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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,
Plaintiffs,

v.

DEB HAALAND, in her official capacity as
Secretary of the United States Department of the
Interior, et al.,
Defendants,

KENNETH KLEMM; BEAVER CREEK
BUFFALO CO.; WASHINGTON
CATTLEMEN’S ASSOCIATION; and PACIFIC
LEGAL FOUNDATION,
Private Landowner Intervenors.

No. 4:19-cv-06013-JST

Related Cases: 4:19-cv-05206-JST
4:19-cv-06812-JST

**PRIVATE LANDOWNER
INTERVENORS’ PARTIAL
OPPOSITION TO FEDERAL
DEFENDANTS’ MOTION
FOR REMAND**

Judge: The Hon. Jon S. Tigar

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INTRODUCTION

1
2 This case centers on the United States Fish and Wildlife Service (FWS) and the National
3 Marine Fisheries Service's (NMFS) (together, the "Services"), revised regulations for
4 implementing the Endangered Species Act (ESA), finalized on August 27, 2019. *See* 84 Fed. Reg.
5 44,753 (the "4(d) Rule"); 84 Fed. Reg. 44,976 (the "Section 7 Rules"); 84 Fed. Reg. 45,020 (the
6 "Section 4 Rules") (together, the "2019 Regulations"). A group of 19 state and local government
7 jurisdictions (California), a group of nonprofit organizations (CBD), and the Animal Legal Defense
8 Fund (ALDF) (collectively, the "Plaintiffs"), challenge the 2019 Regulations in three separate
9 lawsuits brought in late 2019.¹

10 Defendant-Intervenors Ken Klemm, Beaver Creek Buffalo Company, Washington
11 Cattlemen's Association, and Pacific Legal Foundation (collectively, the "Private Landowners"),
12 sought limited intervention to defend the 4(d) Rule, codified at 50 C.F.R. §§ 17.31, 17.71, and the
13 provisions of the Section 4 Rules pertaining to the designation of unoccupied critical habitat,
14 codified at 50 C.F.R. § 424.12(b)(2) (the "Rule for Designating Unoccupied Areas"). *See* ECF 69.

15 The Private Landowners oppose the Federal Defendants' motion for voluntary remand to
16 the extent it seeks remand of the 4(d) Rule and the Rule for Designating Unoccupied Areas. Given
17 the limited nature of their intervention, the Private Landowners take no position on the remainder
18 of the Federal Defendants' request for voluntary remand. The Private Landowners further oppose
19 the Plaintiffs' request that the 2019 Regulations be vacated in the event they are remanded. *See*
20 ECF 170.

21 The Plaintiffs argue that in promulgating the 4(d) Rule and the Rule for Designating
22 Unoccupied Areas, the Services abused their discretion. *See* ECF 142 at 24–30 in *CBD*; ECF 162
23 at 32–34, 40–41, 45–46 in *California*; ECF 107 25–30, 37–39 in *ALDF*. The Federal Defendants

24
25 ¹ This Court has related the three cases: *Center for Biological Diversity (CBD) v. Haaland*, No.
26 19-cv-5206 (N.D. Cal. Aug. 21, 2019); *California v. Haaland*, No. 19-cv-6013 (N.D. Cal.
27 Sept. 25, 2019); and *Animal Legal Def. Fund (ALDF) v. Haaland*, No. 19-cv-06812 (N.D. Cal.
28 Oct. 21, 2019). The Private Landowners are filing an identical response in all three cases. The
remainder of this response will refer to documents by ECF number. Except where documents
substantively differ as between each case (such as with the Plaintiffs' complaints and motions for
summary judgment), reference will be made to the ECF numbers in *California*.

1 argue in their motion for voluntary remand that the Services' actions in promulgating the 2019
2 Regulations were a valid exercise of agency discretion, and that the Services possess the flexibility
3 to retain, revise, or rescind the 2019 Regulations based on the exercise of their policy judgment.
4 See ECF 162 at 26 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.
5 967, 981 (2005)). But as to the 4(d) Rule and the Rule for Designating Unoccupied Areas, the
6 Services possess no such discretion. Pursuant to a plain reading of the ESA's text, the 4(d) Rule
7 and certain provisions of the Rule for Designating Unoccupied Areas are statutorily compelled. The
8 Services' actions in adopting these regulations were therefore nondiscretionary, and neither action
9 can be revisited by the Services on remand.

10 As such, this Court should not remand the 4(d) Rule and the Rule for Designating
11 Unoccupied Areas. Briefing on the merits is already underway. And considering the Services'
12 stated intention to exercise their claimed discretion to rescind the 4(d) Rule and revise the Rule for
13 Designating Unoccupied Areas, there remains a great need for the resolution of that controversy.
14 This Court should exercise its discretion to deny remand of the 4(d) Rule and the Rule for
15 Designating Unoccupied Areas and determine these questions of statutory construction on the
16 merits.

17 Should it decide to remand in response to the Federal Defendants' request, the Court must
18 reject the Plaintiffs' request that the 2019 Regulations—including the 4(d) Rule and the Rule for
19 Designating Unoccupied Areas—be vacated without an adjudication of the merits. While vacatur
20 may be the ordinary remedy for a violation of the APA, it can only follow an adjudication of the
21 merits of such a claim. Plaintiffs have moved for summary judgment and have argued that the 4(d)
22 Rule and Rule for Designating Unoccupied Areas are unlawful. This Court cannot give the
23 Plaintiffs an APA remedy before all parties have had a full and fair chance to litigate and the Court
24 has decided the merits. To vacate the 4(d) Rule and the Rule for Designating Unoccupied Areas
25 would equate to granting Plaintiffs full relief on their motions for summary judgment, without
26 affording the Private Landowners an opportunity to respond. And perhaps more fundamentally, it
27 would amount to a rescission of the 2019 Regulations without the APA's required public process.
28 This Court should therefore reject the Plaintiffs' request for pre-merits vacatur, and instead consider

1 only their alternative request to proceed with summary judgment briefing and adjudicate the merits
2 of their claims. This Court can and should adjudicate the merits of Plaintiffs' claims as to the 4(d)
3 Rule and the Rule for Designating Unoccupied Areas.

4 **BACKGROUND**

5 The following background is necessary to properly evaluate the context of the Federal
6 Defendants' motion for remand.

7 **I. The Endangered Species Act**

8 The Endangered Species Act authorizes the Services, to list species as endangered or
9 threatened. 16 U.S.C. § 1533(a)(1), (b)(2).² An "endangered species" is "any species which is in
10 danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A
11 "threatened species" is any species which is likely to become an endangered species within the
12 foreseeable future throughout all or a significant portion of its range. *Id.* § 1532(20). Private
13 property is regulated under the statute in two significant ways.

14 First, as an additional safeguard for endangered species, befitting their greater risk of
15 extinction, the ESA prohibits "take" of such species. 16 U.S.C. §§ 1532(19); 1538(a). Take is
16 defined broadly to include not only intentional actions to harm or capture species, but also common
17 land use activities that inadvertently affect species or their habitats. *See Babbitt v. Sweet Home*
18 *Chapter of Communities for a Great Or.*, 515 U.S. 687, 696–704 (1995). Recognizing the take
19 prohibition's stringency, Congress limited its application to endangered species, explaining that it
20 should "be absolutely enforced *only* for those species on the brink of extinction." Congressional
21 Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in*
22 *1976, 1977, 1978, 1979, and 1980* at 357 (1982) (statement of Sen. Tunney) (emphasis added). *See*
23 *16 U.S.C. § 1538* (prohibiting take only "with respect to any endangered species").

