the most significant
 6 driving force behind species extinction worldwide. That broad consensus is applicable to
 7 threatened and endangered fish and wildlife in Washington state.

8 54. Habitat modification and degradation—including the related concepts of habitat
 9 loss, fragmentation, and isolation—impact members of threatened and endangered species in
 10 profound ways. Broadly speaking, habitat loss may disrupt essential ecological functions
 11 such as breeding, feeding, and sheltering. Members of species experiencing habitat loss,
 12 fragmentation, and degradation may be disturbed in their day-to-day movements, such as
 13 nesting and foraging for resources.²

14 55. Estuarine and nearshore habitats are especially important for juvenile Chinook
 15 salmon. These habitats provide essential rearing areas that support growth and improve
 16 marine survival.

17 56. Over seventy percent (70%) of Puget Sound's historic tidal wetlands have been
 18 lost or degraded due to physical alterations including diking, channelization, and tidegate
 19

21 ² See Joern Fischer & David B. Lindenmayer, *Landscape Modification and Habitat*
 22 *Fragmentation: A Synthesis*, 16 Global Ecol. Biogeogr. 265 (2007), citing D. A. Saunders,
 23 *Food and Movements of the Short-Billed Form of the White-Tailed Black Cockatoo*, 7(2)
 Wildl. Res. 257 (1980); Gary W. Luck & Gretchen C. Daily, *Tropical Countryside Bird*
Assemblages: Richness, Composition, and Foraging Differ by Landscape Context, 13(1)
 Ecol. Appl. 235 (2003).

1 infrastructure.³ These modifications reduce habitat connectivity and quality, limiting juvenile
 2 salmon access to productive floodplain environments and reducing the number of adult
 3 Chinook that return to spawning grounds. This habitat degradation has direct and indirect
 4 effects—both short-term and cumulative—on Southern Resident killer whale prey supply
 5 and overall population viability.

6 57. The Tribes have taken an important leadership role in working to maintain and
 7 recover salmon stocks in the region, including all the habitat types they depend upon for their
 8 food web, and throughout their migration and life histories: marine benthic, eelgrass,
 9 nearshore and estuary, freshwater streams including water quality and instream flows,
 10 floodplain, side and off-channel habitats, wetlands, riparian and forests.

11 58. As detailed in the examples below, the Tribes are involved in habitat protection
 12 and restoration in at least three major roles: funding and participating in scientific study and
 13 fisheries management; funding and carrying out habitat restoration efforts; and participation
 14 in processes resulting from implementation of ESA Section 7 and Section 10, which can
 15 authorize incidental take that would otherwise be unlawful under the traditional interpretation
 16 of ESA Section 9.

17 59. Swinomish is a founding member of the Skagit River System Cooperative
 18 (“SRSC”) (originally the Skagit System Cooperative from when it was founded in 1976 until
 19

20 ³ Nelson, B.W., E.J. Ward, D.W. Linden, E. Ashe, and R. Williams. 2024. Identifying Drivers
 21 of Demographic Rates in an At-Risk Population of Marine Mammals Using Integrated
 22 Population Models. *Ecosphere* 15(2): e4773. <https://doi.org/10.1002/ecs2.477>; Fresh, K., M.
 23 Dethier, C. Simenstad, M. Logsdon, H. Shipman, C. Tanner, T. Leschine, T. Mumford,
 G.Gelfenbaum, R. Shuman, J. Newton. 2011. Implications of Observed Anthropogenic
 Changes to the Nearshore Ecosystems in Puget Sound. Prepared for the Puget Sound Nearshore
 Ecosystem Restoration Project. Technical Report 2011-03.

1 2003), a fisheries and environmental science and research consortium between Swinomish
2 and the Sauk-Suiattle Indian Tribe. SRSC is a highly respected entity with more than 25
3 highly qualified scientists and biologists with expertise in fish biology, hydrology,
4 hydrogeology, restoration ecology, and environmental permitting and regulatory compliance.

