

Andrew Hursh (Montana Bar #68127109)
Bryan Hurlbutt (*pro hac vice*, Idaho Bar #8501)
ADVOCATES FOR THE WEST
966 Discovery Way
Missoula, Montana 59802
Tel: 208-268-5210 (Hursh)
208-730-6961 (Hurlbutt)
ahursh@advocateswest.org
bhurlbutt@advocateswest.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

WILDEARTH GUARDIANS and
WESTERN WATERSHEDS
PROJECT,

Plaintiffs,

v.

U.S. FISH AND WILDLIFE
SERVICE,

Defendant.

Case No. 9:24-cv-00066-DLC-KLD

**PLAINTIFFS' RESPONSE
OPPOSING DEFENDANT'S
MOTION FOR VOLUNTARY
REMAND WITHOUT VACATUR
(ECF NO. 29)**

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES.....ii

GLOSSARY OF TERMSiv

INDEX OF EXHIBITSiv

INTRODUCTION..... 1

BACKGROUND.....2

ARGUMENT3

 I. LEGAL STANDARDS FOR REVIEWING FWS’S REQUEST
 FOR VOLUNTARY REMAND WITHOUT VACATUR.3

 II. FWS’S REMAND REQUEST IS AN IMPROPER EFFORT
 TO EVADE JUDICIAL REVIEW.5

 A. FWS Does Not Intend to Reconsider the Grazing Permits
 Plaintiffs Have Challenged in This Litigation5

 B. Remand Is Not Appropriate Because FWS Seeks to Bolster the
 Record.....8

 C. FWS’s Examples of Remand Precedent Are Inapposite..... 10

 III. REMAND WOULD UNDULY PREJUDICE PLAINTIFFS
 AND WOULD NOT BE IN THE INTEREST OF JUDICIAL
 ECONOMY. 11

 A. The Scope of FWS’s Remand Request Is Too Narrow. 12

 B. Remand Is Not in the Interest of Judicial Economy and Finality 13

 C. Plaintiffs Would Be Prejudiced by Remand Without Vacatur. ... 14

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

TABLE OF AUTHORITIES

Cases

<i>Amentum Servs., Inc. v. United States</i> , No. 21-2029C, 2021 WL 5871734 (Fed. Cl. Dec. 10, 2021).....	5
<i>American Waterways Operators v. Wheeler</i> , 427 F.Supp.3d 95 (D.D.C. 2019)..	4, 8, 9
<i>California Communities Against Toxics v. EPA</i> , 688 F.3d 989 (9th Cir. 2012)	3
<i>Chlorine Chemistry Council v. EPA</i> , 206 F.3d 1286 (D.C. Cir. 2000)	5, 9
<i>Ctr. for Biological Diversity v. BLM</i> , 675 F. Supp. 3d 1112 (D. Idaho 2023).....	16
<i>Ctr. for Biological Diversity v. BLM</i> , No. CV-21-2507-GW-ASx, 2022 WL 4233648 (C.D. Cal. Sept. 13, 2022).....	10
<i>Ctr. for Biological Diversity v. Ross</i> , 419 F. Supp. 3d 16 (D.D.C. 2019).....	13
<i>Dep’t of Homeland Sec. v. Regents of Univ. of Calif.</i> , 591 U.S. 1 (2020)	8
<i>Harmonia Holdings Group, LLC v. United States</i> , No. 21-1704C, 2021 WL 12148882 (Fed. Cl. Nov. 10, 2021)	8
<i>In re Clean Water Act Rulemaking</i> (hereafter “CWA Rulemaking”), 60 F.4th 583 (9th Cir. 2023).....	3, 11, 14, 15
<i>Keltner v. United States</i> , 148 Fed. Cl. 552 (2020)	passim
<i>Ksanka Kupaqa Xa’łcin v. U.S. Fish & Wildlife Serv.</i> , No. CV 19-20-M-DWM, 2019 WL 13450299 (D. Mont. June 7, 2019)	8
<i>Limnia, Inc. v. U.S. Dep’t of Energy</i> , 857 F.3d 379 (D.C. Cir. 2017).....	passim
<i>Lutheran Church–Missouri Synod v. FCC</i> , 141 F.3d 344 (D.C. Cir. 1998)	4, 5, 9
<i>Miss. River Transmission Corp. v. FERC</i> , 969 F.2d 1215 (D.C. Cir. 1992).....	5, 9
<i>N. Alaska Env’t Ctr. v. Haaland</i> , No. 3:20-cv-00187-SLG, 2022 WL 1556028 (D. Alaska May 17, 2022)	10
<i>N. Coast Rivers All. v. U.S. Dep’t of Interior</i> , No. 1:16-cv-307-LJO-MJS, 2016 WL 8673038 (E.D. Cal. Dec. 16, 2016)	3, 10
<i>Or. Nat. Desert Ass’n v. Freeborn</i> , No. CV-06-1311-MO, 2007 WL 9658100 (D. Or. June 19, 2007)	10
<i>Rahman v. United States</i> , 149 Fed. Cl. 685 (2020)	4
<i>Rock Creek All. v. U.S. Fish & Wildlife Serv.</i> , No. CV 01-152-M-DWM (D. Mont. Mar. 19, 2002).....	4, 8
<i>Sierra Club v. Nat’l Marine Fisheries Serv.</i> , 711 F. Supp. 3d 522 (D. Md. 2024)	4, 11, 13
<i>SKF USA Inc. v. United States</i> , 254 F.3d 1022 (Fed. Cir. 2001)	3

