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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' REPLY BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT [ECF
No. 18]**

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GLOSSARY OF TERMS

Term	Definition
1994 EA	FWS’s 1994 Environmental Assessment of Refuge Grazing (AR976–1072)
2009 Plan	FWS’s 2009 Comprehensive Conservation Plan for the Refuge (AR334–544)
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
the Memo	FWS’s memorandum in support of the 2023 Environmental Action Statement (AR1078–79)
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)
SOF	Plaintiffs’ Statement of Undisputed Facts (ECF No. 20)

INTRODUCTION

The Court should grant Plaintiffs’ summary judgment motion, ECF Nos. 18–20, because federal defendant U.S. Fish and Wildlife Service (FWS) has failed to file any opposition or cross-motion for summary judgment, and because Plaintiffs are entitled to judgment as a matter of law under the undisputed facts.

Rather than respond to Plaintiffs’ summary judgment motion in accordance with the Court’s scheduling orders and local rules, FWS has instead filed only a motion for voluntary remand without vacatur. ECF No. 29 (“Remand Mot.”). In its motion, FWS concedes facts that prove legal error but seeks to avoid having the Court enter any meaningful relief. Plaintiffs’ response opposing that motion, ECF No. 30, explains why the Court should exercise its broad discretion to deny voluntary remand for several reasons, including because FWS does not intend to reconsider its challenged actions authorizing grazing permits (the “2023 Permits” or “Permits”) on the Red Rock Lakes National Wildlife Refuge, and because leaving the Permits in place (as FWS seeks) would prejudice Plaintiffs and perpetuate ongoing harm to the Refuge’s fish, wildlife, and habitat.

Moreover, FWS’s remand motion confirms Plaintiffs’ basis for summary judgment: FWS admits that it failed to follow through on decades of promises to carefully plan, monitor, and manage grazing at the Refuge when it issued the 2023 Permits, re-authorizing grazing for five-year terms. FWS also admits that it neither recognized nor accounted for these failures when issuing the 2023 Permits or the Environmental Action Statement and Compatibility Determination upon which the permits relied—the very actions Plaintiffs challenge here.

There are no disputes as to any material facts. Plaintiffs have met their

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burden to demonstrate entitlement to relief as a matter of law. And the admissions in FWS’s remand motion confirm the legal violations Plaintiffs have shown.

Accordingly, the Court should grant Plaintiffs’ summary judgment motion; declare unlawful and vacate the 2023 Permits, the Environmental Action Statement, and the Compatibility Determination; order FWS to prepare an EIS prior to authorizing future grazing at the Refuge; and enter other necessary relief to protect Plaintiffs’ rights in the lawful administration of the Refuge and its environmental values.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs brought this case to address longstanding violations of law and the environmental harm caused by FWS’s authorization of commercial livestock operations within the Red Rock Lakes National Wildlife Refuge. *See* Complaint, ECF No. 1. The Refuge, located in Montana’s Centennial Valley and containing the largest wetland system in the Greater Yellowstone region, was established in 1935 “as a refuge and breeding ground for wild birds and animals.” *See* Plaintiffs’ Statement of Undisputed Facts (“SOF”), ECF No. 20, ¶¶ 1–6.

The National Wildlife Refuge System Improvement Act (“Refuge Act”) requires that FWS administer the Refuge consistent with a comprehensive conservation plan prepared in accordance with the Act’s wildlife conservation mandate. 16 U.S.C. § 668dd(e)(1)(E). The Act forbids Refuge uses, including commercial agriculture, “unless [FWS] has determined that the use is a compatible use.” *Id.* § 668dd(d)(3)(A)(i).

As the record before the Court shows, FWS has authorized commercial grazing in the Refuge, largely at the behest of local ranchers, by providing a shifting array of rangeland “treatment” justifications over the years. SOF ¶¶ 7–10.