5 60. SRSC was the co-author of the 2005 Skagit Chinook Recovery Plan (the
6 “Recovery Plan”) with the Washington Department of Fish & Wildlife after Chinook salmon
7 were listed as “threatened” in 1999 under the ESA. The Recovery Plan was approved by
8 NMFS/NOAA Fisheries.

9 61. The Recovery Plan states that “habitat degradation and destruction of estuary,
10 floodplain, riparian nearshore, eelgrass, and side/off channel habitats, temperature impaired
11 water quality, low stream flows, and hydromodifications like dikes, levees and tidegates
12 blocking fish access and cutting off historical habitat have caused the decimation of the ESA-
13 listed Chinook and other salmon runs.” Degradation to these habitats affects Chinook
14 recovery directly as well as the entire food web that they depend upon to feed and grow
15 strong enough before they journey to the ocean.

16 62. To assist in habitat restoration, Swinomish has recently completed a tidal
17 restoration project along Swinomish Channel, and has two other estuary restoration projects
18 underway, including at Similk Bay and along Swinomish Channel, totaling nearly 300 acres
19 of estuary habitat.

20 63. Swinomish participates in numerous processes associated with implementation
21 of ESA Section 10 and ESA Section 7.

22 64. For example, on April 22, 2024, NMFS issued a biological opinion, jeopardy
23 determination, and incidental take statement for the No Name Slough tidegate replacement

1 project. Swinomish commented and consulted with NMFS on, and participated in, the ESA
2 Section 7 consultation as a sovereign Tribe and co-manager of affected fisheries. In that
3 process, Swinomish advocated for habitat restoration to mitigate adverse effects and
4 incidental take, including habitat degradation, that is caused by the continued presence of
5 tidegates in the Skagit estuary.

6 65. Non-federal agencies seeking incidental take authorization may submit a habitat
7 conservation plan or safe harbor agreement under ESA Section 10. Authorization is
8 necessary for “incidental” take, and the associated conservation plan to “minimize and
9 mitigate the impacts of such taking” may include “habitat acquisition and maintenance.” 15
10 U.S.C. § 1539(2)(A); 16 U.S.C. § 1532(3) (defining “conserve” and “conservation”).

11 66. Swinomish has participated in ESA Section 10 processes, including the Forests
12 and Fish Habitat Conservation Plan, which governs forestry activities on more than 10
13 million acres of private land in Washington. The fundamental premise of the plan is that
14 habitat degradation caused by logging and forest practices causes “take” of ESA-listed fish
15 and upland species.

16 67. Rescission of the harm rule risks undermining the implementation of the Habitat
17 Conservation Plan, which provide regulatory certainty and needed protections for listed fish
18 and Treaty resources.

19 68. Squaxin also participates in ESA Section 7 and 10 review and consultation to
20 protect treaty-guaranteed habitat and resources. Notably for section 7, in 2023, Squaxin
21 consulted on the Joint Base Lewis-McCord Conservation Program pilot project. For Section
22 10, Squaxin participates in local Habitat Conservation Plans and the Forest and Fish Habitat
23 Conservation Plan.

1 69. Squaxin was a founding convener for four salmon recovery WRIAs (Water
2 Resource Inventory Areas): 10/12 (governed jointly), 13, 14, and 15. The goal of these
3 WRIAs is to ensure self-sustaining salmonid runs at harvestable levels through restoration
4 and conservation of freshwater streams and rivers, marine shorelines, and natural processes,
5 along with the careful use of hatcheries and responsible harvest.

6 70. Squaxin was a co-author of the 2005 South Puget Sound Chinook and Bull
7 Trout Recovery Plan, which was adopted by NOAA Fisheries in 2007. A focus of the
8 document is habitat degradation and restoration, as evidenced by the opening statement: “In
9 South Puget Sound, human activities have dramatically disrupted the function of many
10 natural processes. These disruptions, termed ‘human-based stressors,’ change habitat and,
11 ultimately, the ecosystem that Chinook and bull trout have adapted to through evolutionary
12 development. On a temporal scale, many of these human-induced stressors have been
13 sudden, creating significant impacts that have led to declines in the viability of both species.”