24 The prohibition could be extended to particular threatened species but only if "necessary
25 and advisable" for the protection of that species. 16 U.S.C. § 1533(d); S. Rep. No. 93-307, at 8

26 ² This authority has been delegated to the Services by the Secretary of the Interior and the Secretary
27 of Commerce, respectively. *See* 16 U.S.C. § 1532(15). FWS exercises its authority with respect to
28 most terrestrial and freshwater plant and animal species. NMFS exercises its authority with respect
to most marine and anadromous species.

1 (1973) (“[O]nce he has listed a species of fish or wildlife as a threatened species,” the Secretary
2 may prohibit take “as to the particular threatened species.”). But take of threatened species would
3 presumptively be unregulated because Congress wished for states to take the lead on regulating
4 these species. A Legislative History of the Endangered Species Act of 1973, *supra*, at 357
5 (statement of Sen. Tunney) (“States . . . are encouraged to use their discretion to promote the
6 recovery of threatened species . . .”).

7 Second, the ESA authorizes the designation of land—including private land—as critical
8 habitat for threatened and endangered species. *See* 16 U.S.C. § 1533(b)(2). “Critical habitat” can
9 include habitat areas “occupied” by a species at the time of its listing, as well as areas “unoccupied”
10 by the species. 16 U.S.C. § 1532(5). Areas occupied by a species can be designated as critical
11 habitat if they contain the physical or biological features essential to the conservation of the species
12 and which may require special management considerations or protection. 16 U.S.C. § 1532(5). The
13 statute imposes a “more onerous procedure on the designation of unoccupied areas.” *Ariz. Cattle*
14 *Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). For these areas, the specific site
15 must be “essential” for the conservation of the species. 16 U.S.C. § 1532(5).

16 Critical habitat designations have numerous effects on private landowners. Principally, they
17 reduce the value of any private property within the designation because prospective buyers
18 recognize the burdens that flow from such designations. *Cf. Weyerhaeuser Co. v. U.S. Fish &*
19 *Wildlife Serv.*, 139 S. Ct. 361, 368 n.1 (2018). Moreover, if activities performed on the designated
20 land should ever require federal funding or approval the designation will trigger greater scrutiny of
21 that permit, resulting in limitations on land use and costly mitigation requirements. 16 U.S.C.
22 § 1536. *See also Weyerhaeuser*, 139 S. Ct. at 366. Cognizant of these harmful effects, Congress
23 mandated that critical habitat designations be based on “the best scientific data available and [take]
24 into consideration the economic impact . . . and any other relevant impact.” 16 U.S.C. § 1533(b)(2).
25 Emphasizing its desire to strike a balance between regulatory costs and benefits, Congress expressly
26 authorized the Service to exclude areas of critical habitat if the benefits of exclusion would exceed
27 the benefits of inclusion, unless the exclusion would cause the extinction of a protected species. *Id.*

28 ///

1 **II. Regulatory History**

2 **A. The “blanket” 4(d) rule and the Services’ historic approach to designating** 3 **unoccupied critical habitat**

4 In 1975, FWS issued a regulation, commonly known as the “blanket 4(d) rule,” that
5 prohibited the take of all threatened species, including any subsequently listed threatened species,
6 unless the agency issued a separate rule to relax the prohibition for a particular species. 50 C.F.R.
7 § 17.31 (2018). Under that regulation, endangered and threatened species were generally regulated
8 in the same manner, despite the differences in the threats they face and despite Congress’s choice
9 to explicitly distinguish between these two categories for purposes of regulating take. NMFS has
10 never had a rule like the blanket 4(d) rule. Instead, NMFS has always followed the statute’s
11 approach of leaving take of threatened species unregulated unless it determines that such regulation
12 is necessary and advisable for the conservation of the particular species. *See* 84 Fed. Reg. at 44,753.

13 Prior to 2016, both FWS and NMFS determined critical habitat by first considering
14 occupied areas before turning to unoccupied areas, designating the latter only if the former was
15 insufficient for the conservation of the species. In 2016, the Services eliminated this rule. *See* 81
16 Fed. Reg. 7414 (Feb. 11, 2016). Under the 2016 regulations, unoccupied areas were more likely to
17 be designated than ever before because, among other things, the Services took the position that
18 unoccupied areas could be “essential” even if they lacked the physical and biological features
19 necessary for the species to be able to occupy the area, there was no reasonable likelihood the area
20 would develop such features, and that such features would never exist in quantities necessary for
21 the area to serve an essential role in the species’ conservation. *Id.* at 7420.

22 **B. Washington Cattlemen’s Association’s rulemaking petition**

23 On August 10, 2016, Washington Cattlemen’s Association (Cattlemen) filed a rulemaking
24 petition with FWS urging the repeal of the blanket 4(d) rule. *See* Declaration of Charles T. Yates
25 (Yates Decl.), and Exhibit B thereto (Washington Cattlemen’s Association’s Petition to Repeal 50
26 C.F.R. § 17.31) (Cattlemen’s Petition). Cattlemen’s Petition explained that the blanket 4(d) rule
27 exceeded FWS’ authority under the ESA, which only authorizes take of threatened species to be
28 regulated after a determination that such regulation is necessary and advisable for the particular

1 species. *See* Yates Decl. Exh. B at 9–13. *See also* 16 U.S.C. § 1533(d); S. Rep. No. 93-307, at 8.
2 This interpretation is compelled by the text of the statute, the overall statutory scheme, and the
3 legislative history. *See* Yates Decl. Exh. B at 9–13.

4 **C. The 2018 Proposed Regulations**

5 On July 25, 2018, the Services publish a packet of proposed updated regulations for
6 implementing the ESA. *See* 83 Fed. Reg. 35,174 (the “Proposed 4(d) Rule”); 83 Fed. Reg. 35,178
7 (the “Proposed Section 7 Rules”); 83 Fed. Reg. 35,193 (the “Proposed Section 4 Rules”) (together,
8 the “2018 Proposed Regulations”).

9 The 2018 Proposed Regulations responded to Cattlemen’s Petition by proposing to repeal
10 FWS’ blanket 4(d) rule, at least for those species listed in the future. Under the Proposed 4(d) Rule,
11 all species currently listed as threatened would remain regulated absent further rulemaking. *See* 83
12 Fed. Reg. at 35,174. But all species listed as threatened in the future, including those upgraded from
13 endangered to threatened, would not be subject to the blanket rule. *See id.* Instead, take of these
14 species would be regulated only if and to the extent the agency determined necessary and advisable,
15 as reflected in a species-specific regulation. *See id.* Counsel for the Private Landowners commented
16 in support of that proposal, arguing that repeal of the blanket 4(d) rule is not only permitted, but
17 compelled by the ESA. *See* Exh. A to Yates Decl. at 8–12 (PLF’s Comments).

18 FWS and NMFS also proposed to revise their regulations for designating unoccupied
19 critical habitat by restoring the preference for considering all occupied areas before turning to
20 unoccupied areas. *See* 83 Fed. Reg. at 35,193. They similarly proposed to limit the designation of
21 unoccupied areas to situations where there is a reasonable likelihood that the area will contribute
22 to the species’ conservation, reasoning that this better reflected the statute’s requirement that an
23 unoccupied area be essential for conservation than did the 2016 regulation. *Id.* at 35,198.

24 **D. *Weyerhaeuser Company v. United States Fish & Wildlife Service***

25 On November 27, 2018, the Supreme Court decided *Weyerhaeuser*, holding unanimously
26 that the ESA limits the designation of “critical habitat” to areas that currently constitute “habitat”
27 for the species. 139 S. Ct. at 368–69. In that case, FWS designated 1,500 acres of private property
28 as unoccupied critical habitat for the dusky gopher frog even though the frog did not live there and

1 could not survive there unless the land was substantially modified. *Id.* at 366. FWS also determined
2 that the designation could cost effected landowners as much as \$33.9 million in lost development,
3 making it unlikely they would respond by investing significant additional resources to modify their
4 land for the frog’s benefit. *Id.* at 366–67.

