

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

**MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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GLOSSARY OF TERMS

Term	Definition
APA	Administrative Procedure Act
AR	Administrative Record (citations formatted AR[page #])
AUM	Animal Unit Month
CAA	Cooperative Agriculture Agreement
CEQ	Council on Environmental Quality
DOI	U.S. Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
FWS	U.S. Fish & Wildlife Service
GYE	Greater Yellowstone Ecosystem
NEPA	National Environmental Policy Act
NWR	National Wildlife Refuge
the Refuge	Red Rock Lakes National Wildlife Refuge
Refuge Act	National Wildlife Refuge System Improvement Act
SUP	Special Use Permit

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INTRODUCTION

Plaintiffs respectfully seek summary judgment holding unlawful and reversing Defendant U.S. Fish and Wildlife Service’s (“FWS”) 2023 Permits, Compatibility Determination, and Environmental Action Statement approving commercial cattle grazing for 2023–2027 at the Red Rock Lakes National Wildlife Refuge (the “Refuge”) in southwestern Montana’s Centennial Valley.

As explained below, FWS has long recognized that cattle grazing threatens the Refuge’s fish and wildlife and must be strictly monitored and controlled—yet FWS has consistently failed to conduct the monitoring studies or implement the grazing management improvements it deemed necessary back in 1994 and again in 2009. The 2023 Permits continue this pattern of broken promises.

This Court must reverse because FWS violated its twin duties under the National Wildlife Refuge System Improvement Act (“Refuge Act”), 16 U.S.C. § 668dd *et seq.*, to manage the Refuge “consistent” with its 2009 comprehensive conservation plan for the Refuge, and to ensure that any grazing it might choose to allow is “compatible” with the Refuge’s fish and wildlife purposes.

Reversal is also required because FWS violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* FWS has never prepared an Environmental Impact Statement (“EIS”) under NEPA to assess grazing management on the Refuge, even though FWS has admitted for decades that cattle grazing poses significant impacts to fish and wildlife and their habitats there. In approving the 2023 Permits, FWS unlawfully determined that it could rely on a badly-outdated Environmental Assessment (“EA”) from 1994, even though FWS never implemented the grazing management scheme that EA required. And FWS

ignored the significantly changed circumstances and new information since then that require current NEPA analysis, including grazing conflicts with imperiled wildlife at the Refuge such as Arctic grayling, grizzly bear, and greater sage-grouse, as well as climate change threats.

Because FWS violated the Refuge Act, NEPA, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2), in approving the 2023 Permits and associated Compatibility Determination and Environmental Action Statement, the Court should grant summary judgment to Plaintiffs, hold unlawful and vacate the challenged actions, and remand to FWS with instructions to comply with NEPA and the Refuge Act before deciding whether to authorize any commercial cattle grazing on the Refuge.

FACTUAL BACKGROUND

President Franklin D. Roosevelt established Red Rock Lakes National Wildlife Refuge in 1935 “as a refuge and breeding ground for wild birds and animals.” SOF ¶¶ 1–5¹; AR340–31.

The Refuge comprises tens of thousands of acres of protected federal lands that include the largest wetland system in the Greater Yellowstone Ecosystem (“GYE”), and it provides important habitat for numerous birds and other fish and wildlife, such as trumpeter swans, greater sage-grouse, Arctic grayling, and many large mammals including grizzly bears. *Id.*

When the Refuge was established in 1935, FWS discontinued cattle grazing

¹ Plaintiffs’ Statement of Undisputed Facts (“SOF”), filed herewith, establishes the relevant facts supporting this motion with citations to Administrative Record (“AR”) documents submitted by FWS.

because overgrazing was threatening the Refuge’s ecological values. SOF ¶¶ 7–10. FWS later renewed grazing on the premise that it might alleviate perceived hazards from fire and rodents at the Refuge. *Id.* But overgrazing occurred again, and in 1968, FWS reduced the amount of grazing authorized. *Id.*

FWS prepared the 1994 EA to evaluate whether to continue grazing at the Refuge, and if so, under what conditions. SOF ¶¶ 39–42. At that time, grazing was managed under a “pre-determined rest-rotation cycle,” where pastures are grazed once every three years, with minimal monitoring, oversight, or other management. SOF ¶¶ 43–47. The 1994 EA noted that, even with the grazing reductions implemented since 1968, “negative impacts or long term plant species changes can still occur” under that grazing management, and “[i]n the long-term, the purposes of the Refuge would not be achieved.” SOF ¶ 44; AR984.

