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VIA EMAIL AND CERTIFIED MAIL

Debra Haaland  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
exsec@ios.doi.gov

Martha Williams  
Director  
U.S. Fish & Wildlife Service  
1849 C Street N.W., M/S 3012  
Washington, D.C. 20240  
Martha\_Williams@fws.gov

Hugh Morrison  
Acting Regional Director, Pacific Region  
U.S. Fish and Wildlife Service  
911 NE 11<sup>th</sup> Ave.  
Portland, OR 97232  
Hugh\_Morrison@fws.gov

RE: Notice of Violations of the Endangered Species Act Regarding a Determination that the Streaked Horned Lark Does Not Warrant Listing as an Endangered Species

Dear Secretary Haaland, Director Williams, and Acting Regional Director Morrison:

This serves as a 60-day notice of intent to sue the Secretary and U.S. Fish and Wildlife Service (“Service”) from the Center for Biological Diversity and Audubon Society of Portland for failing to list the streaked horned lark (*Eremophila alpestris strigata*) (“Lark”) as an endangered species and for promulgating a Section 4(d) rule that fails to provide for the conservation of the Lark. *See* U.S. Fish and Wildlife Service, Threatened Species Status for Streaked Horned Lark with Section 4(d) Rule, 87 Fed. Reg. 21,783 (Apr. 13, 2022) (“2022 Threatened Determination”); 16 U.S.C. §1540(g)(2)(C). In doing so, the Service acted arbitrarily, capriciously, and in violation of the Endangered Species Act (“ESA”).

The Center for Biological Diversity is a national, non-profit conservation organization supported by more than 1.7 million members and online activists. The Center is dedicated to securing a future for all species, great and small, hovering on the brink of extinction.

Audubon Society of Portland is a non-profit conservation organization with over 16,000 members in Oregon. Audubon Society of Portland’s mission is to inspire all people to love and protect birds, wildlife, and the natural environment upon which life depends.

In 2002, the Center and others petitioned the Service to protect the Lark under the ESA. Since that time, the Lark has continued to decline and the most recent rangewide estimate estimated that just 1,170 to 1,610 Larks remain. 87 Fed. Reg. at 21,790. This estimate, however, was based on actual counts of fewer than 400 birds—a critically small population. Despite this—and the ongoing “steep decline in the quantity, quality, and distribution of suitable habitat for the Lark,” U.S. Fish and Wildlife Service, Species Status Assessment for the Streaked Horned Lark (*Eremophila alpestris strigata*) (2022) (“SSA V2”), and other threats such as the synergistic effects of small population sizes, invasive species, climate change, airport management activities and related airstrikes, military training, the placement of dredged materials, and recreation—the Service determined that the Lark is currently not in danger of extinction throughout all or a significant portion of its range. It’s failure to do so, but to instead promulgate a harmful 4(d) Rule that allows for the take of Larks, is arbitrary, capricious, and in violation of the ESA.

### **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, until 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.* at § 1532 (20). A “species” includes any subspecies of fish or wildlife or plants[.]” *Id.* at § 1532(16).

A listing determination is made 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.” *Id.* § 1533(a)(1)(A)-(E); *see also* 50 C.F.R. § 424.11(c). The agency must list a species as long as “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 each of the listing factors both individually and in combination. *Ctr. for Biological Diversity v. Everson*, 435 F. Supp. 3d 69, 81 (D.D.C. 2020). 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 “develop and implement” recovery plans for the listed species. *Id.* § 1533(f). Additionally, Section 9 of the statute prohibits various activities including the “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).

However, the ESA’s take provisions do not automatically apply to species listed as threatened. *Id.* § 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” 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

The Lark is a subspecies of horned lark that is endemic to the Pacific Northwest west of the Cascades, i.e., it exists nowhere else on Earth. 87 Fed. Reg. at 21,789. Extirpated from the northern and southern portions of its range, the Lark is now found in 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. *Id.* at 21,790.

