IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

CTM HOLDINGS, LLC, an Iowa limited liability company, Plaintiff, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as the Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Chief of the Natural Resources Conservation Service; and JON HUBBERT, in his official capacity as Iowa State Conservationist, Defendants, IOWA FARMERS UNION, IOWA ENVIRONMENTAL COUNCIL, FOOD & WATER WATCH, and DAKOTA RURAL ACTION, Intervenors.	Case No. 24-CV-02016-CJW-MAR **INTERVENORS' BRIEF IN SUPPORT OF INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND/OR DISMISSAL**

Pursuant to Federal Rule of Civil Procedure ("FRCP") 56, FRCP 12(b)(1), Local Rule ("LR") 56, and LR 7(d), Intervenors Iowa Farmers Union, Iowa Environmental Council, Food & Water Watch, and Dakota Rural Action, by and through undersigned counsel, submit the following Brief in Support of Intervenors' Motion for Summary Judgment and/or Dismissal. Pursuant to LR 56(a), Intervenors incorporate the contemporaneously filed Statement of Materials Facts and Appendix in Support of this Motion.

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I. Introduction

Plaintiff challenges a 40-year-old Farm Bill program called Swampbuster (16 U.S.C. §§ 3821–3824) as unconstitutional because it allegedly "force[s]" farmers to choose between complying with it (and thus being allowed to retain Farm Benefits[1]), and "forfeiting all [] possible uses" of their land "in perpetuity." *See* Int. App. 144, 147, 148 (Compl. ¶¶ 47, 62, 66). But compliance with Swampbuster is completely voluntary; it is just one of many eligibility requirements which, if met, grant a farmer access to the billions of dollars in federal farm benefits that USDA administers every year. If a property owner does not want to comply with Swampbuster, the owner can still farm the land as he or she pleases. He or she will just no longer be eligible to receive Farm Benefits. Swampbuster is not unique: Congress routinely (and constitutionally) imposes eligibility requirements when handing out taxpayer subsidies.

Plaintiff's "force[d]" choice theory is wrong, but even if it were viable, Plaintiff is not among those who suffer from it. Plaintiff is not a farmer and has not received any Farm Benefits since September 30, 2024. Plaintiff cannot be "force[d]" to make a choice about whether to maintain something it no longer receives. Moreover, the record unequivocally demonstrates that Swampbuster has never required Plaintiff to "forfeit[] all [] possible uses" of its Wetland. Indeed, even before filing the lawsuit, Plaintiff earned $26,500 from a timber sale on the Property—including logs cut down from the Wetland—all while complying with Swampbuster and receiving monthly Farm Benefits checks.

Bottom line, Plaintiff has not suffered and will not suffer from the injury this lawsuit seeks to redress. Because Plaintiff lacks standing to challenge Swampbuster, there is no justiciable case

[1] Intervenors use the same acronyms and defined terms (Farm Benefits, Property, Wetland, etc.) as are reflected and defined in the separate Proposed Statement of Material Facts, filed with this Motion.

or controversy for the Court to decide. Plaintiff's legal theories also all fail on the merits, and summary judgment and/or dismissal in favor of the Defendants should be granted.

II. Legal and Factual Background

The USDA administers billions of dollars in loans, grants, crop insurance, and other taxpayer subsidies for farmers ("Farm Benefits"). *See* Intervenors' Statement of Material Facts ("SOMF") ¶¶ 29–30. The 1985 Farm Bill included two provisions—one for highly erodible land conservation (Sodbuster) and one for wetland conservation (Swampbuster)—that farmers must comply with to maintain eligibility for Farm Benefits. 16 U.S.C. §§ 3811, 3821(a); *see also* SOMF ¶ 31. Neither Swampbuster nor Sodbuster are mandatory; instead, conservation compliance is just one of the eligibility requirements that must be met to qualify for Farm Benefits. SOMF ¶¶ 37–39.

To maintain eligibility under Swampbuster, a farmer may not "produce an agricultural commodity on converted wetland." 16 U.S.C. § 3821(a). "Converted wetland" is defined as a "wetland that has been drained, dredged, filled, leveled, or otherwise manipulated. . . ." 7 C.F.R. § 12.2(a). Wetland conversion does not include removing trees so long as the stumps are left in the ground. SOMF ¶¶ 62–64. Similarly, non-agricultural activities are exempt from Swampbuster. *Id.* ¶ 40. Any person who is found to violate Swampbuster does not automatically or immediately lose their Farm Benefits. Instead, they have a right to administrative appeal, and, following that, have one year to initiate "a mitigation plan to remedy the violation" before becoming ineligible for crop insurance benefits. 16 U.S.C. § 3821(c)(3).