The 1994 EA thus rejected continuing the existing rest-rotation grazing scheme and adopted an “adaptive management by prescription” program, which called for defining “desired” animal and plant community objectives, establishing site-specific habitat treatment plans, “developing annual prescriptions for habitat treatment,” and “selecting the appropriate management tools on an as needed basis,” among other steps. SOF ¶¶ 47–52; AR984. The 1994 EA emphasized that grazing 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.

But these reforms were never implemented, and FWS continued to authorize

cattle grazing on the Refuge following the same pre-determined rest-rotation system previously in place. SOF ¶¶ 62–72.

FWS admitted this in 2009, when it prepared a “Comprehensive Conservation Plan” for the Refuge (“the 2009 Plan”), as required by the Refuge Act. SOF ¶¶ 53–61. The 2009 Plan acknowledged that FWS “never fully actualized” the grazing program selected in 1994 and was still operating on the rest-rotation system previously assessed to be too damaging. SOF ¶ 55; AR373. A “key issue” was FWS’s “inadequate monitoring of the current grazing program to determine its effectiveness as a management tool,” due to staffing and funding problems. *Id.*; AR342. The 2009 Plan underscored that “[c]hanges in the grazing program must take place” and that grazing must only occur with “increased and improved oversight,” including numerous specific monitoring commitments. SOF ¶¶ 54–57; AR373, 412.

These promises have again been broken. SOF ¶¶ 62–72. Grazing stocking rates remain based largely on 1986/1987 range surveys, and grazing continues to follow pre-determined rest-rotation cycles without the monitoring, annual reviews, and adjustments called for in both the 1994 EA and 2009 Plan. *Id.*

The 2023 Permits challenged here perpetuate this pattern. SOF ¶¶ 73–77. They authorize grazing for new five-year terms using the same pre-set grazing rates and rotational schedules as before, without the annual planning elements the 1994 EA prescribed, such as pre-treatment site evaluation, contingency plans, funding and personnel, public coordination, and post-treatment monitoring. *Id.*

Although Plaintiffs warned FWS in 2023 that it could not continue approving grazing as in the past and must comply with the Refuge Act and NEPA

by fully analyzing current conditions, impacts, and alternatives, FWS disregarded those warnings. *See* SOF ¶¶ 76–77. After issuing the 2023 Permits, FWS prepared a 2023 “Compatibility Determination” asserting that the cattle grazing is compatible with the Refuge purposes, SOF ¶¶ 78–89, and a 2023 “Environmental Action Statement” asserting that the 1994 EA remained adequate, SOF ¶¶ 90–93, all without acknowledging its chronic lack of staffing and resources, its longstanding failure to implement grazing program revisions and monitoring called for since 1994, or the changed circumstances that render the 1994 EA badly outdated. *See* SOF ¶¶ 55–72.

Accordingly, Plaintiffs brought this lawsuit and now seek summary judgment on all their claims. *See* ECF No. 1 (Complaint).²

STANDARDS OF REVIEW

Summary judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The APA requires courts to hold unlawful and set aside federal agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

“An agency action qualifies as ‘arbitrary’ or ‘capricious’ if it is not reasonable and reasonably explained.” *Ohio v. EPA*, 603 U.S. 279, 280 (2024) (quotation omitted). An agency “must offer ‘a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice

² The accompanying Bender, Hartwell, Kelly, Krupp, and Taft declarations document Plaintiffs’ Article III standing to bring this case.

made’ and cannot simply ignore ‘an important aspect of the problem.’” *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

I. FWS VIOLATED THE REFUGE ACT IN TWO WAYS.

FWS’s management of each National Wildlife Refuge must fulfill the purpose of the Refuge Act, *i.e.*, to conserve and restore fish, wildlife, and plant resources, as well as each Refuge’s specific establishing purposes. *See* 16 U.S.C. § 668dd (a)(2), (a)(3)(A). The Refuge Act contains two important requirements that FWS violated here—the “consistency” and “compatibility” requirements.

First, under the consistency requirement, FWS must prepare a “comprehensive conservation plan” for each refuge, 16 U.S.C. § 668dd(e)(1), which must provide “management direction to achieve the purposes of the refuge.” 50 C.F.R. § 25.12. 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) (emphases added).

Second, the Refuge Act prohibits FWS from allowing any refuge use, such as commercial grazing, “unless [FWS] has determined that the use is a compatible use.” 16 U.S.C. § 668dd(d)(3)(A)(i) (emphasis added); *see also* 50 C.F.R. § 25.21(b). 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. This requires a determination “that is consistent with the principles of sound fish and wildlife management and administration, available

science and resources, and adherence to the requirements of [the Refuge Act] and other applicable laws.” 16 U.S.C. § 668ee(3).