Horned larks are small, ground-dwelling birds. Generally pale brown with yellow washes in 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.” *Id.* at 21,789. Larks form pairs in the spring and the nesting season begins in mid-April and ends in late August with peaks in May and early June. *Id.* Following an initial nesting attempt in April, Larks often attempt to re-nest in late June or early July. *Id.*

Historically, Larks thrived in relatively flat, open areas that were maintained by flooding, fire, and sediment transport dynamics. *Id.* However, the historic conditions that maintained these habitats have been interrupted by flood control, dams, and fire suppression. *Id.* Lacking the conditions that previously created and maintained their habitat, Larks now rely on large, open areas created by anthropogenic disturbance, such as areas within or adjacent to grass seed fields, pastures, or fallow fields, recently planted conifer farms, wetland mudflats, islands created by dredged materials, and coastal areas free from encroaching seagrass. *Id.*

“The average minimum viable population (MVP) for the groups Aves and Passerines has been identified as 5,269 and 6,416 individuals, respectively.” *Id.* Although an MVP has not been calculated for Larks, it is “most likely larger than the [Lark’s] current abundance.” *Id.* On a region-by-region basis, the Service has set the MVP at 700 Larks for the South Puget Lowlands, 525 for the Pacific Coast and Lower Columbia River, and 4,500 Larks for the Willamette Valley. Draft Recovery Plan at 14.

“The most recent rangewide population estimate for streaked horned larks is 1,170 to 1,610 individuals.” 87 Fed. Reg. at 21,790. The only available rangewide data provided by the North American Breeding Bird Survey (“BBS”) “indicates a 6.52 percent decline for the subspecies between 2005 and 2015.” 87 Fed. Reg. at 21,792. Although consistent survey data is lacking for the regional populations, the Service in 2017 estimated that 252 Larks remained in the South Puget Lowlands and that only 167 Larks remained in the Pacific Coast and Lower Columbia River. *Id.* Estimates for the Willamette Valley population can be tenuous as most of the population occurs on inaccessible sites on private lands, but the Service estimated 1,100 Larks remained in the Willamette Valley in 2017. *Id.*

The Service first considered the Lark as a candidate for ESA listing in 2001. 66 Fed. Reg. 54,808 (Oct. 30, 2001). In 2002, the Center for Biological Diversity (“Center”) submitted a formal listing petition. Petition (Dec. 10, 2002). Among other threats, the Center 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 the Petition’s submittal, 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, and 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 until it was sued by the Center for failing to make ESA 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.).

In October 2012, the Service finally proposed listing the Lark under the ESA. *See* 77 Fed. Reg. 61,938 (Oct. 11, 2012). Despite painting a bleak picture of the Lark’s current status and the myriad threats to its continued existence, the Service proposed to list the Lark as threatened rather than endangered. *Id.* Subsequently, despite peer reviewers and commentators expressing concern over the Service’s proposal to list the Lark as threatened rather than endangered, in October 2013 the Service published a final regulation listing the Lark as threatened. Determination of Endangered Status for the Taylor’s Checkerspot Butterfly and Threatened Status for the Streaked Horned Lark, 78 Fed. Reg. 61,452 (Oct. 3, 2013). The Service concurrently published a 4(d) rule that omitted protections urged by peer reviews and other commentators, exempting all routine agricultural activities in the Willamette Valley where most of Larks occur from the ESA’s prohibition on killing or otherwise taking Larks, including during the breeding season. *Id.* at 61,500–502.

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 ruled that the Service acted arbitrarily and capriciously in its analysis of whether the Lark was endangered in a significant portion of its range. Transcript at 44–45. The Court also remanded the 4(d) Rule for further consideration along with the listing decision.

Following remand, the Service conducted a new Species Status Assessment (“SSA”) and took another look at its 2013 determination. However, on April 13, 2021, the Service again proposed affirming the listing of the Lark as a threatened species, as well as expanding the 4(d) rule to the entirety of the species’ range. Proposed Rule, Threatened Species Status for Streaked Horned Lark with Section 4(d) Rule, 86 Fed. Reg. 19,186 (Apr. 13, 2021). Peer reviewers and commenters again expressed objections to the Service’s decision to not list the Lark as an endangered species and the 4(d) Rule’s sweeping exceptions. Nevertheless, following the proposed rule and comments, the Service updated the SSA and then, a year later on April 13, 2022, still determined that the Lark was a threatened species—and not in danger of extinction throughout all or a portion of its range. 2022 Threatened Determination, 87 Fed. Reg. 21,783. The Service also upheld its prior Section 4(d) Rule and even broadened some of the exceptions from take.