USDA administers "over 20" conservation programs, including the Conservation Reserve Program ("CRP"), which "provides annual rental payments, usually over 10 years, to producers to replace crops on highly erodible and environmentally sensitive land with long-term resource-

conserving planting." SOMF ¶¶ 33-34. CRP contracts also incentivize farmers to replace crops with conservation practices on wetlands. SOMF ¶ 35.

III. Legal Standard

A. Summary Judgment

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] movant will be entitled to summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Bedford v. Doe*, 880 F.3d 993, 996 (8th Cir. 2018).

B. Lack of Subject Matter Jurisdiction under Rule 12(b)(1)

"Motions under 12(b)(1) may assert either a 'facial' or 'factual' attack on jurisdiction." *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018). If a party brings a factual attack, "a district court may look outside the pleadings to affidavits or other documents." *Id*. "This does not convert the 12(b)(1) motion to one for summary judgment." *Id*. "Instead, the party invoking federal jurisdiction must prove jurisdictional facts by a preponderance of the evidence." *Id.*

IV. Argument

A. The case must be dismissed because Plaintiff lacks standing.

Defendants are entitled to summary judgment and/or dismissal of the Complaint because the undisputed facts show that Plaintiff does not have standing to bring this suit. "To establish Article III standing, a plaintiff must have suffered an injury in fact that is fairly traceable to the defendant's challenged action, and it must be likely that the injury will be redressed by a favorable judicial decision." *Hawse v. Page*, 7 F.4th 685, 688 (8th Cir. 2021) "A generalized grievance does

not count as an Article III injury." *See Cross v. Fox*, 23 F.4th 797, 800 (8th Cir. 2022) (cleaned up). Moreover, "a court does not obtain subject-matter jurisdiction just because a plaintiff raises a federal question in his or her complaint." *Id.* Indeed, Article III limits federal courts' power to hearing only "cases" and "controversies," a "requirement [that] subsists through all stages of federal judicial proceedings." *Glow In One Mini Golf, LLC v. Walz*, 37 F.4th 1365, 1371 (8th Cir. 2022) (cleaned up).

Plaintiff lacks standing for all five of its claims because it has not suffered, nor does it stand to suffer, any injury because: (1) Plaintiff voluntarily stopped receiving Farm Benefits months ago, and (2) Plaintiff never faced a decision between complying with Swampbuster and making financial use of its Wetland.

i. Plaintiff does not have standing because the record demonstrates that Plaintiff has not suffered, and will not suffer, any injury-in-fact.

Plaintiff frames its alleged injury as a constitutionally intolerable choice: "The Swampbuster statutes and regulations force Plaintiff to choose between keeping 9 acres of [the Wetland] out of crop production in order to keep USDA benefits, and using the 9 acres for crop production and forfeit the ability to receive all USDA benefits." Int. App. 144 (Compl. ¶ 47). The record conclusively demonstrates that Plaintiff does not and will not suffer from this injury because:

- Plaintiff does not receive any Farm Benefits, and has not since September 30, 2024 (SOMF ¶¶ 41, 47);
- Plaintiff does not intend to seek Farm Benefits in the future (SOMF ¶¶ 45–47);
- Plaintiff does not intend to continue using the Property for farming but instead plans to sell it for commercial development (SOMF ¶¶ 65–74).

In other words, Plaintiff has nothing at stake. As of September 30, 2024, Plaintiff has no Farm Benefits to lose, and farming the Wetland will carry no ineligibility consequences. Accordingly, the relief Plaintiff seeks will not redress any of the alleged injuries in the Complaint.

See Glow In One Mini Golf, LLC, 37 F.4th at 1371 (dismissal required when a "federal court can no longer grant effective relief").

Moreover, the record shows that Plaintiff has never faced the "force[d]" choice it claims is unconstitutional. Plaintiff alleged that it had "no choice but to give up ***all uses***" of the Wetland in order to comply with Swampbuster, Int. App. 145 (Compl. ¶ 54) (emphasis added), and that Swampbuster forces Plaintiff to "forfeit[] ***all its possible uses in perpetuity***." Int. App. 148 (Compl. ¶ 66) (emphasis added). But during the time it received Farm Benefits, Plaintiff sold timber from the Property—including trees that were cut down from the Wetland—and earned $26,500 from the sale, all with USDA's knowledge and in compliance with Swampbuster. SOMF ¶¶ 57-64. In other words, not only was Plaintiff able to put the Wetland to *some* financial use, Plaintiff did so while remaining compliant with Swampbuster. *Id.*

Plaintiff cannot save its claims by arguing that it might change course and seek to re-enroll in Farm Benefits in the future. The injury-in-fact requirement demands that an injury be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "Allegations of possible future injury do not satisfy the requirements of Art. III"; instead, "[a] threatened injury must be 'certainly impending.'" *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Plaintiff produced no evidence suggesting that it is even considering re-enrolling in Farm Benefits, let alone that it will "certainly" do so. To the contrary, the record demonstrates that Plaintiff's long-term plan—which it communicated to USDA employees—has been to sell the Property for commercial development, not to farm it. SOMF ¶¶ 65-74. Plaintiff lacks standing because it has not suffered an injury-in-fact. S*ee Cross*, 23 F.4th at 800 (plaintiff lacked standing to challenge Tribe's eligibility requirement for holding public office because plaintiff could not show he was likely to run for office "in the reasonably foreseeable future").

ii. Plaintiff cannot assert a claim on its tenant's behalf.

