IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KANSAS NATURAL RESOURCE COALITION, Plaintiff, v. U.S. DEPARTMENT OF INTERIOR; et al., Defendants.	CIVIL ACTION CASE NO. 6:18-cv-01114-EFM-GEB

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

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Introduction

In 1996, Congress enacted the Congressional Review Act (CRA) to restore some measure of democratic accountability to the federal bureaucracy. That law compels agencies to submit every rule to Congress for review before it can go into effect. 5 U.S.C. § 801(a)(1)(A). Kansas Natural Resource Coalition (KNRC) challenges the Department of Interior's failure to submit to Congress a vitally important rule that encourages state, local, and private conservation efforts for endangered species. Interior's unreasonable delay in complying with this requirement undermines KNRC's efforts to conserve the lesser prairie chicken and other species.

Despite wrongfully withholding this important rule from Congress, Federal Defendants (collectively Interior) move to dismiss KNRC's complaint, principally arguing that no agency's violation of the CRA—no matter how clear-cut—can be reviewed by any court. Although the statute contains a provision that, at first blush, could support Interior's argument, 5 U.S.C. § 805, a review of the statute as a whole, canons of statutory interpretation, legislative history, and the strong presumption of judicial review for agency actions, foreclose Interior's claim that it can openly violate the statute with impunity. Simply put, if Interior's argument carries the day, it will entirely defeat the operation of the statute, contrary to Supreme Court precedent. *See King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015).

Additionally, Interior argues that KNRC's complaint should be dismissed for lack of standing and on statute of limitations grounds. But these arguments too cannot withstand scrutiny. The motion to dismiss should be denied.

Background

The CRA was enacted to restore the "delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws." 142 Cong. Rec. S3683 (Apr. 18, 1996) (joint statement of Sens. Nickles, Reid, and Stevens); 142 Cong. Rec. 6922

(1996) (identical statement submitted on behalf of the House sponsors). The problem Congress aimed to solve with this statute is immensely important: federal agencies issue countless rules of great economic, social, and political significance without anyone considering them who is directly accountable to the American people. *See* Compl. ¶¶ 17-19.

The CRA rectifies this problem by compelling agencies to submit every rule they adopt to Congress before the rule may go into effect. 5 U.S.C. § 801(a)(1)(A). Once a rule is submitted, our elected representatives can review the rule and, if they wish, pass a joint resolution voiding the rule using expedited procedures. 5 U.S.C. § 802(a). If both houses of Congress pass such a resolution, it goes to the President for his signature, after which it becomes law. *See I.N.S. v. Chadha*, 462 U.S. 919 (1983). At that point, the disapproved rule cannot take effect and the agency is barred from issuing any new rule "that is substantially the same" unless "specifically authorized" by Congress. 5 U.S.C. § 801(b). For the vast majority of rules, however, Congress does nothing and allows the rules to go into effect.

To ensure agency compliance with the CRA, Congress provided that no rule may lawfully be in effect until it has been submitted. This not only affects controversial and burdensome rules that Congress might wish to overturn but, as this case demonstrates, also popular, beneficial, and non-controversial rules. Compl. ¶ 16. Congress expected courts to enforce this requirement. *See* 142 Cong. Rec. S3686.

The U.S. Fish and Wildlife Service's Policy for Evaluating Conservation Efforts When Making Listing Decisions (PECE Rule) is a vitally important conservation rule that encourages states, local governments, environmentalists, and property owners to work collaboratively on species' recovery. Compl. ¶¶ 24-30. The PECE Rule rewards such collaborations by allowing them to avoid the listing of a species under the Endangered Species Act and the burdensome regulations

that entails. Compl. ¶¶ 24-30.

KNRC has developed a conservation plan to protect the lesser prairie chicken, which its 32 member counties have adopted. *Id*. ¶¶ 31-43. That plan focuses on reducing threats to the species while also improving and restoring habitat. *Id*. The primary incentive for landowners to participate in KNRC's conservation plan is the promise of avoiding the need to list the species. *Id*. ¶ 43. Interior's refusal to submit the PECE Rule to Congress as required by the CRA eliminates this incentive and, therefore, undermines KNRC's efforts to conserve the lesser prairie chicken. *Id*. By simply submitting the rule to Congress, Interior can cause it to lawfully go in to effect, restore the incentives for collaborative conservation, and avoid future litigation over the PECE Rule's status under the CRA.

Standard of Review

A complaint is only required to set forth a short and plain statement of the claim to give the defendant fair notice and the grounds upon which the claim rests. Fed. R. Civ. P. 8(a). The court must assume all of the complaint's allegations are true and draw all reasonable inferences in the plaintiff's favor. *M.A.K. Investment Grp., LLC v. City of Glendale*, 889 F.3d 1173, 1178 (10th Cir. 2018); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). Unless the defendant presents evidence to challenge the complaint's factual allegations, a complaint should not be dismissed under Federal Rule of Civil Procedure 12(b)(1) unless its allegations and inferences are insufficient to establish subject matter jurisdiction. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Under Federal Rule of Civil Procedure 12(b)(6), a complaint should not be dismissed for failure to state a claim unless it lacks sufficient factual allegations to present a plausible claim for relief. *See M.A.K. Investment*, 889 F.3d at 1178.

Argument

To determine whether an agency action is subject to judicial review, courts begin with a "strong presumption" that review is available and impose on the agency the "heavy burden" of rebutting that presumption. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). Congress can preclude judicial review under a particular statute if the language of the statute clearly and convincingly bars review of the particular agency actions. 5 U.S.C. § 701(a)(1); *see Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). But if there is substantial doubt about the availability of judicial review, the presumption controls. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984).