5 **E. The 2019 Regulations**

6 On August 27, 2019, the Services finalized their proposed ESA regulatory reforms. *See* 84
7 Fed. Reg. 44,753; 84 Fed. Reg. 44,976; 84 Fed. Reg. 45,020. In doing so, FWS finalized the
8 prospective repeal of the blanket 4(d) rule, as proposed. *See* 84 Fed. Reg. 44,753. Under the 4(d)
9 Rule, take of species listed as threatened will be regulated only if and to the extent that FWS
10 determines it necessary and advisable for the conservation of that species, and issues a regulation
11 to that effect. *See* 84 Fed. Reg. at 44,753.

12 The Services also finalized their proposed rules for designating unoccupied critical habitat,
13 making minor changes based on the *Weyerhaeuser* decision and public comments. 84 Fed. Reg.
14 45,020. Responding to *Weyerhaeuser*, the Services will only designate unoccupied areas if they
15 contain one or more of the physical or biological features essential to the conservation of the
16 species. *Id.* at 45,022. The rationale being that an area not containing at least one essential physical
17 or biological feature, cannot constitute “habitat” as required by the ESA. 84 Fed. Reg. at 45,049.

18 **III. Procedural History**

19 **A. Initiation of the lawsuits**

20 In late 2019, the Plaintiffs brought challenge to the Services’ adoption of the 2019
21 Regulations. As to the 4(d) Rule and the Rule for Designating Unoccupied Areas, Plaintiffs allege
22 the Services violated the language, structure, and conservation purpose of the ESA. *See* ECF 90 in
23 *CBD*; ECF 28 in *California*; ECF 62 in *ALDF*. The Plaintiffs also allege various procedural claims
24 under the APA, ESA, and the National Environmental Policy Act (NEPA).

25 **B. Intervention by the Private Landowners**

26 On December 17, 2019, the Private Landowners moved for leave to intervene to protect
27 their significant interest at stake in this litigation. *See* ECF 69. These motions were granted on
28 May 18, 2020. *See* ECF 97.

1 The Private Landowners are a group of landowners, conservationists, and ranchers, who
2 possess significant interests in the Services’ regulation of private property under the ESA. *See* ECF
3 69 at 9–11, 19–23. For example, Ken Klemm is a Kansas bison rancher and conservationist, who
4 owns land within the range of the lesser prairie-chicken, *id.* at 9–10, a species currently being
5 considered for listing as threatened under the ESA, *see* 86 Fed. Reg. 29,432 (June 1, 2021)
6 (proposing to list populations of the lesser prairie-chicken located in Kansas as threatened with a
7 section 4(d) rule). Although the lesser prairie-chicken does not currently occupy Mr. Klemm’s
8 property, with continued improvements due to his conservation efforts, it will return someday soon.
9 ECF 69 at 9–10; ECF 69-3 ¶ 10 (Declaration of Kenneth Klemm) (Klemm Decl.). However, under
10 the blanket 4(d) rule previously in effect, the listing of the lesser prairie-chicken as threatened
11 would have resulted in an automatic prohibition on take, imposing significant burdens on property
12 owners and effectively punishing those like Mr. Klemm, who have managed their properties to
13 restore its habitat. *See* ECF 69 at 19–23. Similarly, the members of Cattlemen provide habitat to
14 listed species and species being considered for listing under the ESA. *See id.* at 10–11. These
15 members are significantly burdened by ESA regulations including the treatment of common land
16 use activities as “take” if they inadvertently disturb or harm listed species, and the increase in
17 permitting burdens resulting from the designation of critical habitat. *Id.* To advance its members’
18 business and conservation interests, Cattlemen filed a rulemaking petition in 2016 urging FWS to
19 repeal the blanket 4(d) rule. *Id.*

20 The Private Landowners sought limited intervention to defend the 4(d) Rule and the Rule
21 for Designating Unoccupied Areas. *See id.* at 8–9. They intervened specifically as to these two rules
22 due to the significant negative effects of the blanket 4(d) rule and prior approach to designating
23 unoccupied critical habitat on their conservation and business activities. *See id.*

24 The primary impetus for the Private Landowners’ intervention was to make two arguments
25 that they anticipated the Federal Defendants would neglect. *Id.* at 25. First, the Private Landowners
26 sought to argue—as Cattlemen did in its rulemaking petition and as Counsel did in PLF’s Comment
27 Letter—that a plain reading of Section 4(d) of the ESA, prohibits the prospective extension of
28 Section 9’s take prohibition to all threatened species, and therefore that FWS’ repeal of that policy

1 was not only permitted, but required. *See id.*; Yates Decl. Exhs. A & B. *See also* Yates Decl. Exh.
2 C (law review article authored by former counsel for the Private Landowners setting forth the legal
3 authorities for this theory). Second, the Private Landowners sought intervention to argue that the
4 Rule for Designating Unoccupied Areas is likewise statutorily compelled to the extent that it
5 responds to *Weyerhaeuser* by requiring unoccupied critical habitat contain at least one essential
6 physical or biological feature. *See* 84 Fed. Reg. at 45,049. The Court in *Weyerhaeuser* held that the
7 ESA limits the designation of “critical habitat” to areas that currently constitute “habitat” for the
8 species. *See Weyerhaeuser*, 139 S. Ct. at 368–69. However, an unoccupied area lacking any
9 essential physical or biological features could not constitute “habitat.” The Private Landowners
10 anticipated that the Federal Defendants would eschew these arguments in favor of alternative
11 arguments to maximize the Services’ discretion. ECF 69 at 25.

12 **C. Initial motions for summary judgment and motions to stay**

13 On July 7, 2020, the Court entered its first scheduling order. *See* ECF 112. That scheduling
14 order was later modified to allow additional time for litigation over the contents of the
15 administrative record. *See* ECF 115, 122, 125. Under that modified schedule the Plaintiffs moved
16 for summary judgment on January 18 and 19, 2021. *See* ECF 116 in *CBD*; ECF 130 in *California*;
17 ECF 86 in *ALDF*. The next day, President Biden issued Executive Order 13990 directing all federal
18 agencies to review certain actions taken by the prior administration. 86 Fed. Reg. 7037 (Jan. 20,
19 2021). To permit the Service’s review of the 2019 Regulations, on February 16, 2021, the Court
20 granted a stipulated stay of proceedings for sixty days, and later renewed the stay for an additional
21 ninety days. *See* ECF 139, 141, 143. On June 4, 2021, FWS publicly announced its intent to rescind
22 the Section 4(d) Rule and the Services announced their intent to revise the Section 4 and Section 7
23 Rules. Following this announcement, the Federal Defendants moved for an extended stay to permit
24 the completion of the Services’ announced rulemakings. ECF 150. The Court terminated the
25 Plaintiffs’ summary judgment motions pending resolution of that motion to stay. ECF 147. On
26 October 7, 2021, the Court denied the Federal Defendants’ stay request, and ordered the parties to
27 negotiate a new schedule for merits briefing. *See* ECF 159.

28 ///

1 **D. Renewed motions for summary judgment**

2 On October 15, 2021, the Court entered a stipulated scheduling order to restart the merits
3 briefing on summary judgment. *See* ECF 161. The Plaintiffs re-filed their motions for summary
4 judgment that same day. *See* ECF 142 in *CBD*; ECF 162 in *California*; ECF 107 in *ALDF*. In their
5 summary judgment briefs, the Plaintiffs argue that in promulgating the 4(d) Rule and Rule for
6 Designating Unoccupied Areas the Services abused their discretion, acted contrary to the
7 requirements of the ESA, and engaged in decision-making that was unreasoned, arbitrary, and
8 capricious, in violation of the ESA and the APA. *See* ECF 142 at 24–30 in *CBD*; ECF 162 at 32–
9 34, 40–41, 45–46 in *California*; ECF 107 25–30, 37–39 in *ALDF*.