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

Under Plaintiffs’ First Claim for Relief, FWS violated the Refuge Act’s “consistency” requirement. FWS adopted the 2009 Plan as the “comprehensive conservation plan” required for the Refuge under 16 U.S.C. § 668dd(e)(1). SOF ¶¶ 53–61. As noted above, the 2009 Plan mandates that FWS apply rigorous monitoring and oversight to determine what—if any—grazing is allowed at the Refuge, and when, where, and how such grazing should occur. *Id.* Instead of following that directive, the 2023 Permits authorize five years of grazing using pre-determined rates and schedules patterned on past grazing rotations. SOF ¶¶ 73–77. This violates the Refuge Act’s consistency requirement and the APA.

In the 2009 Plan, FWS admitted that the adaptive management grazing program analyzed and approved in the 1994 EA “was never fully actualized.” AR373. Instead, FWS explained, “[t]he grazing program is currently run on what is a 3-year grazing unit rest-rotation cycle with very little monitoring of grazing impacts on habitat.” *Id.* To correct this failure, the 2009 Plan directed that 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 identifies this same requirement. AR343, 425, 477, 498.

Since 2009, however, FWS has continued to use rest-rotation to assign grazing units and stocking rates in advance without improved oversight,

monitoring, and research. *See* SOF ¶¶ 62–72. To be sure, FWS has made a handful of adjustments at times and has collected some information. *See id.* But the grazing program remains based on pre-determined rates and cycles without the types of increased and improved monitoring and oversight the 2009 Plan requires.³

This same approach, uninformed by monitoring and annual planning, is reflected in the 2023 Permits. *See* SOF ¶¶ 65–66. Each Permit includes a five-year grazing schedule that simply cycles through units at regular intervals mimicking past grazing rates. *See* SOF ¶¶ 73–77. Contrary to the 2009 Plan’s requirements, nothing in the record shows that FWS selected 2023–2027 grazing units and rates based on any “specific habitat and wildlife objectives” or on “monitoring ... to assess if management objectives are being met.” *See* AR412. This is directly contrary to—and thus inconsistent with—the 2009 Plan’s mandate to change prior practices, apply increased oversight and monitoring, and authorize grazing only to achieve specific habitat and wildlife objectives. *See* SOF ¶¶ 55–56.

Courts regularly set aside federal agency actions inconsistent with governing land use plans, as here. *See, e.g., Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002) (where forest plan standard “is not being met, then the timber sales that depend upon it ... must be set aside”); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005) (noting “failure to comply with the provisions of a Forest Plan” is “well-settled” as unlawful); *Or. Nat.*

³ For example, in January 2023, the Refuge’s Deputy Manager admitted that the Refuge still lacks a “comprehensive monitoring program” and “cannot say definitively” whether goals and objectives are achieved. AR328. He described the process by which he sets grazing rates: “I usually take a rough estimate of the previous three grazes and set that as the approximate AUM rate for a unit.” AR13.

Resources Council Fund v. Brong, 492 F.3d 1120, 1125–32 (9th Cir. 2007) (BLM action inconsistent with governing land use plan was unlawful); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1221–23 (9th Cir. 2004) (determination of consistency with coastal management plan was arbitrary and capricious). The Court must similarly hold the 2023 Permits unlawful as inconsistent with the 2009 Plan, violating the Refuge Act’s requirement that FWS “shall manage the refuge ... in a manner consistent with the plan.” 16 U.S.C. § 668dd(e)(1)(E).

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

Under Plaintiffs’ Second Claim for Relief, FWS violated the Refuge Act’s “compatibility” requirement. To support the 2023 Permits—and only after Plaintiffs warned the agency that the permits were unlawful—FWS belatedly issued the 2023 Compatibility Determination, which purports to find the cattle grazing compatible with Refuge purposes. *See* SOF ¶¶ 76–77. In doing so, FWS acted arbitrarily and capriciously in violation of the Refuge Act and the APA by ignoring its own policies, poor past performance, and prior conflicting statements about compatibility, as well as by ignoring or downplaying impacts to key species and from climate change.

1. FWS Ignored Its Prior Findings that Pre-Determined Rest-Rotation Grazing Is Not Compatible, and Ignored Poor Past Performance.

The 2023 Compatibility Determination asserts that grazing will be Refuge-compatible pursuant to three basic stipulations to comply with the Permits, commence vegetation monitoring, and maintain fencing. SOF ¶ 81. FWS’s reliance on these stipulations was arbitrary and capricious for two separate reasons.