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng ’rs, 985 F.3d 1032 (D.C. Cir. 2021)16

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 282 F. Supp. 3d 91, 106 (D.D.C. 2017)16

Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414 (D.C. Cir. 2018)...4, 5, 9, 11

WildEarth Guardians v. Bernhardt, 423 F. Supp. 3d 1083, 1105 (D. Colo. 2019)16

Statutes

16 U.S.C. § 668dd(d)(3)(A)(i).....16

Regulations

50 C.F.R. § 25.21(b).....16

GLOSSARY OF TERMS

Term	Definition
2023 Permits	FWS's 2023 actions issuing commercial agriculture agreements and special use permits to five livestock grazing operators for five-year terms (AR15–59)
APA	Administrative Procedure Act
AR	Administrative Record (citations formatted AR[page #])
EA	Environmental Assessment
EIS	Environmental Impact Statement
FWS	U.S. Fish & Wildlife Service
NEPA	National Environmental Policy Act
Opening Br.	Plaintiffs' Brief in Support of Summary Judgment (ECF No. 19)
the Refuge	Red Rock Lakes National Wildlife Refuge
Refuge Act	National Wildlife Refuge System Improvement Act
Remand Mot.	Defendant's Motion for Voluntary Remand (ECF No. 29)
Reply Br.	Plaintiffs' Reply Brief in Support of Summary Judgment (ECF No. 31)
SOF	Plaintiffs' Statement of Undisputed Facts (ECF No. 20)

INDEX OF EXHIBITS

Exhibit 1	Copy of <i>Rock Creek All. v. U.S. Fish & Wildlife Serv.</i> , No. CV 01-152-M-DWM (D. Mont. Mar. 19, 2002)
Exhibit 2	Second Declaration of Christopher J. Krupp
Exhibit 3	Declaration of John Carter

INTRODUCTION

Plaintiffs oppose the motion by federal defendant U.S. Fish and Wildlife Service (FWS) to remand without vacating its five cooperative agriculture agreements and commercial special use permits authorizing commercial livestock grazing in the Red Rock Lakes National Wildlife Refuge from 2023 through 2027 (the “2023 Permits” or “Permits”). *See* ECF No. 29. In its motion, FWS concedes significant shortcomings in the NEPA analysis and Compatibility Determination upon which the agency relied in issuing the Permits. But instead of withdrawing its defective actions, FWS asks the Court to grant voluntary remand to conduct a new NEPA analysis and to make a new compatibility determination while leaving the Permits in place and allowing grazing to continue.

As explained below, such an end-run around judicial review is improper, inefficient, prejudicial to Plaintiffs, and would threaten the Refuge’s values. FWS admits that the 2023 Permits authorize grazing in a manner that the agency has previously determined was incompatible with Refuge purposes and threatened the Refuge’s ecological values. Granting remand without vacatur would allow such grazing to continue for the duration of the permits and would foreclose Plaintiffs’ ability to seek judicial review of the Permits and relief from the harms these agency actions cause. Moreover, there is no assurance FWS will follow through on completing the processes it proposes on remand, and without this Court reaching the merits, Plaintiffs would face the risk that in future grazing permit approvals, FWS duplicates the same errors Plaintiffs seek to rectify in this case.