10 Specifically, the Plaintiffs argue—in contrast to the Private Landowners—that the Services
11 possess the discretion to interpret Section 4(d) of the ESA by prospectively extending the
12 prohibition on take to all threatened species, and that FWS abused that discretion by repealing the
13 blanket 4(d) rule without a proper explanation or due regard for the ESA’s conservation purpose.
14 *See* ECF 142 at 26–30 in *CBD*; ECF 162 at 32–34, 45–46 in *California*; ECF 107 at 25–30 in
15 *ALDF*. As to the Rule for Designating Unoccupied Areas, the Plaintiffs argue that the Services
16 abused their discretion by requiring that unoccupied areas possess at least one essential physical or
17 biological feature. *See* ECF 142 at 24–26 in *CBD*; ECF 162 at 40–41 in *California*; ECF 107 37–
18 39 in *ALDF*. Again, in contrast to the Private Landowners, the Plaintiffs argue that the Supreme
19 Court’s decision in *Weyerhaeuser* does not support—let alone compel—the Services’ interpretation
20 of the ESA to require at least one essential physical or biological feature for an unoccupied area to
21 be designated as critical habitat. *See* ECF 142 at 24–26 in *CBD*; ECF 162 at 40–41 in *California*;
22 ECF 107 37–39 in *ALDF*.

23 **E. The Federal Defendants’ motion for remand without vacatur**

24 Under the Court’s October 15, 2021, scheduling order, the Federal Defendants’ combined
25 responses to summary judgment and cross-motions for summary judgment were due on
26 December 10, 2021. *See* ECF 161. In lieu of moving for summary judgment and filing substantive
27 responses to the Plaintiffs’ summary judgment motions, the Federal Defendants filed a motion for
28 voluntary remand without vacatur and a “response” to Plaintiffs’ motions that did not contest

1 Plaintiffs’ arguments. *See* ECF 165. In that motion, the Federal Defendants request that this Court
2 remand the 2019 Regulations for the Services to conduct a new rulemaking. *See* ECF 165 at 9–10.

3 Two aspects of the Federal Defendants’ motion are relevant to the Private Landowners’
4 significant interests in the outcome of this litigation. First, the Federal Defendants aver that FWS
5 intends to rescind the 4(d) Rule and readopt its pre-2019 blanket prohibition. *Id.* at 29–30. *See also*
6 ECF 165-1 ¶ 5 (Third Declaration of Gary D. Frazer) (Frazer Decl.). In announcing this intention,
7 the Federal Defendants expressly argue that FWS possesses the discretion to interpret the ESA to
8 reimpose the blanket 4(d) rule. ECF 165 at 16–19 (citing *Sweet Home Chapter of Cmty. for a*
9 *Great Or. v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993); Frazer Decl. ¶ 5.

10 Second, the Federal Defendants assert that the Services intend to revise the Section 4 Rule
11 on remand, describing certain “concerns” with the Rule for Designating Unoccupied Areas. *See*
12 Frazer Decl. ¶ 8 in *ALDF*. In stating their intention to revisit the Rule for Designating Unoccupied
13 Areas on remand, the Services implicitly argue that they possess the discretion to revise or rescind
14 all of the Rule’s provisions, including the requirement that unoccupied critical habitat contain at
15 least one physical or biological feature. *See* ECF 165 at 26.

16 The Plaintiffs respond to the Federal Defendants’ motion for remand by arguing that any
17 remand should be accompanied by vacatur, or alternatively that the Court should adjudicate the
18 merits of their claims. ECF 170. In support of this request the Plaintiffs refer to arguments made in
19 their summary judgment briefs (arguments to which the Private Landowners have not had the
20 opportunity to respond on the merits), and the current administration’s various policy
21 disagreements with the 2019 regulations. ECF 170 at 11–17.

22 STANDARD OF REVIEW

23 Voluntary remand without vacatur is an equitable remedy that is within the sound
24 discretion of the Court to deny or grant. *See Limnia, Inc. v. U.S. Dep’t of Energy*, 857 F.3d 379,
25 381 (D.C. Cir. 2017) (“A district court has broad discretion to decide whether and when to grant
26 an agency’s request for a voluntary remand”). When presented with a motion to remand, the Court
27 may either adjudicate the merits of an agency action or remand it. The moving government party
28 bears the burden of establishing the propriety of voluntary remand prior to a decision on the merits.

1 See *Limnia*, 857 F.3d at 381. Four factors are worthy of this Court’s consideration in exercising its
2 discretion to grant or deny the Federal Defendants’ Motion.

3 First, courts can and do refuse to grant voluntary remand in circumstances where to do so
4 would be inappropriate. See *Util. Solid Waste Activities Grp. v. U.S. EPA*, 901 F.3d 414, 436–37
5 (D.C. Cir. 2018) (refusing to remand a challenge to EPA’s statutory authority to regulate inactive
6 impoundments under the Resource Conservation and Recovery Act because “the scope of the
7 EPA’s statutory authority” was “intertwined with” EPA’s intended “exercise of agency discretion
8 going forward”). See also *Lutheran Church-Missouri Synod v. Fed. Comm’n Comm’n*, 141 F.3d
9 344, 349 (D.C. Cir. 1998) (denying motion for voluntary remand where remand would enable an
10 agency to strategically avoid judicial review).

11 Second, where an agency remand request is predicated on “a change in agency policy or
12 interpretation,” the way in which a court will exercise its discretion differs where the challenged
13 agency action was statutorily compelled (or forbidden) under *Chevron* Step One. See *SKF USA*
14 *Inc. v. United States*, 254 F.3d 1022, 1029–30 (Fed. Cir. 2001). Although a reviewing court may
15 still grant remand, it may also decide the statutory issue where the circumstances warrant. See *id.*
16 See also *Util. Solid Waste Activities Grp.*, 901 F.3d at 436–37 (denying EPA’s motion for
17 voluntary remand and proceeding to the merits on the question of EPA’s statutory authority to
18 regulate inactive impoundments); *Wagner v. Principi*, 370 F.3d 1089, 1092–97 (Fed. Cir. 2004)
19 (denying an agency motion for remand and instead reaching the merits of a *Chevron* Step One
20 question). This rule conforms to broader principles of administrative law, cf. *Social Sec. Bd. v.*
21 *Nierotko*, 327 U.S. 358, 369 (1946) (“[t]hat is a ‘judicial function,’” and not an agency function,
22 to decide the final “limits of its statutory power”).

23 Third, a reviewing court may partially remand an agency action and partially adjudicate its
24 merits. See *Util. Solid Waste Activities Grp.*, 901 F.3d at 436–37 (granting EPA’s motion for
25 voluntary remand as to several of petitioners’ claims and denying remand and proceeding to the
26 merits as to others). See also *Am. Paper Inst. v. U.S. EPA*, 660 F.2d 954, 965–66 (4th Cir. 1981)
27 (granting partial remand of a rule to allow the agency to correct data errors but adjudicating the
28 remainder of petitioners’ claims on the merits); *United States v. Gonzales & Gonzales Bonds &*

1 *Ins. Agency, Inc.*, No. C-09-4029 EMC, 2011 WL 3607790, at *5–6 (N.D. Cal. Aug. 16, 2011)
2 (granting partial remand of one issue and setting a plan for adjudication of the remaining issues).