14 71. Squaxin was a key stakeholder in crafting and reviewing the Green Diamond
15 Habitat Conservation Plan, which protects 51 fish and wildlife species. The plan was adopted
16 by NOAA in 2000, and Squaxin continues to participate in its implementation.

17 72. Squaxin has worked with project partners to conserve over 24 miles of marine
18 shoreline habitat critical for species survival. Select projects include Goldsborough Creek
19 estuary, Bayshore Preserve, Twin Rivers Ranch, and Eagle Point in Oakland Bay, as well as
20 seven projects in lower Eld Inlet, all of which are designed to benefit all salmonids including
21 Chinook salmon and steelhead trout.

22 73. Squaxin’s freshwater conservation projects total over 1,500 acres and include
23 Skookum Valley, the middle and upper Deschutes River, and eight projects in the

1 Goldsborough Creek watershed, all designed to benefit salmon and trout, including ESA-
 2 listed Puget Sound Chinook and Puget Sound steelhead.

3 **The Endangered Species Act and “Harm Rule”**

4 74. The Endangered Species Act Section 9, 16 U.S.C. § 1538, prohibits take of
 5 endangered species. 16 U.S.C. § 1538(a)(1)(B)-(C). Under the ESA, “[t]he term ‘take’
 6 means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt
 7 to engage in any such conduct.” 16 U.S.C. § 1532(19).

8 75. Congress enacted the ESA for a clear purpose: “to provide a means whereby the
 9 ecosystems upon which endangered species and threatened species depend may be
 10 conserved.” 16 U.S.C. § 1531(b). The ESA’s ultimate goal is recovery of listed species to
 11 the point where they no longer need ESA protection. *Id.*; 16 U.S.C. § 1532(3).

12 76. Congress’ focus on ecosystems and habitat is evident throughout the ESA. The
 13 definition of “conserve” and “conservation” includes “habitat acquisition and maintenance.”
 14 16 U.S.C. § 1532(3). The first criteria for listing a species as threatened or endangered is
 15 “the present or threatened destruction, modification, or curtailment of its habitat or range.”
 16 16 U.S.C. § 1533(a)(1)(A).

17 77. Concurrent with the listing of a species, the Services “shall...designate any
 18 habitat of such species which is then considered to be critical habitat.” 16 U.S.C. §
 19 1533(a)(3). Critical habitat includes areas “on which are found those physical or biological
 20 features (I) essential to the conservation of the species and (II) which may require special
 21 management considerations or protection.” 16 U.S.C. § 1532(5).

22 78. ESA Section 7 regulates adverse modification of critical habitat as a mechanism
 23 to ensure a lack of jeopardy for populations of listed species. 16 U.S.C. § 1536(a)(2). ESA

1 Section 10 authorizes incidental take, in many instances based on preparation of a habitat
 2 conservation plan that “minimizes and mitigates, to the maximum extent practicable” the
 3 impacts of taking. 16 U.S.C. § 1539.

4 79. Habitat protection was a paramount concern when Congress enacted the ESA,
 5 as demonstrated in both the legislative history and the text of the statute. In the seminal case
 6 *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) the Court considered likely harm to
 7 fish habitat caused by a proposed dam project. The Court observed that “examination of the
 8 language, history and structure [of the ESA] indicates beyond doubt that Congress intended
 9 endangered species to be afforded the highest priorities,” and the ESA was enacted to
 10 “provide a means whereby ecosystems upon which endangered species and threatened
 11 species depend may be conserved.” *Id.* at 174.