Plaintiff also cannot avoid summary judgment and/or dismissal by asserting a claim on its tenant's behalf. *See* Int. App. 144 (Compl. ¶ 48). Swampbuster denies Farm Benefits to "affiliated persons" of someone who fails to comply. 16 U.S.C. § 3823; *see also* Int. App. 134–45 (Compl. ¶ 24). But Plaintiff's tenant is not "affiliated" with Plaintiff for purposes of conservation compliance, as Plaintiff readily admits. *See* SOMF ¶¶ 52–55. As a result, 16 U.S.C. § 3823 does not apply to this situation and cannot threaten Plaintiff's tenant's benefits (if he even receives any).[2]

In any event, Plaintiff has no standing to vindicate the tenant's interests in Farm Benefits (or anything else). "As a general rule, a plaintiff may only assert his own injury in fact and cannot rest his claim to relief on the legal rights or interests of third parties." *Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008) (cleaned up). This rule is a "fundamental restriction on [federal courts'] authority" and it only "admits of certain, limited exceptions." *See Powers v. Ohio*, 499 U.S. 400, 410 (1991). Plaintiff has not suffered any injury, nor has Plaintiff produced any evidence suggesting its tenant is somehow "hindered" from protecting his own interests. *See Hodak*, 535 F.3d at 904 (third party standing only allowed if, among other things, plaintiff has suffered its own injury and the third party is "hind[ered]" from protecting its own interests). Plaintiff provides no evidence, for example, showing why the tenant could not bring his own lawsuit against USDA, or even join this one as a named plaintiff. *See id*. Plaintiff's attempt to rely on its tenant's theoretical loss of Farm Benefits must be rejected. *Id.*

[2] Plaintiff's assertion "on information and belief" that its tenant "receives USDA crop insurance subsidy," SOMF ¶ 48, is insufficient to demonstrate the existence of the benefits to avoid dismissal at the summary judgment phase. *See Camfield Tires, Inc. v. Michelin Tire Corp*., 719 F.2d 1361, 1367 (8th Cir. 1983) ("an affidavit filed in support of or opposition to a summary judgment motion must be based upon the personal knowledge of the affiant; information and belief is insufficient.").

B. Claim-specific jurisdictional failures also require dismissal.

The Court also lacks subject matter jurisdiction over Claims I–III because they fail to allege a federal cause of action, warranting dismissal under Rule 12(b)(1).[3]

i. Plaintiff has not asserted a federal cause of action for its constitutional claims (Claims I–III).

"The burden of proving federal jurisdiction [] is on the party seeking to establish it." *See Great Rivers Habitat All. v. Fed. Emergency Mgmt. Agency*, 615 F.3d 985, 988 (8th Cir. 2010). When a plaintiff "brings a claim under a federal statute that does not authorize a private right of action, the statute will not support jurisdiction under § 1331." *Cross*, 23 F.4th at 800. The absence of a private right of action is "fatal" to jurisdiction. *Id*.

Plaintiff alleges that "28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343(a)(3) (redress for deprivation of civil rights), and 5 U.S.C. § 702 (judicial review of agency action - rule making)" provide this Court with jurisdiction. However, jurisdictional hooks like § 1331 or § 1343 must be accompanied by a federal cause of action for jurisdiction to exist. *Cross*, 23 F.4th at 800.

Plaintiff does not purport to bring a cause of action directly under the Constitution.[4] Instead, Plaintiff invokes four statutory provisions which could theoretically provide a federal cause of action: (1) 42 U.S.C. § 1983 ("Section 1983"); (2) Declaratory Judgment Act (28 U.S.C. §§ 2201–02); (3) the Farm Bill of 1985 (16 U.S.C. §§ 3801, 3821–3824); and (4) the Administrative Procedure Act ("APA") (5 U.S.C §§ 702, 706). *See* Int. App. 129–30 (Compl. ¶¶ 4–7). However, as explained below, neither Section 1983, the Declaratory Judgment Act, nor the Farm Bill provide

[3] As explained further in section IV.C below, Claims I–V must all be dismissed on the merits, as well.