The Court should thus deny FWS’s remand motion and resolve the merits of Plaintiffs’ claims through the pending summary judgment motion.

BACKGROUND

Plaintiffs bring this case to remedy FWS's violations of the National Wildlife Refuge System Improvement Act ("Refuge Act") and National Environmental Policy Act ("NEPA") when it issued the 2023 Permits approving commercial livestock grazing at the Refuge, including FWS's failures over the last 30 years to follow through on commitments to carefully manage grazing in ways the agency itself has determined are necessary to protect the Refuge and comply with the law. Plaintiffs' Statement of Undisputed Facts ("SOF") (ECF 20) and opening summary judgment brief (ECF 19) set forth the relevant background, including historical damage grazing has caused and ongoing threats grazing poses to the Refuge's ecological values, so Plaintiffs do not repeat those details here.

After Plaintiffs moved for summary judgment in November 2024, the Court granted the parties' requests to stay the litigation to discuss settlement. ECF Nos. 22, 24, 26. This March, the parties agreed to resume the litigation on the merits and submitted a joint scheduling proposal. ECF No. 27. The proposal set deadlines to complete briefing on Plaintiffs' motion for summary judgment. The proposal also acknowledged that FWS might file a motion seeking voluntary remand. Given the risk of prejudice from delay, Plaintiffs were unwilling to toll their already-filed summary judgment motion, and FWS agreed to deadlines for briefing any voluntary remand motion concurrently with summary judgment briefing. The Court approved the joint scheduling proposal. ECF No. 28.

Upon the deadline under the scheduling order, FWS moved for voluntary remand without vacatur of the 2023 Permits but did not file a summary judgment response to defend its actions on the merits. As explained in Plaintiffs' Reply Brief

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION FOR REMAND

in Support of Summary Judgment, ECF No. 31 (“Reply Br.”), the Court may properly grant summary judgment to Plaintiffs; indeed, FWS’s motion for voluntary remand only confirms the facts and legal arguments set forth in Plaintiffs’ summary judgment motion.

Accordingly, the Court should deny FWS’s motion for voluntary remand, for reasons further explained below, and grant summary judgment for Plaintiffs.

ARGUMENT

I. LEGAL STANDARDS FOR REVIEWING FWS’S REQUEST FOR VOLUNTARY REMAND WITHOUT VACATUR.

District courts have broad discretion to deny a motion for voluntary remand. *In re Clean Water Act Rulemaking* (hereafter “*CWA Rulemaking*”), 60 F.4th 583, 596 (9th Cir. 2023). When reviewing requests for voluntary remand, courts in this circuit generally follow guidance provided by *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001), and related case law. *See California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *N. Coast Rivers All. v. U.S. Dep’t of Interior*, No. 1:16-cv-307-LJO-MJS, 2016 WL 8673038, at *3 (E.D. Cal. Dec. 16, 2016). On a request for remand without confessing error, the agency bears the burden of justifying remand due to substantial and legitimate concerns. *Keltner v. United States*, 148 Fed. Cl. 552, 560–61 (2020); *SKF USA*, 254 F.4th at 1029. “[R]emand may be refused if the agency’s request is frivolous or in bad faith.” *SKF USA*, 254 F.3d at 1029.

A government agency’s remand request “should not simply be granted in a perfunctory manner. Rather, such motions should be treated as with any other motion affecting the substantial rights of the plaintiff, by subjecting the

government’s position to careful analysis to ensure that the motion is properly supported and justified.” *Rahman v. United States*, 149 Fed. Cl. 685, 690 (2020). Between the “relative extremes” of bad faith and substantial and legitimate concerns, a court’s discretionary consideration of a motion for voluntary remand should consider “the timing of the government’s motion, its representations regarding the reasons for a remand, the plaintiff’s factual allegations viewed through the prism of the particular legal issues involved, and the overall fitness and completeness of the administrative record available for the Court’s review.” *Keltner*, 148 Fed. Cl. at 563.