12 80. The Court further observed that “[t]he plain intent of Congress in enacting this
 13 statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at
 14 185. As part of its analysis, the Court relied upon the harm rule, specifically citing the
 15 provision stating that habitat degradation may constitute “take.” *Id.* at 184 n.30 (noting that
 16 the term “harm” is “an act or omission which actually injures or kills wildlife, including acts
 17 which annoy it to such an extent as to significantly disrupt essential behavioral patterns,
 18 which include, but are not limited to, breeding, feeding or sheltering; *significant*
 19 *environmental modification or degradation which has such effects is included within the*
 20 *meaning of ‘harm’*” (citing 50 C.F.R. § 17.3 (1976)).

21 81. For over fifty years, harm has been defined by regulation to include “significant
 22 habitat modification or degradation where it actually kills or injures wildlife by significantly
 23 impairing essential behavior patterns, including breeding, feeding, or sheltering,” or a close

variation of that definition. 50 C.F.R. § 17.3; 50 C.F.R § 222.102 (substantively identical NMFS regulation). Known generally as the “harm rule” or “harm regulation,” the inclusion of habitat degradation in the prohibition of the “take” of endangered species is fundamental to the ESA.

82. In 1994, the Services published in the Federal Register “Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions,” 59 Fed. Reg. 126 (Friday, July 1, 1994), stating that

It is the policy of the Services 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. To the extent possible, activities that will be considered likely to result in violation also will be identified in as specific a manner as possible.

83. The Services have followed this policy, and in so doing consistently identified degradation of habitat as “harm” to and “take” of ESA-listed species.

84. Puget Sound Chinook were listed as threatened on March 24, 1999 (64 Fed. Reg. 14308) and June 28, 2005 (70 Fed. Reg. 37160). In the 1999 listing decision, NMFS noted that:

a substantial amount of habitat throughout the Puget Sound region has been degraded or blocked by dams and other barriers. In general, upper tributaries have been negatively affected by forest practices and lower tributaries and 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 [Evolutionarily Significant Unit (“ESU”)].

64 Fed. Reg. 14308, 14318.

85. NMFS provided “Take Guidance,” which states that the top listed causes of “take” were associated with habitat degradation:

Activities that NMFS believes could potentially harm, injure or kill chinook salmon in the listed ESUs and result in a violation of section 9 of the ESA 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 ESUs, such as removal of large woody debris and “sinker logs” or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow....

64 Fed. Reg. 14308, 14326.

86. In the 2005 decision, NMFS concluded that “the Puget Sound Chinook ESU continues to warrant listing under the ESA as a threatened species.” 70 Fed. Reg. 37192. In the associated take guidance, NMFS quoted the harm rule (50 C.F.R. § 222.102) in full and repeated the habitat degrading activities identified in 1994 as the top likely causes of “take.” 70 Fed. Reg. 37160, 37196.

87. In 2006, NFMS proposed listing the Puget Sound steelhead as threatened. In the proposed listing, which was finalized in 2007, the agency stated that:

Activities that we believe could potentially “harm” steelhead populations (see ESA 3(19) and 50 CFR 222.102 [harm]) in the proposed Puget Sound DPS [distinct population segment], and result in a violation of the section 9 take prohibition include, but are not limited to:

1. Land-use activities that adversely affect steelhead habitats in the Puget Sound area (e.g., logging, grazing, farming, urban development, road construction in riparian areas and areas susceptible to mass wasting and surface erosion);
2. Destruction/alteration of the steelhead habitats in the proposed DPS, such as removal of large woody debris and "sinker logs" or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow....

71 Fed. Reg. 15666, 15678 (March 29, 2006).

1 88. In 2005, NMFS listed the Southern Resident Killer Whale as endangered. The
 2 agency recognized both habitat degradation and indirect harm through reduction of prey
 3 availability as “take.” In the listing, NMFS identified:

4 Activities that we believe could result in violation of section 9 prohibitions
 5 against ‘take’ of the Southern Resident killer whale DPS include, but are not
 6 limited to, the following: 1. Coastal development that adversely affects Southern
 7 Resident killer whales (e.g., dredging, land clearing and grading, waste
 treatment/disposal, pile driving)...4. Land/water use or fishing practices that
 result in reduced availability of prey species during periods when Southern
 Resident killer whales are present.