In the March 2022 SSA (SSA V2) the Service provided what it considered to be the best available science regarding the Lark and the agency’s assessment of its current and future viability. In it, 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.” SSA V2 at ii. The Service also acknowledged the “steep decline in the quantity, quality, and distribution of suitable habitat for the lark.” *Id.* In addition to habitat loss, the Service noted that the Lark’s ongoing viability was threatened by “the ongoing loss and degradation of suitable habitat, military training, land management activities and related effects, recreation, and aircraft strikes.” *Id.*

In the 2022 Final Rule, the Service acknowledged that the best available science indicates that only an estimated 1,170-1,610 Larks remained rangewide; far lower than the 5,725 needed for the Lark to be considered minimally viable. 87 Fed. Reg. at 21,789–90. Despite these dire numbers, the Service asserted that Lark populations had increased since 2013, *id.* at 21,791, even though the only rangewide survey data suggested that Lark populations had declined by 6.52 percent between 2005 to 2015. *Id.* at 21,792. In the end, “[d]espite the ongoing influence of ... [the] 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; 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[,]” *id.* at 21,804–05, the Service found that “the subspecies is not currently in danger of extinction.” *Id.* at 21,805.

Regarding whether the subspecies was endangered in a significant portion of its range, the Service determined that it was not because, allegedly, “there is no portion of the range where there is currently a concentration of threats relative to other areas in the range.” *Id.* at 21,806. As

a result, “[b]ecause [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 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.” *Id.* at 21,806.

The Service also reaffirmed its support for its 4(d) Rule, with minor revisions from the prior 4(d) Rule. *Id.* at 21,807–21,811. The only revisions were to note 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; and the inclusion of an additional exception to the take prohibition for incidental take associated with habitat restoration activities that benefit streaked horned lark.” *Id.* at 21,807.

## **VIOLATIONS OF THE ESA**

The Service ignored the best available science and acted arbitrarily and capriciously when it found that the Lark was not an endangered species “because 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.” 87 Fed. Reg. at 21,805. The Service’s justifications are not supported by the best available science.

Specifically, the Service failed to account for the Lark’s population numbers which are far below accepted MVPs and below the population sizes necessary to ensure resilient populations and to prevent inbreeding depression, failed to account for the best available science demonstrating that Lark populations are declining at a significant rate, and failed to determine whether the Lark is endangered in a significant portion of its range by failing to determine whether the Willamette Valley, Pacific Coast or South Puget Lowlands constitute a significant portion of range in danger of extinction due to the concentrated threats in each of these regions.

The Service’s failure to follow the best available science, resulting in the 2022 Threatened Determination, allowed the agency to issue the amended 4(d) rule. The issuance of the amended 4(d) rule, however, fails to further the conservation of the Lark and rather serves the interests of regulated parties because it provides no demonstrable benefit to the Lark and instead exempts (among other things) an activity that has been identified as a primary threat to the Lark: conversion of grass seed to other crops that don’t provide habitat to the Lark. There is no evidence in the record that the 4(d) Rule has done, or will do, anything to 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). As such, the 4(d) Rule is neither necessary nor advisable for the Lark, is arbitrary and capricious, and in violation of the ESA.

### **I. The Lark stands on the brink of extinction with population numbers well below those necessary for resilient populations**

The Service’s most recent estimate of population size for Larks is just 1,170–1,610 Larks rangewide. *Id.* This is less than a third of the estimated MVP for larks. *See* 87 Fed. Reg. at 21,790 (estimating that the MVP for passerines and larks generally is 5,725 individuals). Similarly, in the Willamette Valley, where most Larks are found, 87 Fed. Reg. at 21,791, the

Service previously estimated the regional population at 900 to 1,300 individuals in 2011. 87 Fed. Reg. at 21,792. These numbers are just a fraction of the benchmark of 4,500 Larks the Service set for the species to be considered stable enough that it does not need the protection of the Act. Draft Recovery Plan at 14. Despite both the rangewide numbers and Willamette Valley numbers being a fraction of the MVP, the Service still found that the Lark is not “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).

The Service also ignored the best available science when asserting that there are “multiple populations in high or moderate condition across all representative regions[.]” 87 Fed. Reg. at 21,805. The best available science is that the “effective population size necessary to avoid inbreeding depression in the short-term (i.e., within 5 generations) is  $\geq 100$  and is  $\geq 1000$  to maintain evolutionary potential in perpetuity.” Anderson 2015 at 6. None of the site surveys relied on by the Service evidenced local populations greater than 100 birds. *See* SSA V2 at 19–20. In other words, all of them are subject to negative effects inherent in small populations.