Interpreting the CRA to bar judicial review of agency violations of the rule-submission requirement would violate the fundamental canon of statutory interpretation that statutes must be read as a whole. *King*, 135 S. Ct. at 2492. Interior's preferred interpretation would frustrate the operation of the CRA by allowing agencies to withhold rules from Congress without consequence. That interpretation also cannot be reconciled with the CRA's anti-circumvention provision, which only courts can enforce, or the CRA's severability clause, which shows Congress expected courts to apply the CRA. 5 U.S.C. §§ 801(b), 806. Finally, the CRA's House and Senate sponsors explained that "the limitation on judicial review in no way prohibits a court from determining whether a rule is in effect." 142 Cong. Rec. S3686. Rather, Congress "expect[s] that a court might recognize that a rule has no legal effect" due to an agency's failure to submit it to Congress. *Id*. Thus, the CRA need not be interpreted to foreclose judicial review of agency violations of the rule-submission requirement and the motion to dismiss should be denied.

I. Agency violations of the CRA's submission requirement are reviewable

A. There is a strong presumption of judicial review of agency actions under the APA

Interior argues that sovereign immunity precedents require the Court to construe its power to review agency actions narrowly. Not so. Although Congress ordinarily guards jealously the United States' sovereign immunity, it has taken the opposite approach with federal agencies. Congress has broadly waived sovereign immunity for suits challenging agency actions under the Administrative Procedure Act (APA). *See Bowen v. Massachusetts*, 487 U.S. 879, 891-92 (1988) ("[I]t is undisputed" that 5 U.S.C. § 702 "was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity . . .").

Judicial review under the APA is not construed narrowly but is instead broadly presumed. The Supreme Court and Tenth Circuit recognize "a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action.'" *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)); *Wyoming v. U.S. Dep't of Agriculture*, 661 F.3d 1209, 1242 (10th Cir. 2011) ("All agency actions are presumed reviewable under the APA."). Congress has recognized few discrete exceptions to this general rule, which the courts have appropriately construed narrowly. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Wyoming*, 661 F.3d at 1242.

The agency opposing judicial review bears "the *heavy burden* of overcoming the *strong presumption*" of judicial review. *Dunlop*, 421 U.S. at 567 (emphasis added). To do so, an agency must make a "clear and convincing" showing that Congress wished to withhold review. *See Abbott Labs.*, 387 U.S. at 141. To assess whether this standard is satisfied, courts should consider the statute's text, contemporaneous judicial construction, legislative history, and the effect of

withholding judicial review on the operation of the statute as a whole. *Block*, 467 U.S. at 349. "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Id.* at 351.

This presumption reflects the Supreme Court's concern for the consequences if an agency's "compliance with the law would rest in the [agency's] hands alone." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1652 (2015). Although not casting aspersions on agencies' "fidelity to law," the Court "know[s]—and know[s] that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence." *Id.* at 1652-53. Therefore, courts should be extremely hesitant to find judicial review unavailable. *Id.* at 1651. Congress "rarely intends to prevent courts from enforcing its directives to federal agencies" as this would leave the "agency to police its own conduct" with no consequences if the agency fails to do so. *Id.*

Interior does not address the strong presumption of judicial review in its motion to dismiss. Additionally, Interior has not made the "clear and convincing" showing required to carry its "heavy burden of overcoming the strong presumption" in favor of judicial review. *See Abbott Labs.*, 387 U.S. at 141; *Dunlop*, 421 U.S. at 567.

B. The CRA does not bar judicial review of agency actions unlawfully withheld

Interior argues that the CRA bars any judicial review of anything related to the statute—including obvious agency violations of the law's clear rule-submission command. In making that argument, Interior focuses myopically on a provision of the law providing that no "determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. Although this provision, in isolation, could be read to support Interior's argument, other text, canons of statutory interpretation, and legislative history dispel this initial impression. Instead, the statute's full context shows that the determinations, findings, actions, and omissions referenced in

§ 805 are those of the Office of Management and Budget, Government Accountability Office, Congress, and the President. Nothing supports the assertion that Congress' intended this provision to *de facto* exempt agencies from complying with the statute.

1. Interior's interpretation would negate the CRA's purpose and render the statute ineffective

Statutory provisions are not read in isolation. Rather, "'the fundamental canon of statutory construction'" is "'that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. at 2492 (quoting *Util. Air Reg. Gp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)). In particular, courts "'cannot interpret federal statutes to negate their own stated purposes.'" *Id.* at 2493 (quoting *N.Y. State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973)).

Interior's interpretation would negate the CRA's obvious purpose of restoring democratic accountability and oversight to the administrative state. *See* 142 Cong. Rec. S3683. The only consequence to an agency for violating the CRA's requirement is a court requiring submission for a rule to go into effect. Under Interior's interpretation, there would be no reason for it to ever comply with the statute; there would be no consequence to ignoring the statute's clear command and, thereby, evading democratic scrutiny.[1] *Cf. Mach Mining*, 135 S. Ct. at 1652-53 (courts should

[1] The early experience under the Regulatory Flexibility Act—another statute aimed at restraining agency excesses—demonstrates the consequences of Interior's interpretation. Assured that their actions would not be reviewed by the courts, agencies flagrantly violated this statute. *See* 142 Cong. Rec. H3016 (Mar. 28, 1996) (statement of Rep. Ewing) ("[B]ecause the agencies know their decision to ignore the [Regulatory Flexibility Act] cannot be challenged . . . they almost always do ignore the act. . . [W]ithout judicial review, the Federal regulators will continue to ignore the RFA."); 142 Cong. Rec. H3005 (Mar. 28, 1996) (statement of Mr. McIntosh) ("Federal agencies often ignored the mandate of the [Regulatory Flexibility Act] . . . [J]udicial review . . . will serve as a needed check on agency behavior and help enforce the mandate of the act."). Agencies' mistaken belief that judicial review is not available under the CRA appears to be causing the same result. *See* Compl. ¶¶ 2, 26 (describing studies showing agencies have wrongfully withheld hundreds of rules from Congress).

presume judicial review is available to avoid this precise result). Such a broad free pass for agencies to violate the law "would have been an irrational response to Congress's concern with agency overreaching" when it enacted the CRA. Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y 187, 222 (2018). Because Interior's interpretation would negate the CRA's clear purpose, it must be rejected. *King v. Burwell*, 135 S. Ct. at 2492-93.