Several times from 1935 to the present, FWS has acknowledged the deleterious ecological impacts of Refuge grazing and the need to redress such harms. *Id.*

Importantly, in 1994, FWS admitted in an Environmental Assessment (the “1994 EA”) that under the existing “pre-determined rest-rotation cycle” grazing system, “negative impacts or long term plant species changes can still occur,” and “[i]n the long-term, the purposes of the refuge would not be achieved.” SOF ¶ 44; AR984. FWS specified that “[g]razing must be monitored, controlled and replanned to ensure the desired effects are accomplished,” which “requires high levels of management,” and “will require Refuge staff to plan, monitor, analyze, adjust, and replan for the following year, rather than rely on a pre-determined rest-rotation schedule.” SOF ¶¶ 41, 49; AR987, 1002.

Later, in the Refuge’s 2009 Comprehensive Conservation Plan (the “2009 Plan”), FWS acknowledged that the changes called for in the 1994 EA had not been implemented, and again concluded that “increased and improved oversight,” including numerous specific monitoring commitments, “must take place in order for [grazing] to be an effective management tool.” SOF ¶ 54–57; AR373, 412.

Since 2009, however, FWS failed to follow through with these commitments, and livestock grazing has continued to damage ecological values at the Refuge. *See* SOF ¶¶ 62–72 (describing the grazing program since 2009); SOF ¶¶ 18–38 (describing ecological impacts); Decl. of Peter Bender, ECF No. 19-1 (describing livestock trampling riparian soils and impacts on wildlife and recreation); Decl. of David Hartwell, ECF No. 19-2, ¶ 10 (observing, among other impacts, cattle “eating and trampling vegetation to the point where there is virtually none left, compacting the soil to the point where there is nothing for

wildlife to enjoy, leaving manure behind to stink and pollute the adjacent waters in land set aside for wildlife”); Decl. of Patrick Kelly, ECF No. 19-3, (observing “clear evidence of severe impacts due to livestock grazing” and noting effects on arctic grayling, grizzly bear, and other species); Decl. of John Taft, ECF No. 19-5, ¶¶ 15–21 (describing impacts including those to elk and to bird species).

On November 8, 2024, Plaintiffs moved for summary judgment, citing FWS’s administrative record (ECF No. 17) and detailing the facts that support their entitlement to relief. *See* ECF Nos. 18–20. Plaintiffs’ opening brief explained why FWS’s grazing approvals violated the National Environmental Policy Act (NEPA), the Refuge Act, and the Administrative Procedure Act (APA). *Id.*

Thereafter, the parties stayed this litigation to allow time for discussion of potential settlement. ECF Nos. 22, 24, 26. When those talks failed to generate agreement, the parties sought, and this Court granted, a lift of the stay to resume summary judgment briefing based on a joint proposed schedule. ECF Nos. 27, 28. The joint proposal included deadlines to complete briefing on cross-motions for summary judgment, and it acknowledged that FWS might file a motion seeking voluntary remand. Notably, as negotiated by the parties, should FWS choose to file a voluntary remand motion, briefing on the remand motion would run concurrently with summary judgment briefing, so as not to delay reaching the merits and cause prejudice to Plaintiffs. The Court therefore provided in its order (ECF No. 28) that any remand motion would be briefed concurrently with the pending summary judgment motion.

Upon the deadline provided by schedule, FWS chose not to file a combined cross-motion for summary judgment and response to Plaintiffs’ summary judgment

motion, nor did FWS file a statement of disputed facts (thus admitting, per Local Rule 56.1(d), that no material facts are in dispute). Instead FWS chose only to file and to rely exclusively upon its motion for voluntary remand without vacatur. For the reasons detailed in Plaintiffs’ accompanying opposition to that motion (ECF No. 30), the Court should deny that request. Instead, this Court can and should now resolve the pending summary judgment motion, which FWS has generally conceded in substance, for reasons further detailed below.