Despite this, the Service failed to assess small population size and inbreeding depression as a factor influencing the Lark when it analyzed the stressors influencing the current status of regional populations. *See* SSA V2 at 38. As a result, the Service’s determination that some populations are in “High” or “Moderate” condition—the primary basis for the agency’s determination that the species is a threatened rather than endangered species—ignores a significant threat influencing the Lark. Ultimately, The Service’s failure to explain how these low population numbers do not warrant the listing of the Lark as an endangered species is arbitrary and capricious and in violation of the ESA.

## **II. The Service’s claim that the Lark is not in currently in danger of extinction is not supported by the evidence before the agency and does not represent the best available science**

To justify its conclusion that the Lark is “not currently in danger of extinction,” the Service relies in part on an increase in Lark numbers from “252–253 breeding pairs in 2013 at the time of listing to 383–389 breeding pairs in 2019.” 87 Fed. Reg. at 21,805. In concluding that Lark populations have increased or are stable, the Service failed to reckon with considerable information to the contrary.

In particular, the Service ignores data from the “Breeding Bird Survey” (“BBS”) for the Willamette Valley—where most of the Lark population is found—which the Service acknowledges “provides the only range-wide breeding population trend for the [Lark].” SSA V2 at 40. Concerningly, the BBS data found a “6.52 percent decline for the subspecies between 2005 and 2015[.]” *id.* at 21,792, and “significantly declining populations since the late-1960s, with an estimated annual trend of -5.74 percent.” SSA V2 at 40. By effectively ignoring the BBS data showing a declining trend, the Service acted arbitrarily, capriciously, and contrary to the best available science in violation of the ESA. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068 (9th Cir. 2018) (“[I]n ignoring available data FWS acted in an arbitrary and capricious manner.”).

Unlike the BBS data demonstrating a clear declining trend, the Service acknowledges that the surveys it relies on to justify its threatened determination have so much annual

variability that “there are no clear trends to indicate if the current regional and rangewide population is increasing or decreasing.” SSA V2 at 20. The Service’s conclusion that the Lark’s population remains stable across its range is further belied by data showing that only 24 sites were surveyed in 2013 compared to 37 in 2019, indicating that survey effort alone may explain the differences in population numbers between the two points in time. 87 Fed. Reg. at 21,791.

Similarly, the Service’s conclusion that “[t]he Willamette Valley regional population appears to be well distributed and stable[.]” 87 Fed. Reg. at 21,792, largely ignores the continuing loss of habitat on private lands in the Willamette Valley from population growth and agricultural conversion by relying on survey efforts primarily on airports and dedicated conservation sites. The Service partial acknowledges its error when it admits that “the limited surveys of accessible sites may not accurately reflect the trend in the whole region.” *Id.* Instead, they “may represent a small portion of the total number of streaked horned larks in the Willamette Valley due to lack of access on private lands, and there is no information to infer the condition of these potential populations.” 87 Fed. Reg. at 21,802. But the Service cannot ignore the significant threats the Lark faces on private lands within the Willamette Valley by focusing on populations that are not threatened by the same forces of habitat loss and fragmentation due to agricultural conversion and population growth.

The Service’s conclusion is further contradicted by its own findings that “recent analyses suggest the South Puget Lowlands regional population is declining,” and that “local populations [in the Pacific Coast and Lower Columbia River regions] have varying levels of stability and influence on the regional population.” SSA V2 at 41.

As such, the Service’s conclusion that the Lark remains relatively stable because certain populations have increased or are stable, which forms the primary justification for listing the species as threatened rather than endangered, is not supported by the information before the agency and does not represent the best available science. By effectively ignoring the BBS data showing a declining trend, the continuing loss of habitat in the Willamette Valley, and the ongoing decline of the South Puget Lowlands, Pacific Coast, and Lower Columbia River regional populations, the Service acted arbitrarily, capriciously, and contrary to the best available science in violation of the ESA. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068 (9th Cir. 2018) (“[I]n ignoring available data FWS 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 a species is endangered throughout all of its range, the Service must also determine whether the species is endangered in a significant portion of its range (“SPOIR”). The Service approached its SPOIR 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.” 87 Fed. Reg. at 21,805. “Depending on the case,” the Service may choose to “address the ‘significance’ question’ or the ‘status’ question first.” *Id.* Regardless, if the Service “reach[es] a negative answer with respect to the first question that [it] address[es], [it] do[es] not need to evaluate the other question for that portion of the species’ range.” *Id.*