Interior's interpretation would also impermissibly render several other provisions of the statute unworkable. For instance, the CRA provides that, if Congress and the President enact a resolution disapproving a particular rule, the agency is barred from adopting the same or any "substantially similar" rule. 5 U.S.C. § 801(b). Congress does not itself enforce this anti-circumvention provision, as it can disapprove any rule submitted to it regardless of whether it is the same or substantially similar to a prior disapproved rule. Rather, this provision can only operate if courts enforce it against recalcitrant agencies. *See* Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 Admin. L. Rev. 53, 68 (2018). Barring any judicial review whatsoever "would render [the anti-circumvention provision] meaningless." *Id.*

Under Interior's interpretation, for instance, if Congress and the President disapproved a particular rule, the agency could reissue the exact same rule and, by refusing to send it to Congress, avoid any consequences. Alarmingly, no court could consider such obvious lawlessness even when the agency enforced the rule against private parties. Permitting this result would frustrate the anti-circumvention provision, contrary to the fundamental canon of statutory interpretation that no provision of a statute should be read to render any other ineffective or redundant. *See King v.*

Burwell, 135 S. Ct. at 2492-93; *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009).

Other text of the CRA similarly suggests that § 805 cannot be interpreted so broadly. The provision immediately following § 805 provides that if any provision of the law is held invalid it should be severed from the rest of the statute. 5 U.S.C. § 806. This provision is inconsistent with Interior's interpretation, as the severability clause could only be implicated if courts can apply the CRA. *See* Larkin, *Reawakening the Congressional Review Act*, *supra* at 229.

Viewing the statute as a whole and considering canons of statutory construction reveals that the statute does not clearly bar all judicial review. Therefore, the presumption of judicial review controls and Interior's argument must be rejected. *See Block*, 467 U.S. at 349.

2. The split of judicial authority shows that the provision relied on by Interior does not provide "clear and convincing" proof that Congress wished to withhold review

Although some courts have adopted Interior's interpretation of 5 U.S.C. § 805, still others have rejected it. This split shows that "substantial doubt about the congressional intent exists" and, thus, "the general presumption favoring judicial review of administrative action is controlling." *See Block*, 467 U.S. at 351. Additionally, the courts finding in favor of judicial review better reconcile § 805 with the statute as a whole, faithfully apply canons of statutory construction and the presumption of judicial review, and present a more persuasive interpretation.

Interior relies greatly on the D.C. Circuit's decision in *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009). In a mere three sentences, the D.C. Circuit adopted Interior's interpretation without analyzing any of the problems raised above. *See id*. at 229. Three district courts outside the D.C. Circuit have issued similar holdings, also without addressing the consequences for the CRA's purpose and other provisions. *See United States v. Carlson*, No. 12-305, 2013 WL 5125434, at *14 (D. Minn. Sept. 12, 2013); *United States v. Am. Elec. Power Serv. Corp.*, 218 F. Supp. 2d 931, 949 (S.D. Ohio 2002); *Tex. Savings & Cmty. Bankers Ass'n v. Fed.*

Housing Fin. Bd., No. A 97 CA 421 SS, 1998 WL 842181, at *7 (W.D. Tex. June 25, 1998). These out of circuit precedents do not fully analyze the issue and are, therefore, unconvincing.

Interior also asserts that the Tenth Circuit has held that there can be no judicial review of agencies' violations of the CRA. *See Via Christi Reg'l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007). But the relied upon sentence is clearly dicta. No CRA claim was presented in *Via Christi Regional Medical Center*. Instead, the Tenth Circuit made a passing reference to the law in a footnote suggesting the plaintiff's brief contained a typo citing the CRA instead of another statute. *See id*.

Interior mistakenly asserts that only one district court has reached a contrary decision. Not so. Two courts of appeal have reviewed claims under the CRA and three additional district courts have held that judicial review is available. *See Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 201-02 (2d Cir. 2004) (reviewing whether a rule's effective date complies with the CRA); *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1373-76 (Fed. Cir. 2002) (same); *Center for Biological Diversity v. Zinke*, No. 17-cv-00091, 2018 WL 2144349, at *10 n.89 (D. Alaska May 9, 2018) (holding judicial review is available for Interior's alleged violation of the CRA); *United States v. Reece*, 956 F. Supp. 2d 736, 743-44 (W.D. La. 2013) (an agency's failure to submit a rule to Congress under the CRA can be raised as a defense to enforcement action); *United States v. S. Indiana Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at **4-6 (S.D. Ind. Oct. 24, 2002) (an agency's failure to submit a rule can be raised under the APA).

The most extensive discussion of the interaction of § 805, the CRA as a whole, and canons of statutory interpretation is in *S. Indiana Gas & Electric Co.*, 2002 WL 31427523, at **4-6. Acknowledging § 805's apparently broad language, the Southern District of Indiana concluded that it is not clear whose "determination, finding, action, or omission" is exempt from judicial

review. *Id.* at *5. Interpreting this to include agencies' violations of the statute's rule-submission requirement would allow them to "evade the strictures of the CRA by simply not reporting new rules" and "would be at odds with the purpose of the CRA, which was to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight." *Id.* Therefore, reading the statute to preclude this review "would render the statute ineffectual" because, as discussed above, several of the CRA's provisions could only be implicated in a judicial challenge to agency noncompliance. *Id.*

To avoid this impermissible result, the court construed "determination, finding, action, or omission under this chapter" to mean the determinations, finding, and other actions referenced in the preceding sections performed by the Office of Management and Budget, Congress, and the President. *See id.* at **5-6. This reading of the statute aligns with contemporaneous statements from the congressional sponsors of the law. *Id*. at *5.

