

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION**

STATE OF TEXAS,)	
)	
<i>Plaintiff,</i>)	
)	Case No. 6:24-CV-81-H
v.)	
)	REPLY IN SUPPORT OF
U.S. DEPARTMENT OF THE)	DEFENDANTS’ MOTION FOR
INTERIOR; U.S. FISH AND WILDLIFE)	VOLUNTARY REMAND
SERVICE; DOUGLAS BURGUM, in his)	
official capacity as SECRETARY OF THE)	
INTERIOR; BRIAN NESVIK, in his official)	
capacity as DIRECTOR OF THE U.S. FISH)	
AND WILDLIFE SERVICE,)	
)	
<i>Defendants.</i>)	
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In response to Defendants’ motion for voluntary remand, Plaintiff agrees that remand is proper and urges this Court to also vacate the listing decision at issue. Dkt. No. 49 at 1.

The Administrative Procedure Act (“APA”) provides that “[t]he reviewing court shall . . . hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(C). The United States notes its general position that “set aside” under the APA refers to party-specific relief, and not vacatur of the rule as a whole. Further, any consideration of vacatur, like all equitable remedies, must be subject to traditional equitable limitations. *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21, 25–27 (1994); *Staley v. Harris Cnty.*, 485 F.3d 305, 310 (5th Cir. 2007).

Notwithstanding, the United States also acknowledges that the Fifth Circuit Court of Appeals views vacatur as the presumptive remedy in APA challenges. *Tex. Corn Producers v. U.S. Env’t Prot. Agency*, 141 F.4th 687, 710 (5th Cir. 2025) (“Fifth Circuit precedent establishes that

Section 706 extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to ‘set aside’—i.e., formally nullify and revoke—an unlawful agency action.” (internal quotation omitted)). Acknowledging that the United States requested remand of the Final Rule because the U.S. Fish and Wildlife Service identified substantial legal concerns with the Final Rule, Dkt. No. 44 at 11, and in light of binding Fifth Circuit case law, the United States does not oppose Plaintiffs’ requested vacatur.¹

Dated: May 15, 2026

Respectfully submitted,

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/s/ Elizabeth Kirby

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¹ Defendants continue to oppose the Center for Biological Diversity’s request to intervene in this litigation. Now that the Service has expressed an intention to reconsider its listing determination for the seven Central Texas mussel species at issue in this case, *see* April 16, 2026, Declaration of Leston Jacks, Dkt. No. 45, at ¶¶ 13, 15, it would be a waste of resources for any party to continue to brief the sufficiency of the final listing rule as is.