REPLY ARGUMENT

I. THE COURT MAY PROPERLY RESOLVE THIS CASE ON SUMMARY JUDGMENT.

FWS’s failure to respond to Plaintiffs’ motion for summary judgment does not moot or toll that motion and cannot obviate Plaintiffs’ entitlement to relief. Although summary judgment is never awarded by “default”—because it inherently depends upon the court’s evaluation that facts are not in dispute and its substantive application of law—an opposing party’s silence may strengthen a movant’s case. *See Evans v. Independent Order of Foresters*, 141 F.3d 931, 932 (9th Cir. 1998) (noting award of summary judgment requires determination on merits); *Cristobal v. Siegel*, 26 F.3d 1488, 1495 n.4 (9th Cir. 1994) (noting grants of summary judgment were justified, in absence of opposition, where courts “carefully evaluated the moving papers”).

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying

those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A movant may satisfy this burden where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251 (1986).

Where a party “fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may: . . . grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it.” Fed. R. Civ. P. 56(e). Under Local Rule 56.1(d), “[f]ailure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute.” As long as the movant’s papers do not reveal a genuine issue of material fact and are themselves sufficient to warrant summary judgment, the court can grant an unopposed summary judgment motion. *United States v. Real Property Located at Incline Village*, 47 F.3d 1511, 1520 (9th Cir. 1995), *rev’d on other grounds sub nom, Degen v. United States*, 517 U.S. 820 (1996); *see also, e.g., McDonald v. Mountain West Steel, LLC*, No. CV-17-54-BU-BMM, 2019 WL 133312 (D. Mont. Jan. 8, 2019) (reviewing and granting plaintiffs’ motion for partial summary judgment where defendant failed to respond).

These authorities confirm that the Court may and should proceed to resolve Plaintiffs’ summary judgment motion in the absence of any opposition or cross-motion from FWS. Moreover, as explained in the sections below, FWS’s motion for voluntary remand confirms the key facts and legal claims presented in

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Plaintiffs’ opening summary judgment filings, further underscoring the propriety of granting summary judgment to Plaintiffs.

II. FWS VIOLATED THE REFUGE ACT IN TWO WAYS.

A. The 2023 Permits Are Not “Consistent” with the 2009 Plan.

The Refuge Act mandates that FWS “shall manage the refuge . . . in a manner consistent with the plan” adopted for each Refuge. 16 U.S.C. § 668dd(e)(1)(E). As Plaintiffs’ opening brief explained, when FWS issued five permits in 2023 authorizing commercial cattle grazing at the Refuge for five years (2023 through 2027), the agency failed to act consistently with the Comprehensive Conservation Plan that it adopted for the Refuge in 2009. Plaintiffs’ Memorandum in Support of Summary Judgment (“Opening Br.”), ECF No. 19, at 12–14.¹

In the 2009 Plan, FWS committed that it would end its practice of following a “3-year grazing unit rest-rotation cycle with very little monitoring of grazing impacts on habitat.” AR373. Instead, FWS promised grazing “will only occur on the refuge to achieve specific habitat and wildlife objectives, and will include increased and improved oversight, monitoring, and research (when appropriate) conducted to assess if management objectives are being met.” AR412 (emphasis added). Throughout the 2009 Plan, FWS repeatedly identified these same requirements. AR343, 425, 477, 498. The Plan specifically includes requirements to monitor vegetation, wildlife, and nutrient levels. SOF ¶¶ 57, 59.

The administrative record shows that FWS failed to comply with these

¹ All pin citations to documents on this case docket refer to the Court’s ECF pagination.

requirements when it issued the 2023 Permits. *See* Opening Br. at 12–13. Each permit includes a grazing schedule that simply cycles through units at regular intervals mimicking past livestock grazing rates (*see* SOF ¶¶ 73–77), without basing them on any “specific habitat and wildlife objectives” or “improved oversight, monitoring, and research” (*see* AR412). Plaintiffs have met their burden to demonstrate entitlement to judgment on this claim.