Courts have denied motions for remand in circumstances relevant here, including where remand would allow the agency to evade judicial review of the challenged actions. *See, e.g., Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 348–49 (D.C. Cir. 1998); *Limnia, Inc. v. U.S. Dep’t of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017); *American Waterways Operators v. Wheeler*, 427 F.Supp.3d 95, 98–99 (D.D.C. 2019); *Keltner*, 148 Fed. Cl. at 564–68; *Rock Creek All. v. U.S. Fish & Wildlife Serv.*, No. CV 01-152-M-DWM (D. Mont. Mar. 19, 2002).¹

Remand has also been denied where, like here, it would prejudice the plaintiff or undermine judicial efficiency and the need for finality. *See, e.g., Sierra Club v. Nat’l Marine Fisheries Serv.*, 711 F. Supp. 3d 522, 536 (D. Md. 2024); *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 437 (D.C. Cir. 2018);

¹ The March 19, 2002 order of this Court in *Rock Creek Alliance* pre-dates the range for which documents are available on the Court’s ECF system. For the convenience of the Court and the parties, Plaintiffs attach a copy of that order hereto as Exhibit 1.

Amentum Servs., Inc. v. United States, No. 21-2029C, 2021 WL 5871734, at *2–3 (Fed. Cl. Dec. 10, 2021).

Courts have also rejected late-filed requests for voluntary remand that came after merits briefing. *See, e.g., Miss. River Transmission Corp. v. FERC*, 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992) (noting denial with “extreme displeasure” of a motion for voluntary remand “filed two days before oral argument”); *Lutheran Church*, 141 F.3d at 349 (denying “last second motion to remand” where agency did not confess error or describe intentions on remand); *Util. Solid Waste Activities Grp.*, 901 F.3d at 437 (denying a “last-minute” request for a remand that would “prejudice the vindication” of claims on the merits); *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000) (noting denial of a request for remand without vacatur filed between briefing and oral argument, which would have “left petitioners subject to a rule they claimed was invalid”).

II. FWS’S REMAND REQUEST IS AN IMPROPER EFFORT TO EVADE JUDICIAL REVIEW.

A. FWS Does Not Intend to Reconsider the Grazing Permits Plaintiffs Have Challenged in This Litigation.

A request for remand is an improper tactic to evade judicial review where the agency does not actually intend to reconsider the “original agency decision that is the subject of the legal challenge.” *Limnia*, 857 F.3d at 387. In *Limnia*, the D.C. Circuit rejected a remand motion in which the Department of Energy promised to adjust how it would consider new applications submitted by the plaintiff company but did not commit to revisiting the application denials that were the subject of the lawsuit. The court found that such a remand order would be “in name only,” would

foreclose the company’s “opportunity to vindicate its statutory rights under the APA” as to the challenged actions, and would place the plaintiff in a position “the same as if its case had been dismissed on the merits.” *Id.* at 127.

The same is true here. Each of Plaintiffs’ four claims challenges FWS’s actions issuing the 2023 Permits. *See* Complaint at ¶¶ 111, 116, 121, 126. Yet FWS does *not* actually intend to reconsider these Permits. Instead, FWS asks the Court to leave them in place while it “reconsider[s] its NEPA analysis” and “perform[s] a new compatibility determination” on remand. Declaration of Matthew Hogan, ECF No. 29-1, ¶¶ 8–11; *see also* Defendant’s Motion for Voluntary Remand (“Remand Mot.”), ECF No. 29, at 19–20.²

Here, the Permits that Plaintiffs challenge will expire in the fall of 2027, after three more grazing seasons. The likelihood that FWS would timely complete its new processes such that it could reconsider the 2023 Permits before they expire is exceedingly low. The NEPA process includes time-consuming steps required by law and regulation, including public notification, public comment, a decision about whether to proceed with an EA versus an EIS, and potentially more public comment. *See* Remand Mot. at 14–15. On top of that, FWS claims that it wants to incorporate into its approach additional monitoring and study of grazing at the Refuge, which would take significant time before the public process even began. *See* Remand Mot. at 20; Hogan Decl. ¶ 16.

Moreover, the Refuge has a chronic lack of resources that casts serious

² All pin citations to documents on this case docket refer to the Court’s ECF pagination.

doubt on FWS’s capacity to follow through on its new commitments, let alone to do so in time to reconsider the 2023 Permits challenged in this action. This case itself arises out of FWS’s failure to follow through on numerous previous commitments, *see* SOF ¶¶ 55–57, 62–72, and FWS now confirms that for decades it has lacked the staff and resources to plan, monitor, and study grazing at the Refuge. Hogan Decl. ¶ 6; Remand Mot. at 14. Moreover, FWS has recently cut staff to the point where the National Wildlife Refuge System Chief concluded that no refuge unit in the nation is currently staffed or funded to “fully achieve administration, management and mission goals and objectives.” *See* Second Decl. of Chris Krupp, ¶ 6 (attached hereto).