First, the stipulations fail to end pre-determined rest-rotation grazing,

contrary to FWS’s own prior findings. In the 1994 EA, FWS was clear that, under the ongoing rest-rotation grazing, “the purposes of the Refuge would not be achieved.” SOF ¶ 44; AR984. That is why the agency chose a new path emphasizing that “grazing requires high levels of management” and “[t]he process 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. FWS confirmed these findings and commitments in the 2009 Plan. SOF ¶¶ 55–61.

But the 2023 Compatibility Determination stipulations do not require FWS to finally cease using pre-determined rest-rotation schedules. Instead, the first stipulation merely asserts that grazing will be “in accordance” with the already-issued Permits, nowhere acknowledging that those permits authorize pre-determined rest-rotation grazing for 2023–2027 to generally follow longstanding grazing rates. SOF ¶¶ 62–72, 73–75, 81–82.

“Unexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA.” *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)). As this Court has held, “the Service must provide adequate reasons for rejecting [prior] criteria” and “cannot change course without reason.” *Def. of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1171 (D. Mont. 2008). Here, FWS similarly violated the APA when it failed to even acknowledge—let alone offer a reasonable explanation for ignoring—its own prior findings about the incompatibility of the continued grazing management with Refuge purposes.

Second, the stipulations are too vague and ignore FWS’s own past

performance issues. FWS policy directs that such stipulations “must be detailed and specific” regarding “the manner in which [the] use must be carried out to ensure compatibility,” and “[m]onitoring of the use must be sufficient to evaluate compliance[.]” AR2065. By contrast, the 2023 Compatibility Determination’s second stipulation calls only vaguely for “periodic” vegetation monitoring to later figure out “if” habitat requirements in the Refuge “are being met.” AR964. It contains no specificity to ensure the type of annual oversight FWS previously determined was necessary for compatibility. The 1994 EA and 2009 Plan made clear that rigorous monitoring and annual readjustment are necessary for grazing to be beneficial. SOF ¶¶ 48–52, 55–61. Yet the stipulation lacks any detail as to what will be monitored, where, when, and how often. It also lacks any detail about whether or how monitoring results will be used to adjust grazing.

Furthermore, FWS irrationally ignored its failure to follow through on past promises to monitor habitat and respond accordingly. *See* SOF ¶¶ 46, 55, 72. FWS highlighted its lack of sufficient staff and funding for necessary monitoring and responsive action in 1994, SOF ¶ 46, and again in 2009, SOF ¶ 61. As recently as January 2023, FWS admitted it still lacks comprehensive monitoring. SOF ¶ 72.

In *Reed v. Salazar*, 744 F. Supp. 2d 98 (D.D.C. 2010), the court held that FWS acted arbitrarily and capriciously when entering a funding agreement for refuge management while failing to consider evidence of performance issues under a prior agreement. The court reversed because FWS “reflexively applied its prior analysis” despite “substantial evidence in the record of past performance problems.” *Id.* at 118. Similarly here, FWS failed to explain how its monitoring stipulation will ensure compatibility when substantial evidence in the record

illustrates FWS's poor past performance, including its admissions of inadequate funding and staffing to monitor grazing. SOF ¶¶ 46, 61.

2. FWS Failed to Consider Impacts to Arctic Grayling or Grizzly Bears.

FWS policy requires that a Refuge Act compatibility determination consider direct, indirect, and cumulative impacts of a Refuge use, including uses of adjacent lands or waters that may exacerbate the effects. AR2057. It also must “[d]escribe the specific areas of the refuge that will be used: habitat types and acres involved [and] key fish, wildlife, and plants that occur in or use that habitat.” AR2061. In the 2023 Compatibility Determination, however, FWS violated its own policy by failing entirely to address two key species, Arctic grayling and grizzly bears.

The Refuge has a uniquely important and highly imperiled population of Arctic grayling, SOF ¶ 20, protection of which FWS calls a “key issue.” AR342. Cattle harm grayling through direct and indirect habitat impacts on the Refuge, as well as cumulative impacts of grazing beyond the Refuge. SOF ¶¶ 21–22. For example, FWS stated in the 2009 Plan that “livestock grazing, both historic and current, has had a detrimental effect on Arctic grayling spawning habitat.” AR421.

Grizzly bears are an ESA-listed species that use the Refuge, which is in a wildlife corridor from the GYE that FWS recognizes as important to the species' long-term success. SOF ¶¶ 23–24. The leading cause of grizzly mortality in the GYE is conflict with humans, including conflicts associated with livestock grazing. SOF ¶ 25. Such conflicts have increased as the GYE grizzly population expands, including conflict already documented on the Refuge. SOF ¶ 26.