The court also noted that Interior's interpretation is inconsistent with Congress' decision to amend the Regulatory Flexibility Act to expand judicial review in the bill enacting the CRA. 2002 WL 31427523, at *6. Prior to 1996, the Regulatory Flexibility Act barred review of "any determination *by an agency* concerning the applicability of any of the provisions of this chapter . . ." *Id.* (emphasis added). During Congress' consideration of the CRA, several congressmen acknowledged that this explicit agency exemption from judicial review had emboldened agencies to ignore statutory requirements, with no consequence to the agencies. *See* 142 Cong. Rec. H3016 (statement of Rep. Ewing); 142 Cong. Rec. H3005 (statement of Mr. McIntosh, the principal sponsor of the CRA in the House). The CRA, by comparison, does not refer to agencies in § 805. In light of the experience under the Regulatory Flexibility Act, it is highly doubtful that Congress would have limited judicial review to allow agencies to openly violate the CRA and even less

likely that it would have done so without commenting on the obvious inconsistency. *See S. Indiana Gas & Electric Co.*, 2002 WL 31427523, at *6.

The Western District of Louisiana's decision in *Reece* highlights another reason why § 805 cannot bear Interior's interpretation. 956 F. Supp. 2d at 743-44. If judicial review of agency violations of the CRA is never available, criminal defendants would be barred from raising the issue to avoid conviction. *See id.* This presents a significant constitutional concern because the Due Process Clause forbids the government from depriving anyone of life, liberty, or property except under law. *See* Larkin, *Reawakening the Congressional Review Act*, *supra*, at 227. A rule that is not lawfully in effect due to the CRA does not satisfy this requirement. *See id.* Because Interior's interpretation would raise a significant constitutional concern, it should be rejected in favor of an interpretation that would avoid this concern. *See Fish v. Kobach*, 840 F.3d 710, 742 (10th Cir. 2016) (courts should choose the interpretation of a statute "that best avoids even a shadow of constitutional doubt").

3. The CRA's sponsors confirmed that judicial review is available when agencies violate the rule-submission requirement

The Court need not resort to legislative history to reject Interior's interpretation; the presumption of judicial review, canons of statutory interpretation, and the statute as a whole provide sufficient basis to do so. But Congress' own discussion of the statute removes any lingering doubt about the availability of judicial review when agencies ignore the CRA's rule-submission requirement. The statute's sponsors from both political parties entered an identical joint statement in the Congressional Record for both the House and Senate explaining their shared understanding of the statute. 142 Cong. Rec. S3683; 142 Cong. Rec. 6922-6926. This bipartisan, bicameral statement confirms that the CRA does not bar judicial review of agency's failure to

submit rules to Congress as required.

Under § 805, "the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review." 142 Cong. Rec. S3686. "Nor may a court review whether Congress complied with the congressional review procedures in this chapter." *Id.* "[H]owever," this section "does not bar a court from giving effect to a resolution of disapproval that was enacted into law" by reviewing whether a future rule conforms to the CRA's ban on substantially similar rules. *Id.* Most relevant here, "[t]he limitation on judicial review in no way prohibits a court from determining whether a rule is in effect." *Id.* Instead, Congress "expect[s] that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3)." *Id.*

Contrary to Interior's argument, this statement clearly indicates the law's sponsors' expectation that courts would decide cases like this one. Subsection 801(a)(1)(A) is the subsection commanding that agencies "shall submit" to Congress every rule they adopt before it takes effect. The only way a rule could not be in effect "due to the operation of" this subsection is if a court were to enforce the submission requirement.

Next, Interior argues that Congress' interpretation should not be credited because it would render the judicial review provision redundant. Courts generally cannot review congressional action or inaction on proposed legislation or Congress' interpretation of its own internal rules.[2] However, Congress' interpretation does not render § 805 redundant for several reasons. First, that interpretation also insulates from judicial review the Office of Management and Budget's "major

[2] *See Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 571 (9th Cir. 1989) (absent constitutional infirmity, courts should defer to Congress' interpretation of its internal rules); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (suggesting that the Administrative Procedure Act does not apply to Congress).

rules" determinations. *See* 142 Cong. Rec. S3686; *see also* 5 U.S.C. § 801(a)(3) (delaying the effective date for any rule deemed a major rule). Second, it prevents a challenge to Congress' action from being recast as a challenge to an agency's compliance with a resolution of disapproval. *Cf. Ctr. for Biological Diversity*, 2018 WL 2144349, at *10 n.89 (trying to draw a line between permissible and impermissible challenges). Third, even if this interpretation results in some redundancy, it's an understandable redundancy that the joint statement acknowledges and explains. The joint statement observes that the Constitution's separation of powers generally prevents courts reviewing Congress' actions or inactions. But reaffirming this principle in the statute's text was wise because "Congress may have been reluctant to pass congressional review legislation at all if its action or inaction pursuant to this chapter would be treated differently than its action or inaction regarding any other bill or resolution." 142 Cong. Rec. S3685.

Finally, Interior argues that this clear explanation of Congress' intention should be ignored because it slightly postdates the CRA's enactment—by a mere 20 days—and is therefore "post-enactment legislative history." In making that argument, Interior greatly exaggerates the effect of *Bruesewitz v. Wyeth LLC*'s recognition that post-enactment congressional statements are not formal legislative history. 562 U.S. 223, 241-42 (2011).[3] Contrary to Interior's intimations, the Supreme Court continues to recognize that courts should consider contemporaneous and persuasive statements of Congress' understanding of a statute, even if they postdate enactment. *See United States v. Woods*, 571 U.S. 31, 47-48 (2013) (although not formal legislative history, a post-enactment statement from Congress should be considered "to the extent it is persuasive"); *cf.*

[3] Reliance on post-enactment congressional statements can be treacherous for several reasons. *See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) (post enactment legislative history may be unreliable because memories fade). But Interior does not argue that any of those concerns arise here.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (giving weight to an agency's reasonable interpretation of a statute to the extent it has the "power to persuade").

Both traditional legislative history and subsequent congressional statements support the reliability and persuasiveness of the joint statement. During Congress' consideration of the CRA, one of the sponsors explained that enacting the final version of the statute as an amendment to an existing bill would preclude "a conference report or managers' statement prior to passage[.]" 142 Cong. Rec. H3005 (statement of Mr. McIntosh). But, he explained, the sponsors of the bill intended to draft a statement "that we can insert in the Congressional Record at a later time to serve as the equivalent of a floor managers' statement[.]" *Id*. Thus, when Congress voted, it did so in anticipation that the sponsors would submit the joint statement confirming their shared, contemporaneous understanding of the bill. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("[W]e would be remiss if we ignored these authoritative expressions concerning the scope and purpose" of a statute.).