Finally, FWS’s own characterization of its request for remand demonstrates it does not intend to reconsider the existing permits. Regional Director Hogan provides a litany of reasons FWS wants to keep the 2023 Permits in place and continue grazing on remand. Hogan Decl. at ¶¶ 12–16. Ultimately, FWS only commits to completing analyses on remand by 2027, when the 2023 Permits expire and at which point their reconsideration becomes moot. *Id.* ¶ 9.

This raises the same problem addressed in *Limnia*: If this Court granted FWS’s motion, Plaintiffs’ opportunity to vindicate their rights to challenge the 2023 Permits under the APA would be lost, and remand would result in a circumstance akin to dismissal of this case on the merits. Moreover, Plaintiffs would face the prospect (and delay) of suing again if the agency failed its statutory obligations in issuing new permits. And if FWS’s approach held sway, this process could repeat itself, with the parties stuck in a revolving door of evaded accountability. The Court should thus deny FWS’s motion and reach the merits.

B. Remand Is Not Appropriate Because FWS Seeks to Bolster the Record.

“It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.” *Dep’t of Homeland Sec. v. Regents of Univ. of Calif.*, 591 U.S. 1, 20 (2020). Thus, even where an agency shows that it intends to revisit the challenged decision, remand is still not appropriate where the agency simply seeks a “second bite at the apple.” *American Waterways Operators*, 427 F.Supp.3d at 98. If the object of remand is to “bolster” the government’s rationale so that its actions “have a higher chance of withstanding subsequent judicial scrutiny,” such a “proffered justification for remand is no justification at all.” *Keltner*, 148 Fed. Cl. at 564–67; *see also Harmonia Holdings Group, LLC v. United States*, No. 21-1704C, 2021 WL 12148882, at *1 (Fed. Cl. Nov. 10, 2021) (denying motion for voluntary remand where the defendant sought “to bolster the administrative record”).

This Court has previously denied requests to “delay ongoing litigation to shore up the administrative record or search for post-hoc rationalizations based on new information” and, unless an agency proposes to withdraw its decision, has required the agency to “defend against the existing allegations.” *Ksanka Kupaqa Xa’tçin v. U.S. Fish & Wildlife Serv.*, No. CV 19-20-M-DWM, 2019 WL 13450299, at *1 (D. Mont. June 7, 2019); *Rock Creek All.*, No. CV 01-152-M-DWM (denying a motion for voluntary remand from FWS where the agency’s intent to re-work its decision to add “post hoc reasoning,” without withdrawing it, was improper) (Exhibit 1 at 3).

Here, FWS’s objective on remand is largely to bolster the administrative

record. Rather than defending the 2023 Permits based on the administrative record now before the Court, FWS seeks remand without vacatur so it can monitor and study the impacts of grazing at the Refuge, go through a new NEPA process, and prepare a new compatibility determination to support its grazing program. Remand Mot. at 19–20; Hogan Decl. ¶¶ 8–10.

Plaintiffs submitted letters and comments to FWS in 2023 raising the very issues for which FWS now seeks remand. *See* SOF ¶¶ 76–80. The time for FWS to consider these issues and build a supporting record was *then*. Now, after litigation has been filed and briefed, is not the proper time to seek a do-over. *See American Waterways Operators*, 427 F. Supp. 3d at 98, 100 (denying remand where agency sought to revisit an “otherwise final decision based solely on its new-found desire” to revisit factors the agency had already considered in rendering its first decision prior to the litigation); *see also Miss. River Transmission Corp.*, 969 at 1217 n.2; *Lutheran Church*, 141 F.3d at 349; *Util. Solid Waste Activities Grp.*, 901 F.3d at 437; *Chlorine Chemistry Council*, 206 at 1288 (all describing denials of late-filed remand requests).

When an agency action like this is ripe for review, it is important to respect a plaintiff’s “opportunity to vindicate its statutory rights under the APA.” *Limnia*, 857 F.3d at 388; *see also Keltner*, 148 Fed. Cl. at 565–66. Plaintiffs timely sought judicial review of the 2023 Permits, the government filed the administrative record underlying those decisions, and the issues are briefed on the merits. FWS has chosen not to stand by its challenged actions. But it would be inappropriate and unjust to “remand” these actions so that the agency can avoid an adverse ruling through post-hoc padding of the record.