Yet nowhere does the 2023 Compatibility Determination even mention Arctic grayling or grizzly bears. SOF ¶ 85. This omission is remarkable since FWS

elsewhere recognizes that grayling and grizzly bear are imperiled species that use the Refuge and may be harmed by grazing, and it violates the agency’s own policy that compatibility determinations must address such “key fish, wildlife, and plants that occur in or use” habitats on the Refuge.

An agency acts arbitrarily and capriciously if it “entirely failed to consider an important aspect of the problem, an analysis which turns on what [the] relevant substantive statute makes important.” *Nat’l Urb. League v. Ross*, 977 F.3d 770, 777 (9th Cir. 2020) (citations omitted). The Refuge Act requires “the conservation of fish and wildlife, including species that are threatened with extinction.” 16 U.S.C. § 668dd(a)(1). By ignoring the impacts of the grazing program on these two key species, FWS failed to consider important aspects of the problem, contradicted its own policies, and violated the Refuge Act’s compatibility requirement. 16 U.S.C. §§ 668dd(d)(3)(A)(i), 668ee(1), (3).

3. FWS Arbitrarily Dismissed Threats to Sage-Grouse.

Another imperiled species is the greater sage-grouse, which is one of FWS’s target species at the Refuge. *See* SOF ¶¶ 27–34. FWS has long recognized the conflicts between livestock grazing and sage-grouse conservation—noting in 2010, for example, that “improper grazing was likely having negative impacts to sagebrush and sage-grouse at local scales.” SOF ¶ 30.

Unlike grayling and grizzly, FWS at least considered greater sage-grouse in the 2023 Compatibility Determination. SOF ¶¶ 85–88. But it limited analysis of this key species to two sentences—citing two graduate dissertations to assert that grazing will not harm and might even benefit sage-grouse at the Refuge. *Id.* That assertion is again arbitrary and capricious.

FWS pointed to the first dissertation as supposedly demonstrating that “[c]urrent grazing practices have been shown to have little effect on sage-grouse.” AR962. But the study, which included six grazed pastures across the Centennial Valley, had found that grazing utilization was “low enough that cattle did not have a significant effect on the grass heights” and warned that “additional research is needed” in places “subjected to higher utilization levels.” AR1744. Grazing utilization at the Refuge is significantly greater than at the sites in the cited study—stocking rates on the Refuge vary from three times to over 20 times greater than on the study’s surveyed pastures. SOF ¶ 87. FWS never acknowledged this difference when it relied upon the study to make its sweeping conclusion.

FWS used the second sage-grouse dissertation to contend only that Refuge grazing occurs “after nesting periods,” as if that somehow means grazing does not harm sage-grouse on the Refuge. AR962. Such an implication is wholly unwarranted—FWS ignored that study’s detailed discussion about the negative impacts of grazing and associated infrastructure, including fencing. SOF ¶ 88. Indeed, the study warned that “adding more fences to control livestock grazing systems could be reasonably expected to reduce sage-grouse nest survival.” AR1882 (emphasis added). This issue has particular relevance to the Refuge since FWS relies heavily on fencing to mitigate grazing impacts to its extensive riparian areas. *See* SOF ¶¶ 13, 32, 34, 57–59, 81. Yet FWS never mentioned the trade-off between fencing and sage-grouse impacts, nor acknowledged other negative effects of grazing raised in its reference.

In a prior case where FWS “illogically cobbled together two studies to reach its determination” and “ignored the clear concerns expressed by the studies’

authors,” this Court held the agency’s action arbitrary and capricious because it “failed to logically support its conclusion” and “did not interpret [the] science [it relied on] rationally.” *Crow Indian Tribe v. U.S.*, 343 F. Supp. 3d 999, 1019–20 (D. Mont. 2018), *aff’d in part, remanded in part*, 965 F.3d 662 (9th Cir. 2020). Similarly here, FWS illogically relied on two references while ignoring the clear limitations and concerns expressed by the authors. This fails the Refuge Act’s sound-judgment requirement “consistent with ... available science,” 16 U.S.C. § 668ee(3), and is arbitrary and capricious under the APA.

4. FWS Ignored Climate Change.

The 2023 Compatibility Determination also failed to even mention climate change. *See* AR956–66. The Centennial Valley has become significantly warmer and drier due to climate change, and research demonstrates that “climate change is one of the greatest threats to grassland conservation.” SOF ¶ 35; AR211. “Warming temperatures exacerbate the pressures on grasslands.” AR1921. Climate change also has additive and interactive effects with stressors to species like Arctic grayling, grizzly bear, and sage-grouse, relevant to potential grazing impacts. SOF ¶¶ 36–38.