[4] Amending the Complaint to bring a direct cause of action under the Constitution would be futile. The Supreme Court has recognized only a handful of implied direct causes of action under the Constitution, none of which apply here. *See Egbert v. Boule*, 596 U.S. 482, 483 (2022) (implied rights of action under Fourth Amendment, the Fifth Amendment's Due Process clause, and the Eighth Amendment). In recent years, the Court "has declined 11 times to imply a similar cause of action for other alleged constitutional violations." *Id.*; *see also DeVillier v. Texas*, 601 U.S. 285 (2024) (declining to decide whether the Takings Clause provides an implied cause of action).

Plaintiff a private right of action for any of Plaintiff's Claims. And the APA does not provide jurisdiction over any of Plaintiff's constitutional claims (Claims I–III), because those are based solely on the allegedly unconstitutional actions of *Congress* in enacting Swampbuster, not any "final agency actions" taken by USDA. *See generally*, Int. App. 146–51 (Compl. ¶¶ 55–83). Therefore, Plaintiff has not identified a federal cause of action that would entitle it to relief for Claims I–III, and the Court does not have subject matter jurisdiction over them.

1. Section 1983 does not support claims against federal defendants.

Section 1983 provides a federal cause of action for plaintiffs seeking to hold accountable *state* officials acting "under color of" *state* law. *See Jones v. U.S.*, 16 F.3d 979, 981 (8th Cir. 1994); *see also* 42 U.S.C. § 1983. "By its plain language the statute does not authorize redress against the United States," and Section 1983 is inapplicable to *federal* employees (let alone federal agencies) acting under the color of *federal* law. *Davis v. United States*, 439 F.2d 1118, 1119 (8th Cir. 1971) (per curiam). Here, all of the named defendants are either federal agencies (USDA, NRCS) or federal employees (Thomas Vilsack, Terry Cosby, and Jon Hubbert), and Plaintiff has not alleged that a single one of them acted under color of any state laws, statutes, or regulations. Plaintiff has no claim under Section 1983. *Id.*; *see also Jones*, 16 F.3d at 981; *Abram v. Dept. of Agric*., No. 98-3256, 1999 WL 793536 (8th Cir. Sept. 27, 1999).

For similar reasons, 28 U.S.C. § 1343(a)(3), does not provide jurisdiction. In general, § 1343(a)(3) authorizes federal courts to entertain causes of action under Section 1983. *Ortega v. Schramm*, 922 F.2d 684, 688 (11th Cir. 1991). Like Section 1983 itself, however, § 1343(a)(3) limits jurisdiction to suits seeking redress for deprivation of rights "under color of any State law." 28 U.S.C. § 1343(a)(3). Again, the Complaint never alleges that any Defendants acted under color of state law, and § 1343(a)(3) does not provide this Court with jurisdiction.

2. The Declaratory Judgment Act does not provide a standalone cause of action, only a remedy.

"The Declaratory Judgment Act is strictly remedial and does not provide a separate basis for subject-matter jurisdiction." *First Fed. Sav. & Loan Ass'n of Harrison, Ark. v. Anderson*, 681 F.2d 528 (8th Cir. 1982). Even though 28 U.S.C. § 1331 provides jurisdiction for claims "arising under" federal law, "a court does not obtain subject-matter jurisdiction just because a plaintiff raises a federal question in his or her complaint." *Cross*, 23 F.4th at 800 (8th Cir. 2022). If a plaintiff "brings a claim under a federal statute that does not authorize a private right of action, the statute will not support jurisdiction under § 1331." *Id.* Because the Declaratory Judgment Act does not provide a cause of action (only a remedy), it does not provide this Court with jurisdiction.

3. The Farm Bill does not grant a private right of action.

Nor does the Farm Bill provide a cause of action. First, none of the Farm Bill provisions Plaintiff cites in the Complaint grant a private right of action. *See* 16 U.S.C. §§ 3801, 3821–3824. Second, this Court has already ruled that the Farm Bill does not grant a private right of action for suits involving conservation compliance enforcement. *See Garrison v. New Fashion Pork LLP*, No. 18-CV-3073-CJW-MAR, 2019 WL 5586565, at *10 (N.D. Iowa July 1, 2019). In *Garrison*, this Court analyzed § 3811(b) of Sodbuster and concluded that its language "is strong evidence that Congress did not intend to permit any person or entity other than the Secretary of Agriculture to enforce [Sodbuster]." *Id.* at *9. Although *Garrison* involved Sodbuster, the language the Court relied on is identical to the language found in Swampbuster. *Compare* 16 U.S.C. § 3811(b) *with* 16 U.S.C. § 3821(f). The Farm Bill does not give this Court jurisdiction.