3 Finally, where an agency requests voluntary remand of a rule prior to an adjudication of
4 the merits, vacatur of that rule is improper. Where there has been no adjudication of the merits
5 vacatur circumvents the procedural requirements of the APA and inappropriately affords full relief
6 to the challenger without due consideration of the merits. *See Carpenters Indus. Council v.*
7 *Salazar*, 734 F. Supp. 2d 126, 136 (D.D.C. 2010) (concluding that courts “lack[] the authority” to
8 vacate a challenged regulation “without a determination of the merits.”); *Nat’l Parks Conservation*
9 *Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (“[G]ranting vacatur here would allow the
10 Federal defendants to do what they cannot do under the APA, repeal a rule without public notice
11 and comment, without judicial consideration of the merits.”); *Maine v. Wheeler*, No. 1:14-cv-
12 00264-JDL, 2018 WL 6304402, at *1 (D. Me. Dec. 3, 2018) (same). *See also California v. Regan*,
13 No. 20-CV-03005-RS, 2021 WL 4221583, at *1 (N.D. Cal. Sept. 16, 2021) (asserting that vacatur
14 should not accompany a voluntary remand because “there ha[d] been no evaluation of the merits—
15 or concession by defendants—that would support a finding that the rule should be vacated.”);
16 *Waterkeeper All., Inc. v. U.S. EPA*, No. 18-CV-03521-RS, 2021 WL 4221585, at *1 (N.D. Cal.
17 Sept. 16, 2021) (same); *Friends of Park v. Nat’l Park Serv.*, No. 2:13-CV-03453-DCN, 2014 WL
18 6969680, at *4 (D.S.C. Dec. 9, 2014) (refusing to vacate a rule “because the parties ha[d] not fully
19 briefed the [rule’s] legality”). This presumption against vacatur without an adjudication of the
20 merits is supported by the text of 5 U.S.C. § 706(2)(A), which plainly requires that any order of
21 vacatur be preceded by a finding of illegality on the merits. *See* 5 U.S.C. § 706(2) (“the reviewing
22 court shall . . . *hold unlawful* and set aside agency action, findings, and conclusions *found to be*”
23 in violation of the APA) (emphases added). *See also Carpenters Indus. Council*, 734 F. Supp. at
24 136 (identifying the incompatibility of pre-merits vacatur with the text of 5 U.S.C. § 706(2)).

25 ARGUMENT

26 I. The Court *Need Not* Grant the Federal Defendants’ Motion in Its Entirety

27 The Federal Defendants request remand of the entire packet of 2019 Regulations. *See* ECF
28 165. However, the Court need not remand the 4(d) Rule and the Rule for Designating Unoccupied

1 Areas in response to the Federal Defendants’ request.³ Instead, it may determine the legality of
2 these rules on the merits. As noted, this Court has wide latitude to deny or grant a motion for
3 remand. *See Limnia*, 857 F.3d at 381. This discretion includes the latitude to partially remand and
4 adjudicate the remaining merits. *See Util. Solid Waste Activities Grp.*, 901 F.3d at 436–37;
5 *Gonzales & Gonzales*, 2011 WL 3607790, at *5–*6. Under the circumstances of the present case,
6 partial remand and partial adjudication are especially appropriate, for three reasons.

7 First, the 4(d) Rule is a separate final agency action that operates independently of the
8 Section 4 and Section 7 Rules. The 4(d) Rule was published in a separate Federal Register notice,
9 the public process for notice and comment was conducted separately, and the rule amends
10 independent provisions of the Code of Federal Regulations. *See* 83 Fed. Reg. 35,174. *See also* 84
11 Fed. Reg. 44,753; 50 C.F.R. §§ 17.31, 17.71. As such, this Court may fully adjudicate the merits
12 of the 4(d) Rule, irrespective of how it decides to proceed as to the Section 4 and Section 7 Rules.

13 Second, although the Rule for Designating Unoccupied Areas was finalized as part of the
14 Services’ packet of Section 4 Rules, it constitutes a discrete revision. That packet contains several
15 sets of revisions to different aspects of the procedures for listing species and designating critical
16 habitat. In the notice announcing the Section 4 Rules, these revisions are grouped into five
17 categories, each of which are discussed separately. *See* 84 Fed. Reg. at 45,020–23 (grouping the
18 Section 4 Rules into the categories of “Foreseeable Future,” “Factors Considered in Delisting
19 Species,” “Not Prudent Determinations,” “*Designating Unoccupied Areas*,” and “Physical or
20 Biological Features” (emphasis added)). In their motion for remand the Federal Defendants
21 likewise discuss each of these five sets of revisions separately. *See* ECF 165 at 14–16. And for their
22 part, the Plaintiffs’ summary judgment briefing discusses the substantive legality of the Rule for
23 Designating Unoccupied Areas separately from the substantive legality of the other Section 4 Rules.
24 *See* ECF 142 at 24–26 in *CBD*; ECF 162 at 40–41 in *California*; ECF 107 37–39 in *ALDF*. As such,
25 the merits of the Rule for Designating Unoccupied Areas—codified at 50 C.F.R. § 424.12(b)(2)—
26 may be adjudicated either alone or in conjunction with the remainder of the 2019 Regulations. This

27 _____
28 ³ Again, due to their limited intervention, the Private Landowners take no position on the Federal
Defendants’ motion as it pertains to the remainder of the 2019 Regulations.

1 makes partial adjudication and partial remand especially feasible.

2 Third, briefing on the merits is now underway. *See* ECF 142 in *CBD*; ECF 162 in *California*;
3 ECF 107 in *ALDF*. The Plaintiffs allege in their complaint and argue on summary judgment that in
4 promulgating the 4(d) Rule and Rule for Designating Unoccupied Areas the Services abused their
5 discretion. *See* ECF 142 at 24–30 in *CBD*; ECF 162 at 32–34, 40–41, 45–46 in *California*; ECF
6 107 25–30, 37–39 in *ALDF*. In their motion for remand the Federal Defendants argue that the
7 Services possess the discretion to revise or rescind the 4(d) Rule and Rule for Designating
8 Unoccupied Areas, based on the exercise of their policy judgment. *See* ECF 162 at 26 (citing *Brand*
9 *X*, 545 U.S. at 981). The Private Landowners however intend to argue that as to the 4(d) Rule and
10 the Rule for Designating Unoccupied Areas’ requirement that unoccupied areas contain at least one
11 essential physical or biological feature, the Services have no such discretion. *See supra* 8–9.

12 The 4(d) Rule is separate final agency action, and the merits of the Rule for Designating
13 Unoccupied Areas are capable of separate resolution. Moreover, merits briefing on the questions
14 of statutory construction raised by these two actions is already underway. This Court may therefore
15 exercise its discretion to adjudicate the merits of the Plaintiffs’ claims against the 4(d) Rule and the
16 Rule for Designating Unoccupied Areas, while remanding the remainder of the 2019 Regulations.

17 **II. The Court *Should* Deny the Federal Defendants’ Motion for Remand as to the 4(d)**
18 **Rule and the Rule for Designating Unoccupied Areas**

19 Not only do the circumstances of this case *allow* the Court to deny remand of the 4(d) Rule
20 and the Rule for Designating Unoccupied Areas, they also counsel strongly *in favor* of doing so.
21 As discussed, the Services make two arguments in their motion that directly implicate the Private
22 Landowners’ rights in this case. First, they expressly argue that FWS’ repeal of the blanket 4(d)
23 rule was an exercise of agency discretion and that FWS therefore possesses the discretion to rescind
24 the 2019 4(d) rule and readopt the blanket 4(d) rule on remand. Second, although they do not
25 identify the essential physical or biological feature requirement for designating unoccupied areas
26 specifically, the Federal Defendants implicitly argue that the Services possess the discretion to
27 revise or rescind that requirement on remand. By moving for voluntary remand, the Federal
28 Defendants therefore implicitly ask this Court to prejudge the merits of the Private Landowners

1 arguments and affirm the Services’ discretion to revisit the 4(d) Rule and the Rule for Designating
2 Unoccupied Areas. The Court should reject this effort, for four reasons.