FWS has neither disputed these facts nor contested this claim. And the content of FWS’s remand motion *supports* granting summary judgment for Plaintiffs on this claim. As detailed in the declaration submitted by FWS’s regional director, the agency admits it “has not had sufficient staffing or funds to monitor the impact of grazing on vegetation, wildlife, or nutrient levels to the degree anticipated . . . nor has it been able to prepare site-specific prescriptive treatment plans.” Decl. of Matthew Hogan, ECF No. 29-1, ¶ 6. Hogan admits that “the existing grazing program on the Refuge has more closely resembled the three-pasture rest-rotation system” which was rejected by the 2009 Plan. *Id.*

B. FWS Violated the Refuge Act’s “Compatibility” Requirement.

The Refuge Act prohibits FWS from allowing uses like commercial grazing on the Refuge “unless [FWS] has determined that the use is a compatible use.” 16 U.S.C. § 668dd(d)(3)(A)(i). A “compatible use” is one that, based on “sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge.” 50 C.F.R. § 25.12. FWS may open, expand, renew or extend a “refuge use only *after* the Refuge Manager determines that it is a compatible use.” 50 C.F.R. § 25.21(b) (emphasis added).

FWS belatedly prepared a formal Compatibility Determination to support the 2023 Permits—months after issuing the permits. *See* SOF ¶¶ 76–80. The 2023 Compatibility Determination purports to find the authorized cattle grazing compatible with Refuge purposes. *See* SOF ¶¶ 78–89. However, as demonstrated in Plaintiffs’ opening brief, FWS’s 2023 Compatibility Determination was arbitrary and capricious and violated the Refuge Act and the APA because FWS (1) ignored its own prior findings that pre-determined rest-rotation grazing is not compatible at the Refuge, and ignored its own poor past performance in following through with commitments to manage grazing on the Refuge (Opening Br. at 14–17); (2) ignored impacts to Arctic grayling and grizzly bears (*id.* at 17–18); (3) arbitrarily dismissed threats to sage-grouse (*id.* at 18–20); and (4) ignored climate change (*id.* at 20–21).

Plaintiffs have met their burden on this claim for each issue above, based on facts from the administrative record. FWS has not contested these facts or substantively disputed this claim.

Regarding the first issue listed above, FWS’s remand motion again *supports* granting summary judgment. FWS admits that when it issued the 2023 Permits and Compatibility Determination, the agency “*incorrectly concluded*” that the grazing program at the Refuge was similar to “Alternative E”—the grazing program FWS selected in a 1994 EA. Hogan Decl. ¶¶ 6, 7 (emphasis added). Alternative E called for careful annual planning, monitoring, and management of grazing, and when FWS issued its prior grazing compatibility determination for the Refuge, it found these Alternative E requirements were essential. SOF ¶¶ 48–52. By contrast, according to FWS’s recent filings, “the existing grazing program on the Refuge has

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more closely resembled Alternative A of the [1994] EA,” which characterized the pre-existing practice of simple rest-rotation grazing cycles. As the record shows, FWS itself warned that perpetuation of the simple rest-rotation Alternative A—which the agency now acknowledges to have indeed perpetuated in the present challenged actions—was *not* compatible and threatened the Refuge’s values. SOF ¶¶ 43–47, 55. FWS’s decision to issue the 2023 Compatibility Determination based on a characterization of the grazing program that the agency now admits was wrong is the hallmark of arbitrary and capricious decision-making.

With respect to the second, third, and fourth issues listed above, FWS’s remand motion says nothing about grizzly, sage-grouse, or climate change, and it mentions Arctic grayling only once in passing (Remand Mot. at 13), failing to in any way refute Plaintiffs’ showings on those issues.

III. FWS VIOLATED NEPA IN TWO WAYS

A. FWS’s Reliance on the 1994 EA Violated NEPA.

NEPA requires an agency to take a “hard look” and disclose to the public that it “has adequately considered and elaborated the possible consequences of the proposed agency action” and alternatives to that action. *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 872 (9th Cir. 2022) (citation omitted).