8 70 Fed. Reg. 69903, 69911 (November 18, 2005).

9 89. FWS has also long understood habitat degradation to cause “take.” In 1999,
 10 FWS listed bull trout as threatened. FWS stated that:

11 The following actions likely would be considered a violation of section
 12 9...Destruction or alteration of riparian or lakeshore habitat and adjoining
 13 uplands of waters supporting bull trout by timber harvest, grazing, mining,
 14 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.

15 64 Fed. Reg. 58910, 58929 (November 1, 1999).

16 **The Services’ Radical Reinterpretation of the ESA and Harm Rule Rescission**

17 90. Despite 50 years of consistent interpretation, the scientific consensus that
 18 habitat degradation injures ESA-listed species, and the 6-3 majority opinion in *Sweet Home*
 19 upholding the existing regulation, on April 17, 2025, in a Federal Register notice titled
 20 “Rescinding the Definition of ‘Harm’ Under the ESA,” FWS and NMFS jointly proposed to
 21 fully rescind the definition of “harm” from 50 C.F.R. § 17.3 (FWS regulation) and 50 C.F.R.
 22 § 222.102 (NMFS regulation).
 23

91. The only basis for the rescission was the Services' assertion that "[r]egulations previously promulgated by FWS expanded the ESA's reach in ways that do not reflect the best reading of the statute, to prohibit actions that impair the habitat of protected species." 90 Fed. Reg. 16102. The Services newly asserted that "our existing regulations, which still contain the definition of 'harm' contested in *Sweet Home*, do not match the single, best meaning of the statute. As Justice Scalia's dissent in *Sweet Home* explains, the regulations' interpretation of the statutory language violates the *noscitur a sociis* canon, did not properly account for over a thousand years of history, and is inconsistent with the structure of the ESA." *Id.*

Public Comment, and Lack of NEPA Review, ESA Consultation, or Government to Government Consultation with any Tribe

92. The Tribes timely submitted extensive comments opposing the proposed rescission, submitted via Federal eRulemaking Portal.

93. Swinomish also submitted more than 20,000 pages of best available scientific and technical studies and reports, including 318 peer-reviewed studies. The submitted studies demonstrate that 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.

94. The Services received 357,698 comments, overwhelmingly in opposition to the proposed rescission and reinterpretation of the ESA. According to analysis conducted by the New York Times, about 99 percent of the comments were against the change.⁴

⁴ See "Trump, Ending Decades of Protection, Opens Wild Habitats to Drilling and Mining," July 10, 2026, available at:

1 95. At least fourteen tribes in addition to Swinomish and Squaxin located in
 2 Washington State commented in opposition to the rescission. The tribes opposing the
 3 rescission include: Cowlitz Tribe; Lower Elwha Klallam Tribe; Nisqually Indian Tribe;
 4 Nooksack Indian Tribe; Puyallup Tribe of Indians; Quileute Tribe; Quinault Indian Nation;
 5 Sauk-Suiattle Indian Tribe; Skokomish Indian Tribe; Snoqualmie Tribe; Stillaguamish Tribe
 6 of Indians; Tulalip Tribes; Confederated Tribes of the Umatilla Indian Reservation;
 7 Confederated Tribes and Bands of the Yakama Nation. The State of Washington also
 8 submitted comments in opposition.

9 96. Other tribes across the United States also submitted comments in opposition,
 10 including: Big Pine Paiute Tribe of the Owens Valley (CA); Bishop Paiute Tribe (CA);
 11 Cheyenne River Sioux Tribe (SD); Fallon Paiute Shoshone Tribe (NV); Hoopa Valley Tribe
 12 (CA); Nez Perce Tribe (ID); Confederated Tribes of Warm Springs (OR); and Pueblo of San
 13 Felipe (NM).

14 97. Swinomish requested government-to-government consultation from the
 15 Services.

16 98. The Tribes requested that the Services comply with National Environmental
 17 Policy Act (NEPA) by carrying out environmental review and ESA Section 7 by engaging in
 18 Section 7 consultation.