3 **First**, the extent of the Services’ discretion to impose a prospective blanket prohibition on
4 take for all threatened species and to designate unoccupied areas not containing essential physical
5 or biological features are significant controversies upon which a decision is needed now more than
6 ever. The importance of a decision on the question of the 4(d) Rule’s legality, is especially
7 significant now that FWS has announced its intent to rescind the 4(d) Rule and readopt the blanket
8 rule. Frazer Decl. ¶ 5. If the Private Landowners are correct, FWS is not entitled to rescind the 4(d)
9 Rule on remand because it does not have the discretion to do so. Adjudicating the merits of the
10 extent to which the ESA compelled FWS to repeal the blanket 4(d) rule therefore cuts to the heart
11 of what the Federal Defendants are seeking. Other courts have declined to grant voluntary remand
12 where unresolved questions of statutory construction bear on an agency’s proposed course of
13 action. *See Util. Solid Waste Activities Grp.*, 901 F.3d at 436–37 (refusing to grant voluntary
14 remand and instead deciding the merits of “the scope of the EPA’s statutory authority” to regulate
15 inactive impoundments under the Resource Conservation and Recovery Act because that statutory
16 question would bear on EPA’s exercise of “discretion going forward”).

17 The question of whether the ESA’s requirement that critical habitat be “habitat” compelled
18 the essential physical or biological feature requirement for designating unoccupied areas, remains
19 in need of resolution for similar reasons. A decision on the merits of that statutory question would
20 properly guide the Services in their stated intent to make revisions to the Rule for Designating
21 Unoccupied Areas. *See* Frazer Decl. ¶ 8. If the Court agrees with the Private Landowners that an
22 area must contain at least one essential physical or biological feature to constitute “habitat,” then
23 the Services lack any discretion to revisit that requirement on remand.

24 **Second**, in the closely related situation where an agency believes its original decision was
25 incorrect and its remand request is predicated on “a change in agency policy or interpretation,” the
26 exercise of the court’s discretion will differ if the challenged agency action was either statutorily
27 compelled or forbidden under *Chevron* Step One. *See SKF*, 254 F.3d at 1029–30. In such scenarios,
28 a reviewing court may decide the statutory issue if the circumstances warrant. *See id.*; *Wagner*, 370

1 F.3d at 1092–97. As discussed, the Private Landowners intend to argue on the merits that the repeal
2 of the blanket 4(d) rule and the requirement that unoccupied areas contain at least one essential
3 physical or biological feature, are legally compelled by a plain reading of the text of the ESA. *See*
4 *supra* 8–9. Any analysis will end at *Chevron* Step One. *Id.* This Court should therefore exercise its
5 discretion to “decide the statutory issue” instead of remanding that portion of the Rule. *See SKF*,
6 254 F.3d at 1029–30. *Cf. Nierotko*, 327 U.S. at 369 (“it is a ‘judicial function,’” and not an agency
7 function, to decide the final “limits of its statutory power”).

8 ***Third***, affirming the Services’ discretion and remanding the 4(d) Rule and the Rule for
9 Designating Unoccupied Areas without deciding the merits, would effectively deny the Private
10 Landowners their defense of the rules and significantly prejudice their interests in the outcome of
11 this litigation. The Private Landowners intervened to establish that the repeal of the blanket 4(d)
12 rule and the requirement that unoccupied critical habitat contain at least one essential physical or
13 biological feature—are compelled by law. *See supra* 8–9. Remanding the 2019 Regulations for
14 FWS to readopt the blanket 4(d) rule and for the Services to revise the Rule for Designating
15 Unoccupied Areas, permits them to evade judicial review of the scope of their discretion, merely
16 by re-exercising the discretion they claim to possess in the first place. But the *scope* of that
17 discretion is what this case is fundamentally about. *Cf. Am. Petroleum Inst. v. U.S. EPA*, 683 F.3d
18 382, 388 (D.C. Cir. 2012) (stressing that an agency cannot “stave off judicial review of a challenged
19 rule simply by initiating a new proposed rulemaking that would amend the rule in a significant
20 way” because this would allow “a savvy agency” to “perpetually dodge review”). This is not merely
21 an abstract disagreement. It has a real effect on the Private Landowners’ concrete interests in this
22 litigation—theirs and their members’ ability to run their businesses, manage their properties, and
23 pursue their conservation goals, free from the significant burdens and perverse incentives imposed
24 by FWS’ previous blanket prohibition on take, and the Services’ prior regime for designating
25 unoccupied critical habitat. *See* ECF 69 9–11, 19–23; ECF 69-4 ¶¶ 12–15 (Declaration of Toni
26 Meacham) (Meacham Decl.); Klemm Decl. ¶¶ 12–15 (identifying significant concrete interests in
27 the adjudication of the merits of this litigation and significant concrete harms that will result from
28 the revival of the Services’ prior regime, should the Plaintiffs prevail). *See also* ECF 97 at 4

1 (granting intervention to the Private Landowners and therefore determining that they possess
2 significant concrete interests in the outcome of this litigation). Courts have denied motions for
3 voluntary remand where granting the motion would prejudicially allow an agency to evade judicial
4 review. *See Lutheran Church-Missouri Synod*, 141 F.3d at 349.⁴

5 The Court should deny the Federal Defendants’ motion to the extent it requests remand of
6 the 4(d) Rule and the Rule for Designating Unoccupied Areas, and instead permit summary
7 judgment briefing to continue as to those issues.

8 **III. This Court Should Reject the Plaintiffs’ Request for Remand With Vacatur**

9 This Court should reject the Plaintiffs’ request that it vacate the 2019 Regulations without
10 first adjudicating the merits. Pre-merits vacatur is improper. This Court should consider only the
11 Plaintiffs’ alternative request that it adjudicate the merits of their claims and enter an appropriate
12 remedy at that time. As discussed above, this Court can and should adjudicate the merits of
13 Plaintiffs’ claims as to the 4(d) Rule and the Rule for Designating Unoccupied Areas.

14 ///

15 ⁴ Where agency action is compelled—as the Private Landowners argue it is here—remand to the
16 agency is far from inevitable, *see George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C.
17 Cir. 1992) (refusing to remand to the agency where only “one disposition is possible as a matter of
18 law”). As such, voluntary remand will significantly impair the judicial review rights of the Private
19 Landowners. *Cf. Joshua Revesz, Voluntary Remands: A Critical Reassessment*, 70 Admin. L. Rev.
20 361, 403 (2018). If the merits are adjudicated and the 4(d) Rule and Rule for Designating
21 Unoccupied Areas are upheld as compelled, these rules *will not* be remanded to the Services.
22 However, the framework for voluntary remand—established in the context of the formal
23 adjudicative procedures more widely prevalent in a bygone era of administrative law—generally
24 approaches the problem as if remand is inevitable (as it generally is in the context of judicial review
25 of formal administrative adjudication). *See Revesz, supra*, at 403. The framework therefore treats
26 most voluntary agency remand requests as a mere “question of timing.” *Id. See also* ECF 165 at 33
27 (positing that remand in the context of the Plaintiffs’ challenge is merely a question of timing). But
28 in the present context of judicial review of informal agency *rulemaking* “the choice between
voluntary remand and litigating on the merits is not merely a question of timing.” *Revesz, supra*, at
403. Instead, it is “a question of what remedy” private parties to the action will receive. *Id.* For this
reason, in applying the voluntary remand doctrine in this challenge to an informal rulemaking, this
Court “should be . . . attentive to private parties’ [such as the Private Landowners’] rightful
position.” *Id. See also* Toni M. Fine, *Agency Requests for “Voluntary” Remand: A Proposal for
the Development of Judicial Standards*, 28 Ariz. St. L.J. 1079, 1092–93, 1119 (1996) (framing the
discussion in terms of the “[i]mportance [o]f [j]udicial [r]eview [f]unction” and noting that “the
rights of intervenors warrant special attention in th[e] context” of an opposed motion for voluntary
remand).