With the Lark, the Service only addressed the “status” question. *Id.* 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.” *Id.* “Thus, for [the Lark, the Service] considered 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.” *Id.*

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.” *Id.* at 21,806. This cursory conclusion is contradicted by the record, which clearly shows threats are concentrated in portions of range.

In particular, the Service identified agriculture conversion and urbanization as serious threats in the Willamette Valley, where most of the Lark’s remaining population remains. With the decline in its native habitat, the Lark is now found primarily on grass seed fields in the Willamette Valley. 87 Fed. Reg. at 21,808. 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.” *Id.* at 21,795. In place of grass seed, growers have switched to crops “such as wheat, stock for nurseries and greenhouses, grapes, blueberries, and hazelnuts.” *Id.* As noted by the Service, “[t]hese other crop types do not have the low-statured vegetation and bare ground preferred by the streaked horned lark.” *Id.*; SSA V2 at 24, 26. Overall, between 2007 and 2017, the quantity of grass and other seed farms in the Willamette Valley decreased by 26 percent. SSA V2 2022 at 13; Bob Altman Comments at 4. 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 streaked horned larks.” 87 Fed. Reg. at 21,795, SSA V2 at 26.

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.” *Id.* at 25. Ultimately, the Willamette Valley’s population is predicted to double in the next 50 years. 87 Fed. Reg. at 21,974–75. This “[p]opulation growth will result in increased construction and road development, further impacting the remaining prairies and oak woodlands.” SSA V2 at 25. The combination of agricultural conversion and urbanization clearly constitute concentrated threats that endanger the Lark in a significant portion of its range.

The Service notes specific and concerning threats to other populations as well. The Service, for example, notes that climate change presents a particular threat to larks on the Pacific Coast, noting that the “outlook for streaked horned larks along the Pacific Coast is less encouraging due to the effects of climate change” with “[s]ea-level rise, increased coastal erosion, and more severe weather events” predicted to “cause significant effects to lark habitats on the coast.” 87 Fed. Reg. at 21,799.

Likewise, the Service found that small population size presents a particular threat in the South Puget Lowlands and Pacific Coast and 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.” SSA V2 at 66, 71. 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.” *Id.* at 44. 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 streaked horned larks in the South Puget lowlands[.]” *Id.* 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.” *Id.* at 45.

Similarly, the agency did not address why the impacts of climate change and small population size don’t endanger the Lark within this portion of its range now, and instead dismissed the Pacific Coast’s low populations as having “been low for many years.” *Id.* Because there was “no apparent declining trend[.]” the Service determined that the “Pacific Coast region is not currently at risk of extirpation.” *Id.* The Service’s reliance on *past* population numbers to dismiss the *current* and *future threat* of increasing loss of habitat due to climate change, sea level rise, and invasive beach grasses is arbitrary, capricious, and in violation of the ESA.

The Service’s failure to address the specific concentration of threats facing the Lark in the Willamette Valley, Pacific Coast, Lower Columbia River, and South Puget Lowlands renders the 2020 Threatened Determination’s SPOIR analysis arbitrary and capricious, and in violation of the ESA.

#### **IV. The Service’s 4(d) rule is arbitrary and capricious and in violation of the ESA**

The Service’s 2022 4(d) Rule is arbitrary and capricious and in violation of the ESA because it fails to provide any demonstrable benefit to the species despite over 9 years of implementation. Instead, it authorizes activities harmful to the Lark and prohibits the agency from taking regulatory actions it admits will benefit the subspecies. The 4(d) rule exempts agriculture activities, including “normal farming practices.” 87 Fed. Reg. at 21,809. This exemption was previously applied in the Willamette Valley, but in the 2021 rule was expanded to the whole range of the Lark.