4. The APA does not provide a cause of action against Congress.

Section 704 of the APA "generally provides a framework for judicial review of final agency action when an adequate remedy is otherwise lacking." *Defs. of Wildlife v. Adm'r, E.P.A.*,

882 F.2d 1294, 1303 (8th Cir. 1989). The APA does not, however, provide jurisdiction over every possible grievance a plaintiff may have. Rather, jurisdiction is limited to judicial review of "final agency actions" for which there is no other "adequate remedy." *Id*. But "final agency action," does not include actions taken by Congress because the APA's definition of "agency" expressly "does not include [] the Congress." 5 U.S.C. § 551(1)(A).

The crux of Claims I–III is that Congress—not the USDA—exceeded the bounds of the Constitution when it passed Swampbuster. *See* Claim I, Int. App. 146–47; Claim II, *id.* 147–48; Claim III, *id.* 149–151. Claims I–III do not identify a single supposedly unlawful "final agency action" by USDA or even cite a single USDA regulation—only the Swampbuster statute itself. Claims II and III each contain a single, vague conclusory allegation that "[t]hus, the USDA's actions under Swampbuster, both facially and as applied to CTM holdings, are contrary to constitutional right, power, privilege, or immunity," *see* Int. App. 148, 151, (Compl. ¶¶ 70, 83). However, "[c]ourts are not bound to accept as true a legal conclusion couched as a factual allegation," *Hawse*, 7 F.4th at 691. Claims I–III have nothing to do with any "final agency action," and the APA does not provide a cause of action.

* * *

"Federal courts do not possess a roving commission to publicly opine on every legal question." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). Neither Section 1983, the Declaratory Judgment Act, nor the Farm Bill provide a cause of action for Plaintiff's Claims, and the APA does not authorize a cause of action for grievances against Congress. As a result, Plaintiff has not identified any cause of action for Claims I–III that would give this Court jurisdiction.

C. Plaintiff's claims all fail on the merits.

i. Claim I fails because Swampbuster is a valid exercise of Congress's spending power.

Plaintiff's first claim—that Swampbuster violates the Commerce Clause by regulating intrastate wetlands—is a red herring because Swampbuster is a "valid exercise of the spending power." *United States v. Dierckman*, 201 F.3d 915, 922 (7th Cir. 2000) (rejecting Commerce Clause challenge to Swampbuster); *see also Horn Farms v. Johanns*, 397 F.3d 472, 476–77 (7th Cir. 2005) (same). To hold otherwise "would demolish, not [only] the Swampbuster legislation, but the whole system of agricultural subsidies, and indeed all federal legislation (including tax credits and deductions) linking financial rewards to the satisfaction of conditions." *Id.* Like countless other federal programs, Swampbuster merely limits access to federal subsidies to those who meet specific eligibility requirements. *See Horn Farms*, 397 F.3d at 478. The Supreme Court has repeatedly upheld Congress's authority to impose eligibility requirements, and to incentivize voluntary compliance with federal policy. *See Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

Plaintiff's arguments about Swampbuster's impact on interstate commerce are therefore irrelevant. *See Dierckman*, 201 F.3d at 922 (explaining that the statute authorizing Swampbuster "invoke[es] the spending power and is not limited by the enumeration of Congressional powers in Article I, section 8 of the Constitution"); *United States v. Butler*, 297 U.S. 1, 53 (1936) ("When an Act of Congress is appropriately challenged in a court, it is the duty of the court to compare it with the article of the Constitution which is invoked and decide whether it conforms to that article."). Because objectives outside the ambit of the Commerce Clause "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds," Swampbuster is valid. *See South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987).

ii. Claim II fails because Swampbuster does not impose "unconstitutional conditions."

Plaintiff's second claim fares no better because no part of the Constitution guarantees the right Plaintiff asks this Court to recognize: unconditional access to free, federal taxpayer money. *See* Int. App. 148 (Compl. ¶ 68). According to Plaintiff, Swampbuster violates the "unconstitutional conditions" doctrine by requiring farmers to relinquish their "rights" under the Commerce Clause. *Id.* (Compl. ¶ 69). However, the Commerce Clause does not grant an absolute right to receive Farm Benefits (or any other government benefits) without meeting eligibility requirements. The Commerce Clause is primarily a grant of legislative authority. *See* U.S. Const. art. I, § 8 ("The Congress shall have Power . . . To regulate Commerce . . . ."). To the extent courts have found that the Commerce Clause grants any individual rights, it is the right to be free from state and local laws that substantially burden interstate commerce. *See Dennis v. Higgins*, 498 U.S. 439, 447–48 (1991). Swampbuster is not a state or local law.