1 **A. Vacatur without an adjudication of the merits is improper**

2 While true that in the Ninth Circuit the ordinary remedy for unlawful agency action is
3 remand accompanied by vacatur, this rule anticipates that a reviewing court first make a finding on
4 the merits that the challenged action is unlawful. *See Pollinator Stewardship Council v. U.S. EPA*,
5 806 F.3d 520, 532 (9th Cir. 2015) (finding remand with vacatur appropriate after determining on
6 the merits that EPA’s registration of several pesticides was not supported by substantial evidence
7 and was therefore illegal); *Alsea Valley All. v. U.S. Dep’t of Commerce*, 358 F.3d 1181, 1185 (9th
8 Cir. 2004) (“[v]acatur of an *unlawful* agency rule normally accompanies a remand.” (emphasis
9 added)). The question of the proper remedy in the context of a motion for voluntary remand,
10 however, is an entirely different question. In this context the Plaintiffs’ request for vacatur
11 constitutes an inappropriate request for the Court to grant them complete relief without first
12 adjudicating the merits, in derogation of the APA’s required procedures. *See id.* That request must
13 be rejected.

14 Numerous district courts, including courts in this district, have concluded that similar
15 requests for pre-merits vacatur would inappropriately afford relief without due consideration of the
16 merits. *See Nat’l Parks Conservation Ass’n*, 660 F. Supp. 2d at 5 (“[G]ranting vacatur here would
17 allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public
18 notice and comment, without judicial consideration of the merits.”); *Maine*, 2018 WL 6304402, at
19 *1 (same); *California*, 2021 WL 4221583, at *1 (asserting that vacatur should not accompany
20 voluntary remand because “there ha[d] been no evaluation of the merits—or concession by
21 defendants—that would support a finding that the rule should be vacated.”); *Waterkeeper All.*, 2021
22 WL 4221585, at *1 (same); *Friends of Park*, 2014 WL 6969680, at *4 (refusing to vacate a rule
23 “because the parties ha[d] not fully briefed the [rule’s] legality”).

24 This presumption against vacatur without an adjudication of the merits is supported by the
25 text of 5 U.S.C. § 706(2)(A)—the source of a court’s authority to vacate final agency action—
26 which plainly requires that any order of vacatur be preceded by a finding of illegality on the merits.
27 *See* 5 U.S.C. § 706(2)(A) (“the reviewing court shall . . . *hold unlawful* and set aside agency action,
28 findings, and conclusions *found to be*” in violation of the APA) (emphasis added). *See also Hold*,

1 Black’s Law Dictionary (4th ed. 1951) (defining “hold” as “[t]o *adjudge* or decide, spoken of a
2 court, particularly to declare the conclusion of law reached by the court as to the legal effect of the
3 facts disclosed.”) (emphasis added); *Find*, Black’s Law Dictionary (4th ed. 1951) (explaining that
4 “find” means “[t]o announce a conclusion, as the result of judicial investigation, upon a disputed
5 fact or state of facts” or “[t]o determine a controversy in favor of one of the parties; as a jury ‘finds
6 for the plaintiff[.]’” . . . and noting that that “[t]he term usually means to ascertain by judicial inquiry
7”). *See also Carpenters Indus. Council*, 734 F. Supp. at 136 (identifying the incompatibility of
8 pre-merits vacatur with the text of 5 U.S.C. § 706(2)). The principle established by the APA is
9 simple and inexorable: merits first, then remedy.

10 Other provisions of the APA also support this presumption against pre-merits vacatur. The
11 APA requires that agencies provide public notice and an opportunity to comment before finalizing
12 any rule. *See* 5 U.S.C. § 553. This requirement applies with equal force to a rule repealing a prior
13 regulation. *See Becerra v. United States Dep’t of Interior*, 276 F. Supp. 3d 953, 966 (N.D. Cal.
14 2017) (“The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking
15 procedures.” (quoting *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 762 (3d Cir.
16 1982))). *See also* 5 U.S.C. § 551(5) (“[R]ule making’ means agency process for formulating,
17 amending, or *repealing* a rule.” (emphasis added)). As other courts have held, vacatur without an
18 adjudication of the merits circumvents these procedural requirements by enabling repeal of a
19 lawfully promulgated rule without notice and comment, and without a conclusive finding of
20 illegality. *See Nat’l Parks Conservation Ass’n*, 660 F. Supp. 2d at 5.

21 The Federal Defendants and the Plaintiffs postulate that vacatur without an adjudication of
22 the merits is sometimes proper. *See* ECF 165 at 34 n.10; ECF 170 at 26–28. In support of this
23 proposition, the Federal Defendants and Plaintiffs cite several orders from district courts within the
24 Ninth Circuit which entered vacatur without adjudicating the merits. *See* ECF 165 at 34 n.10 (citing
25 *In re Clean Water Act Rulemaking*, Nos. C 20-04636 WHA, C 20-04869 WHA, C 20-06137 WHA
26 (Consolidated), 2021 WL 4924844, at *5 (N.D. Cal. Oct. 21, 2021); *Pascua Yaqui Tribe v. U.S.*
27 *EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at * 4 (D. Ariz. Aug. 30, 2021)); ECF 170
28 at 26–28. The most recent of these orders have been appealed to the Ninth Circuit. *See Pascua*

1 *Yaqui Tribe v. Ariz. Rock Products Ass'n*, No. 21-16791 (9th Cir. Oct. 26, 2021); *In re: Am. Rivers*
2 *v. Am. Petroleum Inst.*, No. 21-16958 (9th Cir. Nov. 22, 2021); *In re: Am. Rivers v. Nat'l*
3 *Hydropower Ass'n*, No. 21-16960 (9th Cir. Nov. 22, 2021); *In re: Am. Rivers v. Arkansas*, No. 21-
4 16961 (9th Cir. Nov. 22, 2021). In considering each appeal, the Ninth Circuit will determine in the
5 first instance⁵ whether it will endorse the questionable legality of pre-merits vacatur, or side with
6 the numerous courts that have rejected it.

7 **B. The facts of this case demonstrate the impropriety of pre-merits vacatur**

8 The facts of this case perfectly demonstrate the impropriety of pre-merits vacatur. An
9 unresolved dispute over the legality of the 2019 Regulations remains between the Private
10 Landowners and the Plaintiffs. The Plaintiffs argue on summary judgment that in promulgating the
11 4(d) Rule and Rule for Designating Unoccupied Areas the Services abused their discretion. *See*
12 ECF 142 at 24–30 in *CBD*; ECF 162 at 32–34, 40–41, 45–46 in *California*; ECF 107 25–30, 37–
13 39 in *ALDF*. The Plaintiffs assert that both rules should be vacated considering this purported
14 illegality. ECF 142 at 50–51 in *CBD*, ECF 162 at 40 in *California*; ECF 107 at 40 in *ALDF*. The
15 Private Landowners, however, intend to argue on the merits that both rules must be upheld as
16 statutorily compelled. *See supra* 8–9. The Plaintiffs have been afforded the opportunity to submit
17 briefing on the merits. The Private Landowners have not. Vacatur would therefore grant complete
18 relief to the Plaintiffs and render a complete loss for the Private Landowners, without due process.