The Service asserts that the “revised 4(d) rule will promote the conservation of the [Lark] by encouraging management of the landscape in ways that meet the conservation needs of the subspecies.” 87 Fed. Reg. at 21,807. Specifically, the Service finds the maintenance of suitable habitat on agricultural lands “crucial to maintaining the overall population of [L]arks in the [Willamette] Valley and in aiding in the recovery of the subspecies in Oregon.” *Id.* at 21,808. The Service therefore promulgated the 4(d) Rule to allegedly “remove the negative incentive for private landowners in Oregon to discontinue activities resulting in suitable habitat” for Larks out

of the concern that they may otherwise be subject to regulation from having Larks on their land. *Id.* at 21,809. The Service found the 4(d) Rule “necessary and advisable” for the Lark because it would “provide for the conservation of the species by supporting the maintenance and creation of habitat features that the [Lark] relies upon.” *Id.* at 21,810.

The Service’s “belief,” however, is contradicted by the record. There is no evidence in the record that the 4(d) Rule has contributed to the maintenance or creation of habitat through its exemption of agricultural activities from take. Nor could it for the numerous agricultural activities allowed under the 4(d) Rule which provide no habitat for Larks such as “wheat, stock for nurseries and greenhouses, grapes, blueberries, and hazelnuts.” *Id.* at 21,795. Instead, the record shows that the amount of suitable habitat for the Lark on grass seed farms in Oregon has declined by over a hundred thousand acres from 2005 to 2019—with roughly half of that time elapsing since the first 4(d) Rule went into effect. *Id.* This decline is not due to concern over regulation on account of the Lark, but because “[d]emand for grass seed and the overall acreage of grass seed harvested in Oregon has declined since 2005.” *Id.* And the Service predicts that this will continue, with or without the 4(d) Rule, “due to the variable economics of agricultural markets [which] will likely result in a continued conversion from grass seed fields to other agricultural types, and fewer acres of suitable habitat for [Larks].” *Id.* It is the market, and not the ESA, which is causing the decline of suitable habitat, and yet the Service has promulgated a 4(d) Rule which exempts all agricultural activities from take—even those that are directly contributing to the ongoing loss of Lark habitat.

In contrast to the lack of support for the benefits of the 4(d) Rule, the record is replete with admissions that the 4(d) Rule will be harmful for the Lark. *See, e.g., id.* at 21,808 (admitting that “agricultural activities can harm or kill individual [Larks] or destroy their nests in some localized fields”). Additionally, the record highlights the harm of the lack of timing restrictions on activities permitted by the 4(d) rule and acknowledges that all of the activities allowed by the 4(d) Rule “have the potential to result in destruction of nests, crushing of eggs or nestlings, or flushing of fledglings or adults when conducted during the active breeding season[.]” *Id.* at 21,810.

Lacking any demonstrable benefit, and in the face of these acknowledged harms to the Lark, the 4(d) Rule does not provide for the conservation of the species and there is no evidence that it is bringing the Lark any closer “to the point at which the measures provided by the Act are no longer necessary.” 16 U.S.C. § 1532(c). In contrast, the Service admits that “[p]rohibiting take of the [Lark] rangewide under Section 9 of the Act will help preserve the subspecies’ remaining populations, slow their rate of decline, and allow for the maintenance of suitable habitat for the species.” 87 Fed. Reg. at 21,810. The Service’s failure to do so is arbitrary, capricious, and in violation of the ESA. *See Sierra Club v. Clark*, 755 F.2d 608, 612–13 (8th Cir. 1985) (finding that the Service’s discretion to issue regulations under Section 4(d) “is limited by the requirement that the regulations ... must provide for the *conservation* of threatened species”).

## CONCLUSION

If the Service does not remedy these violations, the Center and Audubon Society of Portland intend to pursue legal action. If you believe any of the foregoing to be in error, have any questions, or wish to discuss this matter, please do not hesitate to contact us.

Sincerely,

Noah Greenwald  
Endangered Species Director  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211  
ngreenwald@biologicaldiversity.org

Bob Sallinger  
Conservation Director  
Audubon Society of Portland  
5151 NW Cornell Road  
Portland, OR 97210  
bsallinger@audubonportland.org

Ryan Adair Shannon  
Staff Attorney  
Center for Biological Diversity  
rshannon@biologicaldiversity.org

Joe Liebezeit  
Staff Scientist  
Audubon Society of Portland  
5151 NW Cornell Road  
Portland, OR 97210  
jliebezeit@audubonportland.org