The joint statement also reflects this understanding. It explains that the bill "was the product of negotiation with the Senate and did not go through the committee process." 142 Cong. Rec. S3683. Consequently, "no other expression of its legislative history exists" other than a few short statements during the debates. *Id.* To cure this deficiency, the sponsors "intended" their joint statement "to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms." *Id.*

On the CRA's tenth anniversary, the House Judiciary Committee considered this question and came to the same conclusion. *See* H. Comm on the Judiciary, Subcomm. on Commercial & Admin. Law, 109th Cong., Interim Report on the Administrative Law, Process and Procedure

Project for the 21st Century 86 n.253 (Comm. Print 2006).[4] The Committee's report acknowledged that the joint statement postdated the law's enactment. *Id.* But, "[i]n the absence of committee hearings and the sparse commentary during floor debate, these explanations represent the most authoritative contemporary understanding of the provisions of the law." *Id.* Thus, the Committee concluded that the joint statement "arguably merits close consideration by a reviewing court as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law." *Id.*

In summation, Congress' interpretation of the CRA reflected in the sponsors' bipartisan, bicameral statement is more persuasive than Interior's interpretation. It accords better with the strong presumption of judicial review of agency actions under the APA. And it ensures the effective operation of the CRA. Interior's interpretation, on the contrary, would render several other provisions meaningless and defeat the purpose of the statute.

C. Interior has unreasonably delayed submission of the PECE Rule to Congress as required by the CRA

Because Interior has not met its heavy burden to show the CRA bars judicial review, the APA provides review for agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1) (reviewing courts shall "compel agency action unlawfully withheld or unreasonably delayed"). This provision of the APA provides for judicial review of an agency's failure to take "a *discrete* agency action that it is required to take." *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). In other words, the APA "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing

[4] *Available at* https://www.gpo.gov/fdsys/pkg/CPRT-109HPRT31505/.../CPRT-109HPRT31505.pdf.

how it shall act.'" *Id.* (quoting Attorney General's Manual on the APA 108 (1947));[5] *see, e.g.*, *In re A Community Voice*, 878 F.3d 779, 784-85 (9th Cir. 2017) (agency failure to respond to rulemaking petition is subject to judicial review); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418-19 (D.C. Cir. 2004) (same). This "protect[s] agencies from undue judicial interference with their lawful discretion, and [avoids] judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *S. Utah Wilderness Alliance*, 542 U.S. at 66.

The CRA's dictate that agencies submit every rule they adopt to Congress is a discrete, mandatory action that courts can enforce. The CRA commands that federal agencies "shall submit" every rule they adopt for review. 5 U.S.C. § 801(a)(1)(A). "Shall" denotes a nondiscretionary command. *See Jewell v. United States*, 749 F.3d 1295, 1299 (10th Cir. 2014) (describing "the age-old precept that 'shall' means 'shall'"). Thus, this is a discrete, nondiscretionary agency action that courts can compel if an agency unlawfully withholds or unreasonably delays a rule's submission to Congress. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186-89 (10th Cir. 1999).

The PECE Rule is a "rule" subject to the CRA. The statute defines rule broadly as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4); 5 U.S.C. § 804 (defining "rule" in reference to 5 U.S.C. § 551(4)); *cf.* Government Accountability Office, *Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act* (Dec. 5, 2017) (applying the CRA's definition

[5] *Available at* https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947.

of "rule").[6] The PECE Rule is an agency statement of general applicability and future effect that controls the U.S. Fish and Wildlife Service's evaluation of state, local, and private conservation efforts when making listing decisions. *See* Compl. ¶¶ 24-30. The CRA recognizes three narrow exceptions to this broad definition, none of which are implicated here. 5 U.S.C. § 804.

To determine whether a delay is unreasonable, courts balance the burdens on the agency against the impacts to third parties. *See Qwest Communications Int'l, Inc. v. F.C.C.*, 398 F.3d 1222, 1238-39 (10th Cir. 2005) (describing factors). Here, those factors plainly weigh in favor of KNRC.

If the Court ordered Interior to comply with the CRA, the burden on Interior would be minimal. It need only send a "concise general statement relating to the rule" and the text of the rule to each House of the Congress and the General Accounting Office. 5 U.S.C. § 801. Sending a courier with these documents the few miles between Interior's headquarters and the U.S. Capitol would require far less time or expense than, for instance, filing the motion to dismiss this case. This is not the sort of burdensome process that courts have previously relied on to excuse agency delays. *See, e.g.*, *United Steelworkers of Am., AFL-CIO-CLC v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (14-month delay is reasonable where "the agency must, of necessity, deal with a host of complex scientific and technical issues").

Taking this simple step would satisfy the CRA and would prevent any future challenge under the CRA. This makes Interior's invocation of the government's interest in finality, Mot. to Dismiss at 21, puzzling. Interior can easily have finality by submitting the PECE Rule to Congress and—outside of the extremely unlikely scenario that Congress disapproves the PECE Rule—it will cost Interior essentially nothing. Interior's continuing failure to comply with this mandatory

[6] *Available at* https://www.gao.gov/assets/690/688763.pdf.

duty, on the other hand, means that the rule will be a source of additional litigation. The implementation of the PECE Rule will result in additional agency actions subject to challenge under the APA, including because the rule is not lawfully in effect. 5 U.S.C. § 706(2); *see Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049-52 (9th Cir. 2016) (infirmity of 1987 regulation can be raised in any challenge to subsequent agency action relying on it).

The trivial inconvenience to Interior pales in comparison to the consequences for third parties. In this case, Interior's refusal to comply with the CRA undermines the efforts of KNRC and others to conserve the lesser prairie chicken. Compl. ¶¶ 39-43. It also could result in the improper listing of the species under the Endangered Species Act, contrary to KNRC's interests in providing locally led solutions to conservation and natural resource issues. Compl. ¶ 9.