Department of Interior regulations allow FWS to rely on an existing environmental analysis (EA) only if the agency determines “with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action.” 43 C.F.R. § 46.120(c). “The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different

environmental effects.” *Id.*

FWS issued the 2023 Permits without undertaking any public NEPA process. SOF ¶¶ 76–77, 90–91. Months after issuing the Permits, FWS issued a one-page “Environmental Action Statement” supported by a two-page internal memo (the “Memo”), purporting to find that an EA the agency prepared for the Refuge’s grazing program in 1994 was sufficient to authorize grazing in 2023. *Id.*; AR972, 1078–79.

Plaintiffs’ opening brief met their burden and showed, based on facts from the administrative record, that FWS’s refusal to update its NEPA analysis was arbitrary and capricious in two ways. First, the 2023 Permits are not substantially the same action as Alternative E which was authorized in the 1994 EA. Opening Br. at 22–24. Second, circumstances and information bearing significantly on environmental conditions and impacts at the Refuge have changed since 1994. *Id.* at 24–27. FWS has not contested these facts or disputed this claim.

With respect to the first reason above, the contents of FWS’s motion for voluntary remand again *support* granting summary judgment. FWS’s recent filings expressly admit that the existing grazing program at the Refuge, authorized in the 2023 Permits, is *not* like the grazing program adopted in the 1994 EA (Alternative E) and is instead more like a continuation of past grazing practices supposedly rejected long ago (Alternative A). Remand Mot. at 14, 19; Hogan Decl. ¶ 6. Thus, FWS directly concedes Plaintiffs’ argument. FWS’s recent admission as to the character of its currently authorized grazing directly contradicts the Environmental Action Statement and Memo. *See* AR1018 (Memo stating the current grazing program is “a continuation” of and “essentially the same action described in the PLAINTIFFS’ SUMMARY JUDGMENT REPLY BRIEF

existing [1994] EA” and the 2009 Plan). Thus, FWS’s actions issuing the 2023 Permits based on the Environmental Action Statement and without preparing a new EA or EIS were arbitrary, capricious, and unlawful.

With regard to the second reason above, FWS has provided no facts or argument to contest Plaintiffs’ showing regarding the changed circumstances and new information that have arisen over the *three decades* since the NEPA analysis the agency purported to rely on, including significant new circumstances concerning Arctic grayling, grizzly bears, sage-grouse, and climate change.

B. FWS’s Failure to Prepare an EIS Violated NEPA

If a major federal action may have significant impacts, an agency must prepare an EIS, instead of a shorter EA. 42 U.S.C. §§ 4321, 4332(2)(C). “A showing that there are *substantial* questions whether a project may have a significant effect on the environment is sufficient” to require an EIS. *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (quotations omitted). “This is a low standard.” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561–62 (9th Cir. 2006).

Plaintiffs’ opening brief showed how FWS itself repeatedly concluded that the type of grazing practices it approved in the 2023 Permits may have significant adverse environmental impacts, requiring FWS to prepare an EIS. Opening Br. at 22–23; SOF ¶¶ 43–47, 55. Plaintiffs also showed how FWS’s repeated acknowledgments that it needs more information to understand grazing impacts reveals that the environmental effects of the agency’s action are “highly uncertain,” triggering another factor that requires an EIS. Plaintiffs met their burden on this claim, and FWS has not contested these facts or disputed this claim.

In its remand motion, FWS says it intends to conduct a new NEPA analysis to support “future grazing decisions” (Hogan Decl. ¶ 9), but the agency says it “has not yet determined” whether it would prepare an EA or an EIS. Remand Mot. at 19. But again, FWS’s regional director admitted the agency has not “monitor[ed] the impact of grazing on vegetation, wildlife, or nutrient levels to the degree anticipated” decades ago (Hogan Decl. ¶ 6), confirming Plaintiffs’ argument that impacts may be significant. The Court should thus order FWS to prepare an EIS to evaluate grazing at the Refuge. *See* Opening Br. at 24.