19 Moreover, as to the 4(d) Rule in particular, pre-merits vacatur would completely eliminate
20 the procedural protections afforded by the APA's notice and comment requirements. FWS has
21 announced its intention to propose a rulemaking to rescind the 4(d) Rule. ECF 165 at 24; Frazer
22 Decl. ¶ 5. As discussed, to comply with the APA, FWS must provide notice and an opportunity
23 comment before finalizing any such rescission rule. *See Becerra*, 276 F. Supp. at 966. *See also* 5
24 U.S.C. §§ 551(5), 553. However, if this Court were to vacate the 4(d) Rule in response to a request
25 from the Plaintiffs, it would eliminate the need for FWS to conduct any further rulemaking to
26 rescind that rule. By reinstating the blanket 4(d) rule previously in effect, vacatur would achieve

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28 ⁵ The Ninth Circuit has never directly addressed the legality of pre-merits vacatur. *See In re Clean Water Act Rulemaking*, 2021 WL 4924844, at * 5.

1 what FWS intends to do via notice and comment rulemaking. That cornerstone principle of
2 administrative law—that a duly promulgated regulation be rescinded with the same process that it
3 was adopted—would cease to operate. *See Nat’l Parks Conservation Ass’n*, 660 F. Supp. at 5. This
4 would severely prejudice the Private Landowners, who would be left with absolutely no recourse
5 whatsoever. While a bare remand would limit the Private Landowners in their ability to argue in
6 this Court that the 4(d) Rule should be upheld as statutorily compelled, remand *with* vacatur would
7 prevent them from even being able to press that argument for retention of the 4(d) Rule before FWS
8 during a rescission rulemaking. *Cf. California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106,
9 1121 (N.D. Cal. 2017) (“The value of notice and comment prior to repeal of a final rule is that it
10 ensures that an agency will not undo all that it accomplished through its rulemaking without giving
11 all parties an opportunity to comment on the wisdom of repeal.” (quoting *Consumer Energy*
12 *Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 446 (D.C. Cir. 1982))).

13 This Court should not vacate the 2019 Regulations without first considering the merits of
14 the Plaintiffs’ claims.

15 **C. Even if this Court were to apply principles of equity to evaluate the Plaintiffs’**
16 **request for pre-merits vacatur, it should still reject that request**

17 Vacatur is improper without an adjudication of the merits. As such, this Court should
18 decline to apply any test that invokes principles of equity to balance the imposition of vacatur, such
19 as the *Allied-Signal* test referenced by the Federal Defendants and Plaintiffs. *See* ECF 165 at 34–
20 37; ECF 170 at 12. That test contemplates application *after* a decision on the merits determining a
21 rule’s legality. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51
22 (D.C. Cir. 1993) (considering the appropriate remedy following an adjudication of the lawfulness
23 of the challenged action). Nevertheless, even were this Court to consider the Plaintiffs’ request for
24 vacatur and apply the *Allied-Signal* test, application of that test counsels against vacatur of the 2019
25 Regulations. In deciding whether a conclusively unlawful rule should be remanded with or without
26 vacatur the *Allied-Signal* test requires that a court consider the seriousness of the deficiencies in the
27 rulemaking, and the consequences of vacating the rule before remand. *See id.* at 150–51.

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1 First, considering any purported deficiencies in the rulemaking, the Ninth Circuit considers
2 “whether such fundamental flaws in the agency’s decision make it unlikely that the same rule would
3 be adopted on remand.” *Pollinator Stewardship Council*, 806 F.3d at 532 (citing *Allied-Signal*, 988
4 F.2d at 151). But this Court has not adjudicated the merits of the Plaintiffs’ claims. It has therefore
5 made no findings regarding any purported deficiencies in the 2019 Regulations. While the Plaintiffs
6 request for vacatur chiefly relies upon various claimed deficiencies identified in their summary
7 judgment briefing, ECF 170 at 11–17, the Private Landowner Intervenors intend to respond that
8 these claims are not meritorious, at least as to the 4(d) Rule and the Rule for Designating
9 Unoccupied Areas, *see supra* 8–9. This Court cannot credit the Plaintiffs’ claims by vacating the
10 2019 Regulations without also giving the Private Landowners an opportunity to respond to the
11 Plaintiffs’ arguments. The Plaintiffs also base their request for vacatur on the declarations submitted
12 by the Federal Defendants in support of their motion for remand. ECF 170 at 11–17. But these
13 declarations merely set forth various policy disagreements with the 2019 Regulations. *See* Frazer
14 Decl.; ECF No. 165-2 (Fourth Declaration of Samuel D. Rauch, III) (Rauch Decl.), and the Federal
15 Defendants expressly disclaim any confession of error on the part of the Services, ECF 165 at 32.
16 Indeed, all the declarations stand for is the unremarkable proposition that the current (Democratic)
17 presidential administration disagrees with the policy priorities of its (Republican) predecessor. This
18 does not support the Plaintiffs’ suggestion that there exist “fundamental” flaws in the rulemaking
19 sufficient to justify vacatur under *Allied-Signal*. *See* ECF 170 at 17. If policy concerns of the variety
20 set forth in the Federal Defendants’ declarations equate to “fundamental” flaws justifying vacatur,
21 then pending litigation would provide a shortcut for any incoming administration to reverse its
22 predecessor’s actions, without going through the APA’s required process or waiting for a
23 conclusive determination on the merits. Such a rule is wholly incompatible with the APA and the
24 American system of administrative law.

25 As to the second *Allied-Signal* factor, an abrupt return to the prior regime for listing
26 threatened species and designating critical habitat, would cause significant disruptive consequences
27 to the Private Landowners and substantially prejudice them. An abrupt return has significant
28 implications for theirs and their members’ abilities to run their businesses, manage their properties,

1 and pursue their conservation goals. *See* Meacham Decl. ¶¶ 12–15; Klemm Decl. ¶¶ 12–15. These
2 harms would be especially dire should the court vacate the 4(d) Rule without adjudicating the
3 merits—eliminating the need for subsequent rulemaking to rescind the 4(d) Rule and leaving the
4 Private Landowners with no avenue to press their arguments for its retention on remand. *See supra*
5 21–22.

6 Vacatur would also result in wasted expenditures and the expenditure of significant
7 additional resources by the Private Landowners. For example, Ken Klemm, through counsel,
8 recently submitted extensive comments on the proposed listing and 4(d) rule for the northern
9 distinct population segment of the lesser prairie-chicken. *See* Yates Decl. and Exh. D thereto. That
10 proposed listing has significant implications for Mr. Klemm’s business and conservation activities
11 given his property’s location within the lesser prairie-chicken’s Kansas range, and the
12 improvements he has made to encourage its return to his property. ECF 69-3 ¶ 10. Mr. Klemm’s
13 comments were submitted under the (reasonable) assumption that the 4(d) Rule would be either
14 rescinded or retained following an orderly rulemaking process. If the 4(d) Rule were abruptly
15 vacated by this Court, that would significantly alter the trajectory of the lesser prairie-chicken
16 rulemaking and eliminate the basis for many of the arguments set forth in Mr. Klemm’s comment.
17 *See* Exh. D to Yates Decl. For its part, Cattlemen has already been through the lengthy process of
18 filing a rulemaking petition to repeal the blanket 4(d) rule. *See* Meacham Decl. ¶¶ 8–11. Cattlemen
19 finally received a response to its petition in the form of the 2018 Proposed Regulations. *Id.* ¶ 11.
20 Because vacatur would immediately revive the blanket 4(d) rule and eliminate the need for a further
21 rulemaking on remand, Cattlemen would likely be left with no recourse other than to expend the
22 additional time and effort required to submit yet another rulemaking petition identifying the
23 illegality of the blanket 4(d) rule.

24 CONCLUSION

25 The Federal Defendants motion for voluntary remand should be denied as to the 4(d) Rule
26 and the Rule for Designating Unoccupied Areas. The Court should reject the Plaintiffs’ request that
27 the 2019 Regulations be vacated in the event the Court does grant remand.
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DATED: December 27, 2021.

Respectfully submitted,

CHARLES T. YATES
DAMIEN M. SCHIFF

By /s/ Charles T. Yates
CHARLES T. YATES

Attorneys for Private Landowner Intervenors