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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, et al.,

Plaintiffs,

v.

KRISTI NOEM, et al.,

Defendants.

Case No. 6:25-cv-00699-AA

DEFENDANTS' SUR-SUR-REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

The requirement in dispute is whether the 2025 Guidance determines rights and obligations, or whether legal consequences flow from the 2025 Guidance, to constitute final agency action under the second prong of *Bennett v. Spear*. *See* ECF 51 at 32, ECF 136 at 6, ECF 139 at 2. In *Bennett v. Spear*, the Supreme Court held that agency action satisfies that requirement when the agency action "alter[s] the legal regime to which the agency action is subject." 520 U.S. 154, 178 (1997). The District of Massachusetts's opinion in *New England Synod v. DHS* brings the concept of the alteration of a legal regime into sharp relief. No. 4:25-cv-40102, ECF 74 at 51–53 (D. Mass. Feb. 13, 2026).

In *Bennett*, the U.S. Fish and Wildlife Service, one agency of the U.S. government, issued an opinion finding that the Bureau of Reclamation, another agency of the U.S. government, had to maintain minimum water levels to avoid jeopardizing endangered fish during the Bureau of Reclamation's work on the Klamath Irrigation Project. 520 U.S. at 159. Under the Endangered Species Act of 1973, the Fish and Wildlife Service's "terms and conditions must [have been] complied with by the [Bureau of Reclamation] …." *Id.* at 158 (quoting 16 U.S.C. § 1536(b)(4)). Though the Bureau of Reclamation could "technically" disregard the Fish and Wildlife Service's opinion requiring minimum water levels, substantial civil and criminal penalties apply to "any person" who knowingly "takes" endangered species. *Bennett*, 520 U.S. at 170.

Thus, the Supreme Court held, the Fish and Wildlife Service's opinion "alter[ed] the legal regime to which the [Bureau of Reclamation's work was] subject," and the opinion constituted final agency action. *Id.* at 169, 178.

As the district court in *New England Synod* observed, the question under *Bennett*'s rubric is whether the change to the 2025 Guidance from the Mayorkas Memorandum carried "*legal effect*." No. 4:25-cv-40102, ECF 74 at 53. It did not. The Bureau of Reclamation would not have maintained minimum water levels unless the Fish and Wildlife Service's opinion effectively mandated it. But DHS officers could have taken the same enforcement actions under the Mayorkas Memorandum that they can under 2025 Guidance. "If [the Mayorkas Memorandum] had no legal consequences, then the decision to rescind it necessarily could not have any legal consequences either." *Id.* at 51.

Respectfully submitted this 23rd day of February, 2026.

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