By ignoring climate change in the 2023 Compatibility Determination, FWS failed to consider another important aspect of the problem, rendering its decision arbitrary and capricious. For example, the Ninth Circuit recently found FWS’s “discussion of climate change” in a biological opinion to be “deficient” because it did “not account for climate change as a cumulative effect or baseline condition,” and failed to consider “grazing-related impacts on top of potential climate change effects.” *See W. Watersheds Project v. McKay*, No. 22-35706, 2023 WL 7042541,

*2 (9th Cir. Oct. 26, 2023); *see also Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1234 (E.D. Wash. 2016) (“[b]ecause [the agency] failed to consider the potential effects of climate change...[it] failed to consider an important aspect of the problem”). FWS’s failure to even address climate change here was arbitrary and capricious, again requiring reversal.

II. FWS VIOLATED NEPA IN TWO WAYS.

NEPA requires agencies to prepare an EIS for all major federal actions that may have a significant impact on the environment. 42 U.S.C. § 4332(2)(C). An agency may first prepare an EA to evaluate whether potential impacts require an EIS. *See* 40 C.F.R. §§ 1501.5(a), (c), 1508.1(j). But an EA must still 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).

The CEQ NEPA regulations (which apply to all agencies) allow new actions to be covered by an existing EA only if the actions covered by the original EA and the new proposed action are “substantially the same.” 40 C.F.R. § 1506.3(c). Department of Interior regulations (which apply to FWS) allow reliance on an existing 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.*

Over five months after approving the 2023 Permits, FWS issued a one-page “Environmental Action Statement” supported by a two-page internal memo (the “Memo”), purporting to find that its 1994 EA was sufficient to authorize grazing under the 2023 Permits. AR972, 1078–79. FWS’s refusal to update its NEPA analysis was unlawful. The 1994 EA approved a very different grazing program from the 2023 Permits, and environmental circumstances at the Refuge have changed significantly over the past 29 years, requiring new NEPA. Moreover, because grazing impacts may be significant, that new NEPA should be an EIS.

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

Under Plaintiffs’ Third Claim for Relief, FWS’s decision in the Environmental Action Statement to rely on the 1994 EA is arbitrary and capricious. FWS should have conducted a new NEPA analysis before issuing the 2023 Permits.

1. The 2023 Permits Are Not Substantially the Same Action as Authorized in the 1994 EA

In the Environmental Action Statement, FWS asserted that the grazing approach analyzed in 1994 “continues to be an appropriate habitat management tool in concert with its finding of no significant impact.” AR972. In its Memo, FWS characterized its current grazing approvals as “a continuation” and “essentially the same action described in the existing [1994] EA” and the 2009 Plan. AR1078. But the 2023 Permits are far from “substantially the same,” as necessary when relying on an existing NEPA document. 40 C.F.R. § 1506.3(c).

As discussed above, the 1994 EA called for ending then-existing restoration practices with limited monitoring and oversight. SOF ¶¶ 40–43. FWS

found those practices threatened the Refuge’s ecological values. SOF ¶¶ 44–47. The “adaptive management” approach FWS selected in the 1994 EA called for substantial changes, including “refining objectives” and “developing annual prescriptions,” SOF ¶ 48, to “monitor, analyze, adjust, and replan for the following year, rather than rely on a pre-determined rest-rotation schedule,” SOF ¶ 49. It required site-specific prescribed habitat management plans, “[a]nnual evaluation of the objectives for various habitat types,” “[f]ollow-up monitoring to insure the prescription management plan is complete,” and “[p]re- and post-season consultation with various entities.” SOF ¶¶ 51–52.

By contrast, the 2023 Permits set rest-rotation grazing schedules five years out, based on grazing from previous years. SOF ¶¶ 73–75. There are no site-specific habitat treatment plans. *See* AR15–148. There is no annual monitoring, adjustment, consultation, or replanning prior to making grazing decisions for the following year. *See id.* FWS’s conclusion that its current action is “essentially the same” was not rationally connected to the facts. It was thus arbitrary and capricious for FWS to refuse to conduct a new NEPA analysis.