C. FWS’s Examples of Remand Precedent Are Inapposite.

FWS cites several district court cases to suggest voluntary remand is matter-of-course if the agency seeks additional analysis. *See* Remand Mot. at 21. But FWS’s examples are distinguishable, and the agency is wrong to suggest that “precedent” warrants following them here. *Id.*

For example, in *Ctr. for Biological Diversity v. BLM*, No. CV-21-2507-GW-ASx, 2022 WL 4233648 (C.D. Cal. Sept. 13, 2022), the plaintiffs and federal defendants together supported remand (an intervenor opposed but did “not support [its] argument with persuasive or binding case law and/or evidence,” *id.* at *6). Here, of course, that is not the case.

In *N. Alaska Env’t Ctr. v. Haaland*, No. 3:20-cv-00187-SLG, 2022 WL 1556028 (D. Alaska May 17, 2022), the court took care to ensure that federal defendants “credibly assert[ed] that th[e] reconsideration process may result in amendment of or outright reversal of th[e] decisions,” and it received assurance from the government that the relevant permits were suspended during remand, “preventing environmental harm during the reconsideration period.” *Id.* at *5. Here, by contrast, FWS persists in trying to justify grazing and forecasts its plan to approve grazing permits again in the future, while seeking to leave the 2023 Permits in place on remand. *See* Remand Mot. at 20.

Finally, in both *N. Coast Rivers All.*, 2016 WL at *3–5, and *Or. Nat. Desert Ass’n v. Freeborn*, No. CV-06-1311-MO, 2007 WL 9658100 (D. Or. June 19, 2007), the circumstances involved triggering events that were outside the agencies’ control—intervening judicial decisions calling into question their actions. (The latter case involved not a remand request but a motion to stay proceedings.) Here,

by contrast, the reasons FWS seeks to remand its Permit approvals are entirely due to failures of the agency's own making. And because those failures have occurred for decades, FWS had more than ample time to fix them before acting.

III. REMAND WOULD UNDULY PREJUDICE PLAINTIFFS AND WOULD NOT BE IN THE INTEREST OF JUDICIAL ECONOMY.

Even if FWS met its burden to justify remand based on substantial and legitimate concerns, this Court must also “consider whether remand would unduly prejudice the non-moving party.” *Util. Solid Waste*, 901 F.3d at 436 (citing *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015)). Remand may be denied when the scope of the request is inappropriate and would delay resolution of claims. *Keltner*, 148 Fed. Cl. at 566–67. Remand may also be denied when the promised scope of reconsideration is “narrower than the scope of the plaintiffs’ challenge.” *Sierra Club*, 711 F. Supp. 3d at 536.

The Court must also consider whether “the need for finality in [the] matter clearly outweighs the government’s justification for requesting a voluntary remand.” *Keltner*, 148 Fed. Cl. at 565. The Court retains discretion to deny remand “and thus to proceed to decide the merits of the case—if the risk of harm from indefinitely leaving an allegedly unlawful [agency action] in place outweighs considerations of judicial and administrative efficiency.” *CWA Rulemaking*, 60 F.4th at 596. Ultimately, the Court must consider whether remand is in the interests of justice. *Keltner*, 148 Fed. Cl. at 565.

Here, these factors including the scope of remand, Plaintiffs’ interest in finality, and judicial efficiency all weigh against granting FWS’s motion for remand.

A. The Scope of FWS’s Remand Request Is Too Narrow.

FWS’s motion for voluntary remand is too narrow, because it fails to address all issues for which Plaintiffs seek judicial review. FWS seeks remand to perform a new NEPA analysis and compatibility determination that would account for the “funding and staffing resource limitations” that it says have prevented the agency from following through on decades of promises to carefully plan, monitor, and manage grazing at the Refuge. Remand Mot. at 19. Hogan Decl. ¶¶ 5–7.

But a new NEPA analysis and compatibility determination as FWS proposes would not bear at all on Plaintiffs’ first claim for relief—that FWS violated the Refuge Act when it issued the 2023 Permits, which are not consistent with requirements from the 2009 Comprehensive Conservation Plan for the Refuge. The 2009 Plan requires FWS to end its use of simple rest-rotation grazing cycles and requires increased oversight, monitoring, and targeted adjustment of grazing. *See* Reply Br. at 7–8. Although FWS has now admitted it failed to follow through with these requirements, its remand motion does not propose doing anything about them. Instead, FWS proposes that on remand it will continue to apply grazing as already set out in the 2023 Permits, even though this violates the Plan. Importantly, this claim cannot be cured by the new analysis documents FWS offers alone; FWS would need to modify the existing Permits and any future permits such that grazing complies with the Plan. But FWS does not propose doing so on remand.