Finally, there is no legal remedy other than judicial review under the APA. 5 U.S.C. § 704 (providing judicial review of agency actions where "there is no other adequate remedy in a court"). Only Interior can carry out its obligation to submit rules to Congress under the CRA. The democratically accountable review provided under that law only commences after the agency takes this step. *See* 5 U.S.C. § 802(a) (providing that a resolution of disapproval can only be introduced "in the period beginning on the date on which the report [from the agency] is received by Congress and ending 60 days thereafter").

II. KNRC has alleged sufficient facts to establish standing

To establish standing, a plaintiff must show that she has or will imminently suffer a concrete injury that is fairly traceable to the defendant's actions and it is likely that the injury will be redressed by the relief requested. *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff's burden in showing standing depends on the stage of the litigation. At the pleading stage, the plaintiff's burden

is reduced. "[G]eneral factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). KNRC's complaint adequately alleges facts to support the organization's standing.

A. KNRC has adequately alleged injury

KNRC has adequately alleged injury from Interior's flouting of the CRA. As KNRC's Complaint explains, KNRC has developed a lesser prairie chicken conservation plan that is directly affected by this violation. Compl. ¶¶ 39-41. That plan relies on the PECE Rule to provide an incentive for property owners to participate—which is the PECE Rule's primary purpose. Compl. ¶¶ 42-43; *see* 68 Fed. Reg. 15,100, 15,101, 15,104 (Mar. 28, 2003). Because KNRC's conservation plan calls for ongoing efforts to improve habitat and protect the species, the PECE Rule's incentives are especially important to the success of the plan. *See* Compl. ¶¶ 40-41. For instance, the plan calls for counties to work with property owners to address invasive species that encroach on lesser prairie chicken habitat, to upgrade fencing to reduce harms to lesser prairie chickens, and other efforts to restore habitat. Compl. ¶ 41. Because the PECE Rule has not been submitted to Congress, KNRC cannot honestly recruit property owners to participate in its conservation plan with the promise that the PECE Rule will reward their efforts by allowing the species not to be listed. Compl. ¶ 43. Thus, Interior's failure to submit the PECE Rule to Congress currently injures KNRC by undermining its conservation work.

Just as Interior's failure to submit the PECE Rule to Congress directly harms KNRC, submission of the rule and Congress allowing it to go into effect would directly benefit KNRC's interests. KNRC has defended those interests as amicus curiae in earlier litigation, noting that the

PECE Rule is necessary to its own conservation efforts. *See* Mot. of KNRC for Leave to File Amicus Brief, *Permian Basin Petroleum Ass'n v. Dep't of Interior*, Case No. 7:14-cv-00050, Doc. No. 65 (W.D. Tex. filed May 7, 2015). As Interior will soon consider again whether to list the lesser prairie chicken, the PECE Rule's status will play a pivotal role in KNRC's conservation efforts. Compl. ¶ 43. Under the PECE Rule, KNRC must show that the conservation efforts described by its plan are certain to be implemented and certain to be successful. Compl. ¶ 26. However, KNRC alleges that depends on landowner certainty that the PECE Rule is lawfully in effect and will be applied in any listing decision. Compl. ¶¶ 30, 43. Only once Interior submits the rule—whether voluntarily or as a result of this litigation—can KNRC establish that certainty. Because the PECE Rule sets the standards for evaluating conservation plans like KNRC's, they are one of the objects of the rule and, therefore, easily satisfy standing. *See Lujan*, 504 U.S. at 561-62 ("there is ordinarily little question" of standing when a suit is brought by "an object of the action (or forgone action) at issue").

These injuries are sufficient. As the Supreme Court has long recognized, a broad range of injuries can satisfy this requirement, so long as the injuries are directly felt by the plaintiff. *See Lujan*, 504 U.S. at 562-63 (the mere desire to use or observe an animal species, even for purely esthetic purposes, "is undeniably a cognizable interest for purpose of standing"). Here, Interior's failure to follow the CRA directly injures KNRC's conservation and federalism interests and frustrates KNRC's significant investment of resources into its conservation plan. *See* Compl. ¶¶ 9, 27, 39-43. "[A] concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Rather, it constitutes a sufficient injury to establish standing. *Id*.

At the pleading stage, these alleged injuries are more than adequate to show standing under *Lujan*.[7] *See* 504 U.S at 561. Interior's arguments against KNRC's standing are unconvincing.

1. The PECE Rule, if submitted to Congress, would apply to KNRC's conservation plan

First, Interior argues that the PECE Rule would not apply to KNRC's conservation plan even if it had been submitted. This argument rests on a misunderstanding of the PECE Rule and appears to presume facts not contained in the complaint nor supported by Interior. Traditionally, the U.S. Fish and Wildlife Service could only consider in listing decisions "regulatory measures" that had been implemented and effectively resolved threats to a species. The PECE Rule requires the agency to also consider recently developed incentive-based conservation plans "that have yet to be implemented or to show effectiveness." 68 Fed. Reg. at 15,100.

Although Interior seems to suggest that KNRC's conservation plan is ineligible because it was developed five years ago, the PECE Rule is not limited to last-minute agreements but gives more weight to plans, like KNRC's, that are established but not yet fully implemented and proven effective. *See* 68 Fed. Reg. at 15,101 ("Last-minute agreements (i.e., those that are developed just before or after a species is proposed for listing) often have little chance of affecting the outcome of a listing decision."). Conservation plans that depend on future habitat improvement projects, like KNRC's conservation plan, must be analyzed under the PECE Rule. KNRC's plan calls for counties to work with property owners to remove invasive species that encroach on lesser prairie chicken habitat, improve fencing to reduce adverse impacts to the species, and other habitat restoration efforts. Compl. ¶¶ 39-43. Interior's argument appears to rest on an unstated and

[7] If the Court disagrees, KNRC should have an opportunity to amend the complaint and elaborate on its standing allegations.

unsupported factual allegation: that all of the conservation activities envisioned by KNRC's plan have already been fully implemented and, thus, their effectiveness can be determined with hindsight. This argument is improper in a motion to dismiss, which must assume the accuracy of all of the complaint's allegations and draw any inferences in KNRC's favor.