The Ninth Circuit has required new NEPA analysis when, like here, the agency previously rejected the approach it is now taking. *See Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561–62 (9th Cir. 2006) (failure to supplement EIS violated NEPA when agency took action in way it had previously rejected in the EIS). This Court has done the same. *See Alliance for the Wild Rockies v. Cooley*, 661 F. Supp. 3d 1025, 1042 (D. Mont. 2023) (“substantial change in the proposed action” occurred when, over 20 intervening years, FWS “practically adopted the ‘No Action’ alternative, rejected in the EIS”). Here, FWS

previously rejected the approach it authorized in 2023 due to its negative impacts to the Refuge.

2. Circumstances and Information Have Changed Since 1994.

In its one-page Environmental Action Statement, FWS asserts that “all scientific conclusions, biological premises, and historical observations contained in the 1994 [EA]” remain “factual, relevant, and appropriate” with respect to grazing today. AR972. And just one page of its terse Memo discusses changes to Refuge fish and wildlife, habitat types, native grasslands, climate, and cumulative impacts, brushing each off as insignificant. SOF ¶ 93. Far from providing “appropriate supporting documentation” under 43 C.F.R. § 46.120(c), and far from taking the requisite NEPA “hard look,” FWS makes the type of “perfunctory and conclusory” assertions that violate NEPA. *Ocean Advocs. v. U.S. Army Corps of Engineers*, 402 F.3d 846, 870 (9th Cir. 2005).

A principal problem, again, is that FWS disregarded or misleadingly downplayed important issues like impacts to Arctic grayling, grizzly bears, and sage-grouse, as well as additive impacts caused by climate change. The 1994 EA did not address impacts to Arctic grayling, merely mentioning the species once in passing. AR1004–05. Similarly, the EA only addressed sage-grouse as present at the Refuge and did not assess grazing impacts on the species. AR980, 1006. The 1994 EA failed to assess impacts to grizzly bears because they were not “known to occur on the refuge” back then. AR1033. And perhaps unsurprisingly for a document from 1994, the EA never mentions climate change.

In the past 29 years, changed circumstances and new information have elevated the relevance of all these issues. The Refuge has gained heightened

significance as a critical “sanctuary” for a uniquely important and highly imperiled Arctic grayling population. SOF ¶¶ 20–22. FWS’s determination that grizzlies did not “occur on the refuge” in 1994 has unequivocally changed; grizzly populations have expanded into the Centennial Valley, including the Refuge. SOF ¶¶ 23–26. Across the West, sage-grouse have seen dramatic population declines, increased scientific attention, and new regulatory developments including identification of the Refuge as within a Priority Area for Conservation for the species. SOF ¶¶ 27–34. And substantial new information has accumulated about climate change, including how it relates to factors relevant to adverse impacts of livestock grazing. SOF ¶¶ 35–38.

FWS’s Memo dismisses or ignores these changes in a brief series of conclusory and unsupported statements. For example, a single sentence states that “grayling numbers have declined” but that excluding livestock from “significant riparian areas” means grazing impact “appears to be insignificant.” AR1079. This vague statement grossly understates the gravity of grayling decline, and by pointing to livestock’s supposed exclusion from “significant” riparian areas, FWS ignores the damage that continues to occur in other riparian areas at the Refuge. SOF ¶¶ 21–22, 45. FWS also never mentions longstanding difficulties with adequately maintaining fences to exclude cattle at the Refuge. SOF ¶ 58. Moreover, FWS’s determination that “the impact of grazing appears to be insignificant” is entirely speculative and unsupported, citing no studies or data. AR1079.

The Memo brushes off grizzlies by referring to the local Range Rider program (unaddressed in 1994) and by dismissing out-of-hand “one depredation

incident that resulted in the loss of a bear,” providing no further data or information. *Id.* Grizzly bear populations have increased in the GYE, including the Refuge, and conflicts with humans, including due to grazing, are the leading cause of grizzly bear mortality in the GYE. SOF ¶ 25. FWS did not take a “hard look” at these new circumstances regarding an ESA-listed species. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 687 F. Supp. 3d 1053, 1087 (D. Mont. 2023) (requiring supplemental NEPA given new information about grizzly bear impacts, since “[s]ignificant new circumstances may include new information regarding impacts on a listed species”); *W. Watersheds Project v. U.S. Sheep Experiment Station*, No. 1:19-cv-00065-REB, 2021 WL 1517977, at *14 (D. Idaho Apr. 16, 2021) (agency’s “misleading” treatment of data downplaying grazing conflicts and risks to GYE grizzly violated NEPA).

FWS’s Memo never even mentions sage-grouse, taking no hard look at whether new information about the ways grazing and fencing may adversely impact sage-grouse in this Priority Area for Conservation. AR1079.