IV. THE COURT SHOULD VACATE THE PERMITS AND REQUIRE FWS TO PREPARE AN EIS BEFORE AUTHORIZING ANY FUTURE GRAZING.

Having demonstrated entitlement to summary judgment, Plaintiffs seek relief under the APA, which commands that “[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A) (emphasis added). As noted in their complaint (ECF No. 1) and summary judgment motion (ECF No. 18), Plaintiffs request that this Court declare unlawful and vacate FWS’s challenged actions—the 2023 Permits, Compatibility Determination, and Environmental Action Statement. In addition, the Court should order FWS to prepare an EIS prior to authorizing future grazing permits at the Refuge.

By declining to respond to Plaintiffs’ claims on the merits, FWS has offered the Court no basis to order relief other than what Plaintiffs request. However, in its motion for remand without vacatur, FWS raises issues the agency might have also

raised to argue against vacatur had it filed a summary judgment response. Specifically, the declaration filed by FWS Regional Director Hogan includes various reasons why he believes the 2023 Permits should remain in place and grazing on the Refuge should continue during FWS's requested remand. Hogan Decl. ¶¶ 11–16. Thus, Plaintiffs briefly address those issues here to explain how they fail to justify deviating from the APA's directive to vacate FWS's unlawful agency actions issuing the Permits.

A. Vacatur Is the Default Remedy for APA Violations and is Necessary Here.

It is only in “rare” and “limited circumstances” that courts may deviate from the APA's express mandate and remand without vacatur after holding agency action unlawful on the merits. *WildEarth Guardians v. Bucknall*, 756 F. Supp. 3d 1017, 1044–45 (D. Mont. 2024); *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012). “When a court determines that an agency's action failed to follow Congress's clear mandate[,] the appropriate remedy is to vacate that action.” *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011). Remand without vacatur is appropriate only when a party offers evidence of disruptive consequences sufficient to demonstrate “equity demands” an action persist despite its illegality. *Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

Unlawful actions must be vacated particularly when, upon reconsideration, the agency is likely to reach a different result. *Pollinator Stewardship Council*, 806 F.3d at 533. The Court should consider “whether [] fundamental flaws in the

agency’s decision make it unlikely that the same [action] would be adopted on remand.” *Id.* at 532; *see also North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008).

Here, FWS’s unlawful actions are not mere clerical errors or procedural issues it could remedy with its final action unchanged. As detailed above, FWS’s grazing permits would require fundamental changes to be lawfully re-approved, if they could at all. Because the Permits authorize grazing following simple rotation cycles without careful planning, monitoring, and active adjustment the agency has repeatedly recognized are necessary, FWS cannot simply reassess and reauthorize grazing permits identical to those challenged here. Such “fundamental flaws ‘foreclose [the agency] from promulgating the same [action] on remand.’” *North Carolina*, 531 F.3d at 929 (quoting *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1261–62 (D.C. Cir. 2007)). FWS has admitted this in the past. *See* SOF ¶¶ 41, 44, 55. And FWS implies as much again now, noting that it expects new processes on remand to help the agency “determine whether to modify or eliminate livestock grazing at the Refuge.” Remand Mot. at 6.

B. This Is Not One of the Rare, Limited Circumstances Where Equity Demands Departing from the Default Remedy of Vacatur.

FWS makes a series of unsupported assertions about consequences to the Refuge if its grazing program were interrupted, even for a limited period. Hogan Decl. ¶¶ 11–16. But these statements are self-contradictory and unpersuasive.