Plaintiffs’ second claim alleges FWS violated the Refuge Act when it issued the 2023 Permits in reliance on the 2023 Compatibility Determination. *See* Reply Br. at 8–10. And Plaintiffs’ third and fourth claims allege FWS violated NEPA when it issued the 2023 Permits in reliance on the 2023 Environmental Action

Statement and without preparing an EIS. *Id.* at 10–13. While FWS’s remand motion bears on one facet of these claims, it ignores numerous other issues Plaintiffs raised. FWS proposes in a new NEPA analysis and compatibility determination on remand to correct its failure to accurately characterize and assess the grazing program’s limited resources for planning and monitoring. But that was only one among numerous issues that Plaintiffs raised to support claims two, three, and four. For each of these claims, Plaintiffs also argued how FWS ignored its prior findings about the negative impacts of rest-rotation grazing, failed to consider impacts to arctic grayling and grizzly bear, misconstrued available science on sage-grouse impacts, and ignored climate change. *See* Opening Br. at 14–21, 24–28. FWS does not propose to address these issues on remand.

Thus, the scope of FWS’s remand request is considerably narrower than the scope of Plaintiffs’ challenges, which “makes the agency’s request less persuasive.” *Sierra Club*, 711 F. Supp. 3d at 537.

B. Remand Is Not in the Interests of Judicial Economy and Finality.

Due to the limited scope of FWS’s proposal, if remand is granted, Plaintiffs and this Court would likely only suffer delay in resolving with finality several of the issues at the heart of the claims, as discussed above. Since FWS refuses to acknowledge these issues or confess error, many of Plaintiffs’ claims would likely still require adjudication by this Court at a later date. *See, e.g., Sierra Club*, 711 F. Supp. 3d at 538–39 (denying remand given doubt it would “resolve [the] case more efficiently than a decision on the merits,” particularly where the case had already been stayed for unsuccessful settlement negotiations); *Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16, 23 (D.D.C. 2019) (denying the government’s request

for a stay to pursue more administrative process where it was “far from clear that [the agency] would be able to stick to [its] schedule,” and noting that even if it did, the new process would not necessarily address all issues in the case). Thus, the Court should deny FWS’s remand motion and resolve the merits now.

Moreover, it is critical to Plaintiffs and more efficient for the Court to reach the merits now because—as the Ninth Circuit recently held in *CWA Rulemaking*—district courts lack the power to provide permanent equitable remedies (including vacatur) when they have not rendered judgment on the merits, such as when they grant a voluntary remand motion. 60 F.4th at 594–96. Thus, the only outcome under FWS’s motion is an open-ended remand process, without vacatur and with the many ongoing problems discussed herein. Vacatur and other equitable relief on remand, such as requiring an EIS prior to authorizing grazing, or other requirements as necessary to ensure efficient and effective process, are unavailable under FWS’s voluntary remand motion and must follow a ruling on the merits.

C. Plaintiffs Would Be Prejudiced by Remand Without Vacatur.

If this Court grants FWS’s motion, Plaintiffs will suffer undue prejudice from the continuation of the unlawful agency actions they have challenged. As detailed in Plaintiffs’ previous filings, livestock grazing threatens numerous ecological values at the Refuge—particularly when done by following pre-set grazing cycles and without planning, monitoring, and adjustment, like the grazing authorized by the 2023 Permits. SOF ¶¶ 7–8, 18, 21–22, 25–26, 30–34, 41, 43–47; *see also* Decl. of John Carter, ¶¶ 8, 11, 15–16, 18, 20 (attached hereto) (discussing ecological impacts of grazing). And the negative ecological impacts of grazing harm Plaintiffs. *See* ECF Nos. 19-1–19-5 (standing declarations).