Besides, Swampbuster does not foreclose or impose any particular use of farmland. Plaintiff cites *Koontz*, a case in which a municipality required a landowner to obtain a permit before altering a wetland on his property and then denied the permit because he would not relinquish part of his land for mitigation. Int. App. 147 (Compl. ¶ 64) (citing *Koontz*, 570 U.S. at 606). Unlike the plaintiff in *Koontz*, farmers "do[] not need any federal official's permission under Swampbuster either to engage in farming or to drain wetlands." *Horn Farms Inc.*, 397 F.3d at 478; *see also id.* at 498 (acknowledging that USDA is not standing as "gatekeeper" to prevent destruction of wetlands). Farmers are free to comply with Swampbuster to gain access to Farm Benefits—or not. Indeed, farmers are free to comply with Swampbuster to gain access to Farm Benefits *while still making money off their wetlands*, just like Plaintiff did. SOMF ¶¶ 57–64. Plaintiff's

"unconstitutional conditions" argument boils down to a claim that the Constitution entitles landowners to unfettered access to federal money, with no strings attached. That is not the law.

iii. Claim III fails because Swampbuster is not a taking of private land.

Plaintiff's Fifth Amendment takings claim fails because Swampbuster causes neither a physical nor a regulatory taking. *See* Int. App. 147–48 (Compl. ¶¶ 63–68); *id.* 150 (Compl. ¶ 79) (alleging Swampbuster "effects" a "*per se* physical taking"). First, Swampbuster does not cause any physical invasion, occupation, or possession of Plaintiff's—or any farmer's—property. Nothing in the record demonstrates or even suggests that the government has taken possession of, physically occupied, or allowed anyone else to physically occupy, the Property or anything grown on the Property. Indeed, Swampbuster does not allow the government to take physical possession of private wetlands or any product of those wetlands, nor does it impose in any way on a farmer's right to exclude people from his or her land. *See* 16 U.S.C. § 3821. Rather, non-compliance with Swampbuster has only one consequence: Farm Benefits ineligibility. *See id*. Swampbuster cannot reasonably be characterized as a physical taking. *Cf. Horne v. Department of Agriculture*, 576 U.S. 351, 361–63 (2015) (finding "a categorical duty" to compensate farmers when the government took physical possession of raisins grown on those farmers' land.); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147–49 (2021) (requiring landowner to provide outside parties with physical access to private property is a physical taking because it deprives landowner of the right to exclude).

Second, even if Plaintiff had asserted a regulatory takings claim, such a claim would also fail.[5] While a regulation that goes "too far" may be recognized as a taking, *Pennsylvania Coal Co.*

[5] Plaintiff does not directly assert a regulatory takings claim, but has nonetheless argued that case law dealing with such claims may be relevant. *See* CTM Holdings, LLC's Reply to Motion for Judgment on the Pleadings, ECF No. 39, at 1, n.1. ("In their proposed opposition to the motion for judgment on the pleadings, intervenors emphasize that CTM argues that the *Nollan/Dolan* framework does not apply here. But *Nollan/Dolan* does not apply because those cases were special applications of the doctrine of unconstitutional conditions. But *Nollan*/*Dolan's* inapplicability does not mean that the unconstitutional conditions doctrine does not apply.") (cleaned up).

v. Mahon, 260 U.S. 393, 415 (1922), the outcome of a regulatory takings claim depends on economic impact to the landowner and the extent to which the regulation interferes with investment-backed expectations for the property. *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Importantly, this inquiry focuses on the property as a whole, as opposed to the regulatory impact to some limited portion of the property. *See Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326–27 (2002) (citing *Penn Central*).

In this case, Swampbuster does not go "too far" because Plaintiff has not demonstrated any adverse economic impact nor any interference with an investment-backed expectation. In fact, Plaintiff has already made economically beneficial use of the Property, including the Wetlands. Before filing the lawsuit, Plaintiff earned $26,500 from a timber sale that *included timber cut from the Wetland*. SOMF ¶¶ 57–58. Plaintiff completed this timber sale with USDA's knowledge and in full compliance with Swampbuster, all while collecting monthly CRP payments. SOMF ¶¶ 62–64. Plaintiff has not shown any economic loss stemming from Swampbuster compliance.

Further, there can be no interference with an investment-backed expectation where, as here, the property owner was fully informed about a law's impact before buying it. *See Hause v. City of Fayetteville*, No. 5:24-cv-5143, 2024 WL 5177512 (W.D. Ark. Dec. 19, 2024) (no taking where plaintiff landowners knew about ordinance regulating short-term rentals before buying property they intended to use as short-term rental). Emails between Plaintiff and USDA employees, exchanged months before the Property sale was finalized, show that Plaintiff knew the property contained designated wetlands and was fully informed about the conditions that Swampbuster placed on the Wetland. SOMF ¶¶ 19, 74. Moreover, Swampbuster does not impact Plaintiff's ability to convert its wetlands for purposes other than growing agricultural commodities. 16 U.S.C. § 3821(a). Given that Plaintiff's "ultimate plan" is to sell the property for commercial development,

SOMF ¶¶ 65–67, Swampbuster does not impact Plaintiff's investment-backed expectations. There has been no "taking," Plaintiff has received plenty of compensation, and Defendants are entitled to summary judgment on Claim III.

iv. Claims IV and V fail for lack of jurisdiction and on the merits.