Similarly, Interior's argument that the PECE Rule is mere guidance and KNRC's conservation plan would be considered the same way directly under the Endangered Species Act is incorrect. In fact, Interior adopted the PECE Rule in response to several courts holding that the agency could not consider such conservation plans directly under the statute. *See, e.g.*, *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998); *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 744 (W.D. Tex. 1997); *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996). The PECE Rule overcame this problem by setting clear standards to guide Interior's consideration of conservation plans in listing decisions. *See* 68 Fed. Reg. at 15,106. And courts have since treated the PECE Rule as a binding rule, including enforcing it against the agency. *See, e.g.*, *Permian Basin Petroleum Ass'n v. Dep't of Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015) (striking down an earlier listing of the lesser prairie chicken because Interior did not follow the PECE Rule).

2. KNRC is currently injured by Interior's violation of the CRA and imminently faces other injuries from that violation

Second, Interior argues that KNRC faces no imminent injury because any listing of the lesser prairie chicken will depend on future events. This argument fails for several reasons. First, KNRC is currently injured in its efforts to recruit landowners to participate in its conservation plan because it cannot rely on the PECE Rule to reward their conservation efforts. Compl. ¶¶ 39-43. For KNRC to establish that the conservation efforts described it its plan are certain to be

implemented and successful, it must secure landowner participation prior to any listing decision. *See id.* That injury is being felt today.

Other injuries are also far more imminent than Interior suggests. Interior has announced its intention to issue a proposed listing decision for the lesser prairie chicken this summer. *See* Office of Information and Regulatory Affairs, Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, *Proposed Listing Determination and Critical Habitat Designation for the Lesser Prairie Chicken*.[8] If the PECE Rule is in effect, as KNRC seeks to accomplish by requiring Interior to submit it to Congress, that rule will govern Interior's imminent consideration of the proposed listing, benefitting KNRC. And if Interior continues to withhold the PECE Rule from Congress, denying it lawful effect, that will alter the impending listing decision process for the worse by preventing proper consideration of KNRC's conservation plan. These injuries are sufficiently imminent for standing purposes. It is unnecessary and would be wasteful to allow Interior to sink further resources into that consideration rather than complying with the CRA now.[9]

B. KNRC has adequately alleged causation and redressability

As described above, KNRC's injuries are caused by Interior's failure to submit the PECE Rule to Congress and would be redressed if the Court ordered Interior to submit the rule as

[8] *Available at* https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1018-BB27.

[9] The outcome of Interior's listing decision is likely to be litigated, as applications of the PECE Rule to a species' listing decision routinely lead to litigation. *See, e.g.*, *Defenders of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016); *Desert Survivors v. U.S. Dep't of Interior*, No. 16-cv-01165, 2018 WL 2215741 (N.D. Cal. May 15, 2018); *Rocky Mountain Wild v. Walsh*, 216 F. Supp. 3d 1234 (D. Colo. 2016); *Permian Basin Petroleum Ass'n*, 127 F. Supp. 3d 700; *Western Watersheds Project v. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007); *Western Watersheds Project v. Foss*, No. 04-cv-168, 2005 WL 2002473 (D. Idaho Aug. 19, 2005).

required. Interior argues that the chain of causation is too remote.

Precedent concerning challenges to an agency's failure to respond to a rulemaking petition shows that KNRC has adequately alleged causation. The APA requires agencies to permit the public to petition the agency to issue new rules. 5 U.S.C. § 555(b), (e). Petitioners have standing to challenge an agency's failure to respond to a rulemaking petition so long as they can show that issuance of the rule they seek would advance their interests. *See Natural Res. Def. Council, Inc. v. Securities & Exchange Comm'n*, 606 F.2d 1031, 1042-43 (D.C. Cir. 1979). That's true even though full relief will depend on the agency ultimately granting the petition, implementing the desired rule, and regulated parties complying with the rule. *See id*.

This is because the causation and redressability requirements are considerably relaxed in cases alleging an agency has failed to perform a required procedural step. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009); *Lujan*, 504 U.S. at 573 n.8. For good reason: the rulemaking process requires agencies to perform several steps. If the mere existence of additional steps were sufficient to defeat standing, the process would be self-defeating—each step would block standing to challenge the compliance with every other step. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (environmental group has standing to challenge Interior's failure to perform required environmental review even though it might issue the same decision afterward).

Interior's failure to submit the PECE Rule to Congress directly harms KNRC's interests in securing landowner participation in its conservation plan for the lesser prairie chicken. *See Lujan*, 504 U.S. at 572-73 (distinguishing plaintiffs that assert a generic interest in an agency following mandated procedures from those where the failure to follow the required procedure "could impair a separate concrete interest" of the plaintiff). The requested relief will resolve that injury. Once submitted, the PECE Rule would fully comply with the CRA, KNRC could rely on its incentives

to recruit landowners to participate in its conservation plan, and any listing decision based on KNRC's plan could not be challenged on the basis that the PECE Rule was not submitted to Congress under the CRA. Therefore, standing is satisfied.

III. KNRC's claim is not barred by the statute of limitations

A challenge to a completed agency action, like the adoption of a regulation under the APA's notice-and-comment procedures, must be filed within six years of when the challenged action became final. *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245-46 (10th Cir. 2012). KNRC does not bring such a claim. It does not challenge the adoption of the PECE Rule, such as a claim that the PECE Rule violates the Endangered Species Act. An agency's obligation to submit a rule to Congress arises after it completes this rulemaking process. Thus Interior's arguments regarding whether this a facial or as-applied challenge to that earlier action miss the mark. KNRC does not challenge the PECE Rule but supports it.

Interior's statute-of-limitations argument omits any discussion of the agency action that this case concerns: Interior's subsequent unreasonable delay in submitting the PECE Rule to Congress as required by the CRA. The CRA's rule-submission requirement is precisely the sort of discrete, discretionless action that courts can compel under the APA. *See supra* Part I(C).