19 99. NEPA “is our basic national charter for protection of the environment.” 40
 20 C.F.R. § 1500.1(a). NEPA has two fundamental purposes: (1) to guarantee that agencies take
 21 a “hard look” at the consequences of their actions before the actions occur by ensuring that

22
 23 _____
<https://www.nytimes.com/2026/07/10/climate/endangered-species-act-harm.html> (last accessed
 July 13, 2026).

1 “the agency, in reaching its decision, will have available, and will carefully consider, detailed
 2 information concerning significant environmental impacts,” and (2) to ensure that “the
 3 relevant information will be made available to the larger audience that may also play a role in
 4 both the decisionmaking process and the implementation of that decision.” *Robertson v.*
 5 *Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). “NEPA emphasizes the
 6 importance of coherent and comprehensive up-front environmental analysis to ensure
 7 informed decision making to the end that ‘the agency will not act on incomplete information,
 8 only to regret its decision after it is too late to correct.’” *Blue Mountains Biodiversity Project*
 9 *v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (internal citation omitted).

10 100. Pursuant to NEPA,
 11 all agencies of the Federal Government shall ... include in every recommendation or
 12 report on ... major Federal actions significantly affecting the quality of the human
 13 environment, a detailed statement ... on (i) the environmental impact of the proposed
 14 action, (ii) any adverse environmental effects which cannot be avoided should the
 15 proposal be implemented, (iii) alternatives to the proposed action
 16 (including a “No Action” alternative), and other environmental implications of the action. 42
 17 U.S.C. § 4332(2)(C). This environmental impact statement (“EIS”) helps to ensure “that
 18 environmental concerns [will] be integrated into the very process of agency decision-
 19 making.” *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

20 101. “[B]y requiring agencies to take a ‘hard look’ at how the choices before them
 21 affect the environment, and then to place their data and conclusions before the public, NEPA
 22 relies upon democratic processes to ensure . . . that ‘the most intelligent optimally beneficial
 23 decision will ultimately be made.’” *Or. Nat. Desert Ass’n v. BLM*, 625 F.3d 1092, 1099-
 1100 (9th Cir. 2008) (quoting *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy*
Comm’n, 449 F.2d 1109, 1114 (D.C. Cir. 1971)).

1 102. NEPA recognizes the need for programmatic environmental review when
 2 connected actions under a federal program “will have a compounded effect on a region.”
 3 *Nat’l Wildlife Fed’n v. Appalachian Reg’l Comm’n*, 677 F.2d 883, 888 (D.C. Cir. 1981); *see*
 4 *also Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976) (recognizing need for a programmatic
 5 EIS for federal coal leasing program); *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1407
 6 (9th Cir. 1985) (“Where there are large-scale plans for regional development, NEPA requires
 7 both a programmatic and a site-specific EIS.”).

8 103. In the rule rescission, the Services asserted that the agency action did not
 9 require NEPA review because it was a nondiscretionary action compelled by the statutory
 10 text. 91 Fed. Reg. 43316. The Services asserted that in the alternative, the action was
 11 subject to categorical exclusions for procedural actions with overly broad or speculative
 12 environmental effects, citing 43 C.F.R. § 46.210(i) and other categorical exclusions. *Id.*

13 104. 43 C.F.R. § 46.210(i) applies to “[p]olicies, directives, regulations, and
 14 guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or
 15 whose environmental effects are too broad, speculative, or conjectural to lend themselves to
 16 meaningful analysis and will later be subject to the NEPA process, either collectively or
 17 case-by-case.”

18 105. The contention that this exclusion applies is incorrect. Among other reasons,
 19 the regulation expressly states that conditions listed under 43 C.F.R. § 46.215 do not qualify
 20 for categorical exclusion, and one of the listed actions is those that “[h]ave significant
 21 impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened
 22 Species or have significant impacts on designated Critical Habitat for these species.” The
 23

1 harm rule rescission and revised legal interpretation of the ESA have significant impacts on
2 listed species. As a result, the cited categorical exclusion does not apply.