1. Claims IV and V should be dismissed because Plaintiff failed to exhaust its administrative remedies.

The APA allows review of "final agency actions for which there is no other adequate remedy in a court." 5 U.S.C. § 704. According to USDA regulations, a person must "exhaust all administrative appeal procedures established by the [USDA] Secretary or required by law before the person may bring an action in a court of competent jurisdiction." 7 U.S.C. § 6912(e). If a plaintiff has administrative remedies available under the relevant statute, then it is not an action "for which there is no other remedy in court" and the APA does not provide a cause of action. *See Great Rivers Habitat*, 615 F.3d at 989; *see also, Bartlett v. U.S. Dep't of Agric*., 716 F.3d 464, 477 (8th Cir. 2013) (affirming dismissal of USDA program payment challenge for failure to exhaust).

Plaintiff seeks to "hold unlawful and set aside final agency action determining that Plaintiffs property contains 9 acres of wetland." *See* Int. App. 129 (Compl. ¶ 5). But that determination took place in 2010 and USDA records demonstrate that the time period for appeal expired years ago. SOMF ¶¶ 24–28. As a result, those remedies were not exhausted, and Plaintiff cannot seek judicial review of that determination. *See Great Rivers Habitat*, 615 F.3d at 989.

Even assuming the "final agency action" the Plaintiff seeks to challenge is USDA's wetland "redetermination" decision in 2023, Plaintiff's claims are still precluded for failure to exhaust. In October 2022, Plaintiff asked USDA to conduct a new wetland determination for a piece of the Property called Tract 360. SOMF ¶ 20. The request encompassed land that had already been assessed as part of the 2010 determination (including the Wetland), as well as portions of

Tract 360 which had not been previously assessed. SOMF ¶ 21. In a letter dated January 23, 2023, USDA informed Plaintiff that the previously unassessed portions of Tract 360 were non-wetland. SOMF ¶ 22–23. In a Second Letter sent on the same date, USDA informed Plaintiff that a wetland determination had already been "previously completed" for the Wetland. SOMF ¶ 24. As a result, Plaintiff's "current request for a wetland determination [would] not be completed." SOMF ¶ 24. The Second Letter also informed Plaintiff that it could, in writing and within 30 days, "request review of this decision from the Director of the National Appeals Division (NAD)." SOMF ¶ 27. Plaintiff has produced no evidence showing it requested a review of the Second Letter or otherwise appealed it to the National Appeals Division. SOMF ¶ 28. As a result, Plaintiff failed to exhaust those remedies as well.

Because Plaintiff did not pursue its administrative remedies, Section 704 of the APA does not provide this Court with jurisdiction. *See Great Rivers Habitat*, 615 F.3d at 991 ("The district court correctly concluded it lacked jurisdiction because appellants failed to exhaust their administrative remedies by filing a proper appeal with FEMA.").

2. The Swampbuster regulations do not exceed USDA's authority.

Claims IV and V also fail on the merits. The USDA regulations Plaintiff challenges do not exceed the agency's statutory authority. Under the Farm Bill, the USDA "Secretary shall promulgate such regulations as are necessary to implement programs under this chapter." 16 U.S.C. § 3846(a). To evaluate whether such a rule exceeds the agency's authority, "[c]ourts must exercise their independent judgment." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024). Under the *Loper* standard, both the certification rule and converted wetland rule are consistent with the Farm Bill.

a. The certification review rule comports with the Farm Bill.

The first step in a *Loper* analysis is determining whether the statute is ambiguous. Courts simply apply unambiguous statutes. *Voigt v. U.S. EPA*, 46 F.4th 895, 901 (8th Cir. 2022). In cases of ambiguity, "courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Loper*, 603 U.S. at 373. The tools of statutory construction include legislative history, context, and agency interpretations. *Id.* at 393, 401, 433.

The Swampbuster provisions provide that a wetland certification "shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). The law does not specify what constitutes a valid request for review or the process for review. An unlimited opportunity for certification review would be unworkable and irrational. The department exercised its rulemaking authority to specify that "[a] person may request review of a certification only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6).