First, Plaintiffs have shown through undisputed facts how livestock grazing has damaged and threatens further damage of the Refuge’s ecological values—particularly grazing done with minimal planning, monitoring, and adjustment, like

that authorized by the 2023 Permits. SOF ¶¶ 7–8, 18, 21–22, 25–26, 30–34, 41, 43–47. Those facts in the record include FWS’s own acknowledgement that under such a grazing program, “the purposes of the refuge would not be achieved.” SOF ¶ 44. Notably, Regional Director Hogan confirms this when he warns that if the Permits were vacated, it would lead to grazing on other nearby lands “without proper analysis and long-term planning,” which “could prove detrimental to surrounding plant and wildlife communities and could undermine . . . conservation efforts.” Hogan Decl. ¶ 13. He also admits that grazing *at the Refuge* now occurs without proper analysis and long-term planning. *Id.* ¶ 6. Thus, the environmental harms that Hogan warns about on other lands would damage the Refuge too.

Second, FWS makes several statements about grazing and biodiversity, invasive species, and fire that are conclusory, speculative, and unsubstantiated. Hogan Decl. ¶¶ 11–14. As noted in the Declaration of John Carter (ECF No. 30-3), FWS’s superficial assertions—made without citation to relevant authority—do not adequately or accurately reflect relevant scientific understanding and cannot withstand scrutiny. *See* Carter Decl. ¶¶ 13–26. Rather, livestock grazing can degrade wildlife habitat, can foster the spread of invasives, and is unlikely to reduce fire risk. Carter Decl. ¶¶ 8–11, 20–25.

Even if Hogan’s assertions have some relevance to considering livestock as a rangeland management tool in the general sense, FWS nowhere explains how grazing at the Refuge could be so important that “equity demands” allowing the practice in contradiction with federal law, especially for a temporary period.

Furthermore, grazing as authorized by the 2023 Permits is *not* targeted to achieve the goals Hogan outlines; these permits simply cycle through grazing allotments

using stocking rates FWS set in the 1980s, without the planning, monitoring, and adjustments necessary to understand and achieve these types of specific goals. *See* SOF ¶¶ 63–66, 70, 72, 74–75.

Third, FWS asserts without explanation that it must allow continued grazing under the Permits in order to study its impacts. Hogan Decl. ¶¶ 11–12, 16. But if FWS really wants to try to understand the effects of grazing at the Refuge, it could do that by studying the varying effects from grazing that has already occurred throughout the Refuge, since it is divided into dozens of pastures, some of which were last grazed in 2024, some last grazed in 2023, some last grazed in 2022, and so on, while others have not been grazed for many years. *See* SOF ¶¶ 66, 75. There is no reason FWS needs to create even more grazed pastures in 2025 or 2026. Furthermore, it is not clear whether FWS will actually follow through on its intent to monitor and study grazing impacts, because the agency likely lacks sufficient staff to do so. The record shows, and FWS admits, that it has chronically lacked staff and funding to monitor and research grazing. SOF ¶¶ 55, 61, 72; Hogan Decl. ¶ 6. And this problem is only exacerbated by recent FWS cuts. *See* Second Decl. of Chris Krupp, ECF No. 30-2, ¶¶ 4–6.

Finally, even though none of them chose to intervene in this case, Hogan speculates that grazing operators might suffer economic harm and might have to sell their cattle if they are not allowed to continue grazing on the Refuge. Hogan Decl. ¶ 15. But Hogan provides no evidence for this assertion. Instead, he contradicts himself by acknowledging that if grazing is not allowed at the Refuge, the cattle will shift to graze other lands in the Centennial Valley anyway. *Id.*

Moreover, by speculating about impacts to the grazing operators, FWS improperly

seeks to elevate private economic interests above the statutory goals of the Refuge Act and NEPA to protect the environment. The Court should reject that approach.

For the above reasons, this is not the “rare” circumstance where “equity demands” allowing an illegal agency action to continue. The Court should vacate the Permits.

CONCLUSION

For the reasons above, this Court should grant Plaintiffs’ summary judgment motion; declare unlawful and vacate the challenged 2023 Permits, 2023 Compatibility Determination, and 2023 Environmental Action Statement; and require that FWS prepare an EIS before deciding whether to authorize future cattle grazing on the Refuge.

Respectfully submitted May 23, 2025.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is 4,840 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.

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