This Court should “deny a voluntary remand—and thus [] proceed to decide the merits of the case—if the risk of harm from indefinitely leaving an allegedly unlawful [action] in place outweighs considerations of judicial and administrative efficiency.” *CWA Rulemaking*, 60 F.4th at 596. Here, FWS does not articulate how remand without vacatur would serve judicial efficiency sufficiently to outweigh the harms to Plaintiffs described above. Instead, FWS submits the Declaration of Matthew Hogan (ECF No. 29-1) to attempt to counterbalance the harms Plaintiffs face and as a post-hoc substitute for the underlying NEPA analysis and Compatibility Determination it has declined to defend.

Hogan asserts that without continued grazing the Refuge could experience an increased risk of invasive weeds, fire, and other habitat effects. *See* Hogan Decl. ¶¶ 12–16. But Hogan’s statements are largely unsupported, lack site-specific detail, include internal contradictions, and miss important context; moreover, they fail to explain how any of these effects would occur during the limited time period of remand. *See* Carter Decl. ¶¶ 13–26 (explaining why “it is important that the generalized and unsupported statements in the Hogan Declaration are better contextualized and their limitations better understood,” ¶ 14; noting research showing FWS’s approach to grazing “comes with numerous negative consequences,” ¶ 16; and detailing based on evidence and expertise why “the relevant science and ecological considerations do not support Mr. Hogan’s generalized assertions to argue that Red Rock Lakes would suffer from even the short-term removal of commercial livestock,” ¶ 26); *see also* Reply Br. at 16–18.

Trying to justify its remand motion, FWS turns the agency’s statutory obligations on their head. The Refuge Act, importantly, prohibits activities like

commercial agriculture unless demonstrated to be compatible with the Refuge’s wildlife conservation purposes. *See* 16 U.S.C. § 668dd(d)(3)(A)(i) (FWS “*shall not* initiate or permit” a refuge use “unless [the agency] has determined that the use is a compatible use.”) (emphasis added); *see also* 50 C.F.R. § 25.21(b) (FWS may open, expand, renew or extend a “refuge use only *after* the Refuge Manager determines that it is a compatible use.”) (emphasis added). FWS asks this Court to invert that rule and to prioritize grazing over protecting and restoring the Refuge’s ecological values by allowing grazing to occur *before* and during FWS’s work to adequately assess its compatibility.

Similarly, FWS’s remand proposal contravenes the “well-established purpose” of NEPA to “look *before* leaping.” *Ctr. for Biological Diversity v. BLM*, 675 F. Supp. 3d 1112, 1121 (D. Idaho 2023) (emphasis added) (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F. Supp. 3d 91, 106 (D.D.C. 2017)). The standard APA remedy of remand *with* vacatur is particularly important under NEPA “[b]ecause remand without vacatur or injunction would incentivize agencies to rubber stamp a new approval, rather than take a true and informed hard look” at the consequences of their decisions. *WildEarth Guardians v. Bernhardt*, 423 F. Supp. 3d 1083, 1105 (D. Colo. 2019). Indeed, “because NEPA is a purely procedural statute, where an agency’s NEPA review suffers from a significant deficiency, refusing to vacate the corresponding agency action would vitiate the statute.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021). Yet here, FWS seeks to allow grazing now, and study the impacts in a new NEPA document sometime in the future, prejudicing Plaintiffs.

The bottom line is that this case is a poor fit for voluntary remand. Remand without vacatur would unfairly prejudice plaintiffs, would run counter to judicial efficiency, and would not further the interests of justice.

CONCLUSION

For the reasons above, and as set forth in the briefing on Plaintiffs' summary judgment motion, the Court should deny Defendant's motion for voluntary remand without vacatur, and should grant Plaintiffs' pending summary judgment motion and provide the relief requested therein.

Respectfully submitted May 23, 2025.

/s/ Andrew Hursh

Andrew Hursh (MT Bar #68127109)

/s/ Bryan Hurlbutt

Bryan Hurlbutt (*pro hac vice*, ID Bar #8501)

ADVOCATES FOR THE WEST

966 Discovery Way

Missoula, Montana 59802

Tel: 208-268-5210 (Hursh)

208-730-6961 (Hurlbutt)

ahursh@advocateswest.org

bhurlbutt@advocateswest.org

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is 4,629 words in length, excluding the caption, table of contents, table of authorities, glossary of terms, index of exhibits, signature blocks, and certificate of compliance. Pursuant to Local Rule 7.1, a table of contents, table of authorities, and index of exhibits are included in this brief.

/s/ Andrew Hursh

Andrew Hursh
Attorney for Plaintiffs