Using traditional tools of interpretation, USDA's rule fully comports with the statute: it is consistent with the purpose and text of the statute, the legislative intent, and the agency's longstanding interpretation which Congress has implicitly approved.[6]

Statutory Context. The text of Swampbuster's certification review provisions support USDA's rule. The general purpose of the Swampbuster statute is "to preserve those wetland

[6] Intervenors' opposition to Plaintiff's Motion for Judgment on the Pleadings (ECF No. 34-1) discussed the Eighth Circuit case of *Foster v. U.S.*, which dealt with a similar challenge to USDA's wetland certification rule. However, the *Foster* case is once again pending before the District of South Dakota, having been remanded from the U.S. Supreme Court to the Eight Circuit, and from the Eighth Circuit back down to the District Court. *See Dep't of Agric.*, 609 F. Supp. 3d 769, 781 (D.S.D. 2022), *aff'd*, 68 F.4th 372 (8th Cir. 2023), *cert. granted, judgment vacated sub nom. Foster v. U.S. Dep't of Agric.*, 144 S. Ct. 2707 (2024). *See also* ECF Case No. 21-cv-04081-RAL (D.S.D.).

characteristics still in existence in 1985." *Gunn v. USDA*, 118 F.3d 1233, 1238 (8th Cir. 1997). Plaintiff's interpretation would allow a farmer to file a request for review on the exact same facts immediately after an NRCS determination has been upheld on appeal, which could lead to countless review requests. Such a result is absurd and inconsistent with the general purpose of the statute. Further, the certification review provision provides a process for a landowner to file an appeal before it becomes final. *See* 16 U.S.C. § 3822(a)(3)(B). The appeal provision in the statute would be superfluous if a landowner could simply apply for a new determination. The certification review provision should not render the appeal provision meaningless.

Legislative history. Before the 1996 Farm Bill amendments, the law required the Secretary to periodically review wetland determinations "as the Secretary deem[ed] appropriate." *See* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1422, 104 Stat. 3359, 3573 (formerly codified at 16 U.S.C. § 3822(a)(4) (1995)). The 1996 amendments were intended to provide farmers certainty from changing wetlands delineations "[by] allow[ing] prior delineations of wetlands to be changed only upon request of the farmer," as opposed to at USDA's discretion. *Id*. The current rule provides a way to implement the Act that increases certainty about USDA's determinations, without leading to absurd results.

Agency Interpretation. An agency's long-standing and consistent interpretation can assist the court in its statutory interpretation. *Loper*, 603 U.S. at 402. The agency's interpretation of the rule gives effect to Swampbuster's statutory purpose as well as effect to the purpose of the 1996 amendment. The agency issued its rule months after the 1996 amendments and a contemporaneous interpretation "may be especially useful." *Loper*, 603 U.S. at 394. The agency rule is necessary to allocate limited agency resources and allows NRCS to refuse meritless (or previously decided) review requests. This prevents inconsistency and undue influence in the process. Further, as the

1996 amendments illustrate, when Congress has concerns with USDA implementation, it can and has amended the statute to address them. Since the agency issued the certification review rule, Congress has not altered the certification review provision of the statute.

b. The converted wetland rule comports with the Farm Bill.

The Swampbuster statute defines converted wetland as one "that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) . . . ." 16 U.S.C. § 3801(a)(7)(A). "Otherwise manipulated" is a broad term that includes a variety of actions that could manipulate a wetland. The agency rule addressed this by providing additional illustration of what manipulation of wetland includes: "the removal of woody vegetation." 7 C.F.R. § 12.2(a). Plaintiff argues that USDA enlarged the definition of converted wetland in its rule by adding that language. Int. App. 152 (Compl. ¶ 88). The Eighth Circuit already addressed this exact issue. In *Ballanger v. Johanns*, the court concluded the rule was consistent with the statute and that the added language was merely illustrative. 495 F.3d 866, 871–72 (8th Cir. 2007) ("the parenthetical in the statute should not be treated as an additional requirement").

Under the *Loper* standard, the *Ballanger* court's conclusion does not change. The general purpose of the Swampbuster statute is to preserve wetlands and prevent their manipulation. *See Gunn*, 118 F.3d at 1238. The plain meaning of "otherwise manipulated" encompasses removing something (e.g. vegetation) from an existing wetland. The agency rule adding "removal of woody vegetation" is an illustrative example within the plain meaning of "otherwise manipulated."

Further, as noted above, Congress has not hesitated to amend the Swampbuster provisions when agency implementation has raised concerns. The wetland conversion definition and rule have

been in place since the 1985 Act. The *Ballanger* decision was in 2007. Congress has not amended the Swampbuster provisions in response.

V. Conclusion

For the reasons described above, the Court lacks subject matter jurisdiction over this lawsuit, and Plaintiff's Claims all fail on the merits. The Complaint should be dismissed under Rule 12(b)(1), and/or summary judgment should be granted in Defendants' favor.

Respectfully submitted January 27, 2025,

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