3 106. The Services also determined that the agency action did not require consultation
4 under the ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), based on the rationale that “[t]he
5 Services’ promulgation of rules that govern their implementation of the [ESA] is not an
6 action that is in itself subject to the [ESA’s] provisions, including section 7(a)(2).” 91 Fed.
7 Reg. 43310.

8 107. The U.S. Supreme Court has long recognized the “undisputed existence of a
9 general trust relationship between the United States and the Indian people.” *United States v.*
10 *Mitchell*, 463 U.S. 206, 225 (1983). The trust duty commits the federal government to protect
11 Indian tribes’ rights, resources, and interests. *Cherokee Nation v. Georgia*, 30 U.S. 1, 2
12 (1831). In discharging this responsibility, federal agencies must observe “obligations of the
13 highest responsibility and trust” and “the most exacting fiduciary standards.” *Seminole*
14 *Nation v. United States*, 316 U.S. 286, 296-97 (1942).

15 108. To satisfy their trust obligations, agencies consult with sovereign Tribal nations
16 on a government-to-government basis. Executive Order 13175, Consultation and
17 Coordination with Indian Tribal Governments, states *inter alia* that “no agency shall
18 promulgate any regulation that has tribal implications, that imposes substantial direct
19 compliance costs on Indian tribal governments, and that is not required by statute,
20 unless...the agency, prior to the formal promulgation of the regulation...consulted with tribal
21 officials early in the process of developing the proposed regulation.”

22 109. The Services are a signatory to Joint Secretarial Order 3403, “Joint Secretarial
23 Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal

1 Lands and Waters.” Pursuant to Joint Secretarial Order 3403, *inter alia*, the Services must
 2 “[e]nsure that all decisions by the Departments relating to Federal stewardship of Federal
 3 lands, waters, and wildlife under their jurisdiction include consideration of how to safeguard
 4 the interests of any Indian Tribes such decisions may affect.”

5 110. Also in furtherance of their trust duties, “agencies must at least show
 6 ‘compliance with general regulations and statutes not specifically aimed at protecting Indian
 7 tribes,’” including NEPA’s requirement to prepare an EIS for major federal actions with
 8 potentially significant environmental effects. *Pit River Tribe*, 469 F.3d at 788 (quoting
 9 *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998)); *see also*
 10 *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104,
 11 1110 (S.D. Cal. 2010) (stating that “[v]iolation of this fiduciary duty [to tribes] to comply
 12 with ... NEPA requirements during the process of reviewing and approving projects vitiates
 13 the validity of that approval and may require that it be set aside”).

14 111. On July 14, 2026, the Services published their final decision in the Federal
 15 Register. 91 Fed. Reg. 43300. The Services finalized the rescission of the regulatory
 16 definition of harm. In its place, the Services stated that “the role and meaning of the term
 17 ‘harm’ within the larger definition of ‘take’ was expertly explicated by Justice Scalia in his
 18 *Sweet Home* dissent— an interpretation which we have herein adopted.” 91 Fed. Reg.
 19 43302.

20 112. The Services did not carry out any analysis under NEPA or ESA Section 7.

21 113. The Services recognized the many requests for consultation but did not consult
 22 with any Tribe. Instead, the Services stated that “[t]his regulation, which removes the
 23 definition of ‘harm’ from 50 CFR 17 and 222, does not have direct, substantial effects on one

1 or more Indian Tribes...” and that the Services “conclude that this regulation does not have
 2 ‘tribal implications’ under section 1(a) of E.O. 13175 and formal government-to-government
 3 consultation is not required by E.O. 13175 and related policies of the Department of the
 4 Interior and the Department of Commerce.” 91 Fed. Reg. 43315-16.

5 CAUSES OF ACTION

6 I. Violation of the Administrative Procedure Act

7 114. Plaintiffs re-allege and incorporate each and every allegation set forth in this
 8 complaint.