Because the CRA does not establish a particular deadline by which an agency has to comply with this requirement, precedent requires plaintiffs to wait patiently rather than rush to the courthouse. *See Forest Guardians*, 174 F.3d at 1189-91 (discussing the differences between an agency action unlawfully withheld and an agency action unreasonably delayed). Although courts have not set a clear rule for how long plaintiffs must wait before bringing an agency-action-unreasonably-delayed case, agencies have successfully established that such cases must "involve[] delays of years, not months." *In re A Community Voice*, 878 F.3d at 787. For that reason, it is

common for such cases to challenge an agency's failure to take a required step for six or more years. *See In re Pesticide Action Network N. Am.*, 798 F.3d 809, 811-12 (9th Cir. 2015) (eight-year delay without a "concrete timeline" for performing the required action is unreasonable); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 419 (six-year delay is too long); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (same); *In re Core Commc'ns Inc.*, 531 F.3d 849, 857 (D.C. Cir. 2008) (same); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (nine-year delay unreasonable); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (eight-year delay unreasonable).

Interior cites no case to support its argument that once it delays a mandatory action for six years it is henceforth immune to challenge. If accepted, that argument would put plaintiffs in an impossible bind. By the time a delay has dragged on long enough to be unreasonable, the statute of limitations would bar any challenge. As if to prove this point, Interior argues both that KNRC has sued too early, Mot. to Dismiss at 17-18, and too late, *id.* at 19-22.

The Ninth Circuit recently rejected a similar argument by many of the defendants in this case. In *California Sea Urchin Commission*, Interior argued that a challenge to a recent final agency action is time barred if the arguments supporting that challenge could have been leveled against an earlier agency action. *See* 828 F.3d 1046. In rejecting that argument, the Ninth Circuit noted that any earlier challenge "would necessarily have been theoretical" making judicial review much more difficult. *Id*. at 1052.

The D.C. Circuit's decision in *In re United Mine Workers* is also instructive. 190 F.3d 545. In that case, the court rejected a similar statute of limitations defense, reasoning that where a plaintiff "does not complain about what the agency has done but rather about what the agency has yet to do," there is no completed past agency action from which the statute of limitations could

run. *See id*. at 549. "Indeed," if a plaintiff filed a failure to act claim too quickly, the court "might well have denied [it] as premature." *Id*.

So too here. Any challenge to Interior's failure to submit the PECE Rule to Congress would have been premature in 2003. First, Interior would have argued that the plaintiff did not wait adequate time to show that any delay was unreasonable. *See In re A Community Voice*, 878 F.3d at 787. Second, Interior would have argued the plaintiff lacked standing because any impact would be contingent on the future application of the PECE Rule to a species that affects the plaintiff's interests. *See Cal. Sea Urchin Comm'n*, 828 F.3d at 1052 (rejecting Interior's statute of limitations defense for precisely this reason). It has been less than six years since the PECE Rule was first applied to the lesser prairie chicken and, as explained above, Interior has announced that it will imminently consider listing the species again, triggering again application of the PECE Rule. *See* 79 Fed. Reg. 19,974 (Apr. 10, 2014); Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, *supra*. Contrary to Interior's assertions, this is no stale case.

Interior relies on several cases suggesting that, where Congress sets a particular deadline for an agency action, the statute of limitations runs from that day and expires six years later. In *Center for Biological Diversity v. Hamilton*, for instance, the Eleventh Circuit held that a challenge to the failure to designate critical habitat for an endangered species was time-barred. 453 F.3d 1331, 1334-35 (11th Cir. 2006). The Endangered Species Act requires the U.S. Fish and Wildlife Service to designate critical habitat within two years of a species' listing. *Id*. at 1333. In 1992, the Service listed two species of minnows and declined to designate critical habitat. *Id*. Twenty-two years later, the Service had not designated critical habitat and an environmental group sued. The Eleventh Circuit rejected the claim as time-barred because the statute's two-year deadline for designating critical habitat provided a clear point from which the statute of limitations could run.

As discussed above, the CRA does not contain a clear deadline for agency compliance with the rule-submission requirement from which the statute of limitations period could run. But, even if precedents concerning agency action unlawfully withheld could be applied to an agency-action-unreasonably-delayed case, like this one, dismissal would still be improper. It has been less than six years since Interior applied the PECE Rule in a listing decision for the lesser prairie chicken. Compl. ¶ 34.[10] Thus, even if the statute of limitations period could run from this point, this case would not be time barred. *Cf. Ute Distribution Corp. v. Secretary of Interior*, 584 F.3d 1275, 1283 (10th Cir. 2009) (finding a non-APA claim barred where more than six years had passed since a "single, discrete event" subsequent to the alleged failure to act that could have "given rise to a cause of action and triggered any attendant limitations period"). But, ultimately, the Court need not reach that issue since Interior's arguments do not apply to cases challenging an agency's unreasonable delay in performing a discrete, mandatory action with no explicit deadline.

Conclusion

The CRA is unequivocal that every agency must submit every rule they adopt to Congress for review. Whether due to carelessness, indifference, or improper motives, Interior has not submitted the PECE Rule to Congress as required by the CRA. And it continues to resist this obligation, despite how easy it would be to comply. Instead, Interior seeks to handicap the CRA by blocking any judicial review of any agency violation of the statute. This position is belied by the strong presumption of judicial review for agency actions, which Interior does not acknowledge, much less surmount. And its interpretation would impermissibly thwart the CRA's purpose.

[10] Interior has given no reason to believe that KNRC knew or should have known about its violation of the CRA prior to this point. It is unreasonable to expect KNRC to have noticed the absence of the PECE Rule in an obscure government database containing thousands of other rules prior to this point. And, at the pleading stage, any inferences the Court draws related to that question must be in KNRC's favor.

According to that interpretation, every federal agency is free to ignore the law's requirements and suffer no consequence, no matter the effect on third parties subjected to rules that have not undergone the required democratic scrutiny. This is not a permissible interpretation of the statute and Interior's motion to dismiss should be denied.

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Respectfully submitted,

s/ Kenny Estes

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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