And the Memo dismisses the important topic of climate change in succinct and perfunctory fashion, stating only that the “climate on the refuge has changed” yet baldly concluding that “the change in climate has not significantly affected grazing impacts on the Refuge.” *Id.* Such a bare statement, unsupported by any references or analysis, is wholly inadequate to satisfy NEPA’s hard-look mandate, especially for a new circumstance never addressed in the 1994 EA. NEPA’s “hard look” mandate requires far more than such “[s]uperficial analysis, vague generalities, and conclusory discussions.” *Friends of Wild Swan v. Kehr*, 321 F. Supp. 3d 1179, 1189–90 (D. Mont. 2018), *aff’d sub nom.* 770 F. App’x 351 (9th

Cir. 2019) (quotation omitted); *see also W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1129 (D. Nev. 2008) (“The agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information.”).

FWS’s disregard of NEPA is particularly problematic because the Environmental Action Statement and Memo were prepared *after* FWS already issued the 2023 Permits months earlier. This flouts the NEPA requirement that “[e]nvironmental consideration documents must be ‘prepared early enough so that [they] can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.’” *Friends of Clearwater v. McAllister*, 214 F. Supp. 2d 1083, 1088 (D. Mont. 2002), *aff’d sub nom.* 58 F. App’x 686 (9th Cir. 2003) (citing *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000)). Again, by relying on the 1994 EA instead of preparing a new analysis, FWS violated NEPA.

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

Under Plaintiffs’ Fourth Claim for Relief, not only must FWS perform a new NEPA analysis, but it must do so by preparing an EIS. If a major federal action may have significant impacts, an agency must prepare an EIS. 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.” *Boody*, 468 F.3d at 562.

FWS’s own findings show that the Refuge grazing program “may” have significant impacts. Again, FWS has repeatedly concluded that simple rest-rotation

grazing without careful annual monitoring, oversight, and adjustment can have a host of adverse environmental impacts. *See* SOF ¶¶ 43–47, 55. These substantial questions about whether grazing may have significant impacts are compounded by the changed circumstances and new information above, including increasing climate change, major declines in sage-grouse and grayling, and the presence of grizzly bears.

FWS’s repeated acknowledgements that it needs more information to understand grazing impacts—*see* SOF ¶¶ 48–49, 51–52, 55–58—reveals those impacts are “highly uncertain,” another factor warranting an EIS. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 870 (9th Cir. 2020); *see also Env’t Def. Ctr.*, 36 F.4th at 880 (“The lack of data ... and the uncertainty this poses ... counsels us that an EIS should have been prepared.”). In *Bark*, the Ninth Circuit held that a logging project required an EIS when appellants “identif[ied] considerable scientific evidence” that cast doubt on the project’s ability to “achieve [its] purpose.” *Bark*, 958 F.3d at 870. Here, FWS’s chronic monitoring shortfall creates doubts, and FWS further ignored or brushed aside evidence of grazing’s detrimental impacts to Refuge habitats and wildlife. As found improper in *Bark*, FWS “did not engage” with contrary evidence and “instead drew general conclusions” to avoid preparing an EIS, in violation of NEPA. *Id.* at 871.

III. THE COURT SHOULD VACATE AND REMAND WITH INSTRUCTIONS TO PREPARE AN EIS.

Because FWS violated the Refuge Act, NEPA, and the APA, the Court should hold unlawful and vacate the 2023 Permits, Compatibility Determination, and Environmental Action Statement. *See* 5 U.S.C. § 706(2)(A) (“The 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[.]” (emphasis added); *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1094 (9th Cir. 2020) (“There is a presumption ... in APA cases that the offending agency action should be set aside”); *Or. Nat. Desert Ass’n v. Zinke*, 250 F. Supp. 3d 773 (D. Or. 2017) (agency failed to meet burden to show default APA remedy of vacatur was not appropriate).

Additionally, the Court should order FWS to prepare a full EIS to correct these deficiencies. *See Env’t Def. Ctr.*, 36 F.4th at 880–81 (EA with “data gaps” and “lack of data” on potential effects of offshore well stimulation required an EIS); *Nat’l Parks Conserv. Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (agency’s “lack of knowledge does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it”); *Hausrath v. U.S. Dep’t of the Air Force*, 491 F. Supp. 3d 770, 802–03 (D. Idaho 2020) (requiring EIS where plaintiffs “identified serious gaps” in EA analysis).

CONCLUSION

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

Respectfully submitted November 8th, 2024.

/s/ Andrew Hursh

Andrew Hursh (MT Bar #68127109)
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 6,500 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