9 115. The Services’ rescission of the harm rule, 50 C.F.R. § 17.3 and 50 C.F.R. §
 10 222.102, associated revised legal interpretation of the Endangered Species Act, and adoption
 11 of the definition of “harm” from the dissent in *Sweet Home*, is a final agency action subject
 12 to judicial review pursuant to the Administrative Procedure Act. *See* 5 U.S.C. § 704.

13 116. The Services’ rescission of the harm rule, 50 C.F.R. § 17.3 and 50 C.F.R. §
 14 222.102, associated legal interpretation of the Endangered Species Act, and adoption of the
 15 definition of “harm” from the dissent in *Sweet Home*, violates the Administrative Procedure
 16 Act, 5 U.S.C. § 706(2)(A) because the agency action is arbitrary, capricious, and contrary to
 17 law.

18 117. The Services did not provide adequate or reasonable rationale for their reversal
 19 of longstanding agency position, in violation of the Administrative Procedure Act.

20 II. Violation of the Administrative Procedure Act based on Failure to Consult with 21 the Tribes

22 118. Plaintiffs re-allege and incorporate each and every allegation set forth in this
 23 Complaint.

119. The Services' decision that E.O. 13175 and related policies of the Department of the Interior and the Department of Commerce did not apply, and associated decision to reject Swinomish's request for consultation, and generally to not conduct government-to-government consultation with affected Tribes, is arbitrary, capricious, and contrary to law.

III. Violation of the Administrative Procedure Act based on Violation of the National Environmental Policy Act

120. Plaintiffs re-allege and incorporate each and every allegation set forth in this Complaint.

121. The Services' rescission of the harm rule, 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102, associated legal interpretation of the Endangered Species Act, and adoption of the definition of "harm" from the dissent in *Sweet Home*, is a "major federal action" that requires review under the National Environmental Policy Act, 42 U.S.C. § 4332.

122. The Services' failure to carry out NEPA review, and associated application of a categorical exclusion, violated NEPA and therefore is contrary to law under the Administrative Procedure Act.

123. The Services' failure to comply with NEPA violated their trust duties to the Tribes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

1. A declaration that the challenged agency action is unlawful and invalid.
2. An order setting aside the challenged agency action.
3. Injunctive relief enjoining implementation of the new rule and requiring restoration of the rescinded rule.

4. A declaration that the term “take” under the ESA includes indirect harm, including degradation of habitat that actually kills or injures members of the species listed as threatened or endangered under the Endangered Species Act.

5. An award of costs and attorneys’ fees as authorized under the Equal Access to Justice Act (EAJA) or any other applicable law.

6. Any other relief the Court determines is just and proper.

Respectfully submitted this fourteenth day of July, 2026.

/s/Wyatt Golding
Wyatt Golding, WSBA No. 44412

/s/Liliana Elliott
Liliana Elliott, WSBA No. 61946

/s/Eleanor Bohn
Eleanor Bohn WSBA No. 63894

ZIONTZ CHESTNUT LLP
2101 4th Avenue, Suite 1230
Seattle, WA 98121
wgolding@ziontzchestnut.com
lelliott@ziontzchestnut.com
ebohn@ziontzchestnut.com
T: 206-448-1230
F: 206-448-0962

/s/ Emily Haley
Emily Haley, WSBA No. 38284

/s/Weston LeMay
Weston LeMay, WSBA No. 51916

Swinomish Indian Tribal Community
Office of Tribal Attorney
11404 Moorage Way
La Conner, WA 98057
ehaley@swinomish.nsn.us
wlemay@swinomish.nsn.us
(360) 708-0391

*Attorneys for Plaintiff Swinomish Indian
Tribal Community*

/s/Amalia R. Walton
Amalia R. Walton, WSBA No. 36754

Squaxin Island Tribe
3711 SE Old Olympic Hwy
Shelton, WA 98584
awalton@squaxin.us
(360) 432-1771 | Phone
(360) 432-3699 | Fax

Attorney for Plaintiff Squaxin Island Tribe