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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL CENTER, *et al.*, Plaintiffs, v. DEBRA HAALAND, in her official capacity as Secretary of the Interior, *et al.*, Defendants, and AMBLER METALS, LLC, *et al.*, Intervenor-Defendants.	Case No. 3:20-cv-00187-SLG

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR VOLUNTARY REMAND

INTRODUCTION

The Court should deny the Federal Defendants' motion for voluntary remand without vacatur and either order that merits briefing proceed or order remand with vacatur. Federal Defendants seek remand without vacatur to address only a limited set of legal violations and issues related to their compliance with the National Historic Preservation Act (NHPA) and the Alaska National Interest Lands Conservation Act's (ANILCA) subsistence provisions when authorizing a road to the Ambler Mining District (Ambler Road).[1] The limited scope of the proposed remand, which fails to address the broad range of legal violations raised in this case and leaves matters related to the U.S. Army Corps of Engineers (Corps) wholly unresolved, has the potential to significantly prejudice Plaintiffs.

Defendants also fail to meet their burden to demonstrate that the Court should depart from the default remedy of vacatur. Remand without vacatur is particularly inappropriate in light of Defendants' acknowledgement of the serious legal errors that occurred in this decision-making process. As a result, Plaintiffs Northern Alaska Environmental Center et al. request that this Court deny Defendants' motion and either order the completion of briefing and proceed to the merits, or order remand with vacatur.

[1] Defs.' Mot. for Voluntary Remand (ECF No. 113) [hereinafter NAEC Mot.]; Decl. of Tommy Beaudreau ¶ 3 (ECF No. 113-1) [hereinafter Beaudreau Decl.].

BACKGROUND

Plaintiffs largely rely on their opening brief for summary judgment for the factual and legal background in this case.[2] Plaintiffs raised a broad range of claims related to the Bureau of Land Management's (BLM), Corps', and National Park Service's (NPS) (collectively, Defendants) approval of the Ambler Road.[3]

Plaintiffs explained that BLM and the Corps violated the National Environmental Policy Act (NEPA) by failing to adequately assess the project's impacts. Specifically, Defendants failed to obtain and analyze necessary baseline information about a wide range of resources, including aquatic resources; failed to take a hard look at connected actions and cumulative impacts, including a failure to adequately analyze the project's gravel mines; and failed to take a hard look at the Ambler Road's impacts to permafrost, greenhouse gas emissions, and air quality.[4] The Corps violated Section 404 of the Clean Water Act (CWA) by failing to adequately analyze or mitigate the project's impacts to aquatic resources.[5] Defendants also violated ANILCA by failing to comply with its mandatory process outlined in Title XI, and NPS failed to incorporate sufficient terms and conditions into its right-of-way.[6] Finally, BLM violated the Federal Land Policy and Management Act (FLPMA) by failing to obtain complete project plans or adequately

[2] Pls.' Opening Br. for Summ. J. (ECF No. 99) [hereinafter NAEC Br.].
[3] *Id.*
[4] *Id.* at 17–35.
[5] *Id*. at 35–54.
[6] *Id*. at 55–61.

address project impacts before approving the challenged right-of-way.[7] Because of these significant violations, Plaintiffs asked this Court to vacate the joint record of decision, final environmental impact statement (FEIS), 404 permit, rights-of-way, and related documents.[8]

Rather than file a response, Defendants moved for multiple briefing stays and now seek voluntary remand without vacatur for the limited purpose of allowing the Department of the Interior (Interior) to address only a subset of legal errors related to its consideration of subsistence and cultural resource impacts, and to prepare a supplemental NEPA analysis.[9] Defendants make no commitment to address the legal violations raised by Plaintiffs, and there is no commitment by the Corps to address the legal violations underlying its 404 permit.[10]

ARGUMENT

Defendants' motion for remand without vacatur to address a limited subset of legal errors (i.e., a partial remand) should be denied because it would unduly prejudice Plaintiffs. Defendants also failed to show why the Court should depart from the default

[7] *Id*. at 61–66.

[8] *Id*. at 66–67.

[9] NAEC Mot.; Defs.' Mot. for Voluntary Remand, *Alatna Village Council v. Heinlein*, Case No. 3:20-cv-00253-SLG (ECF No. 111) [hereinafter AVC Mot.]; Beaudreau Decl. ¶ 11. The scope of Defendants' proposal is unclear. Defendants did not request dismissal or a stay, or otherwise indicate how the Court should treat the numerous remaining claims.

[10] AVC Mot. at 3 n.1.

remedy of vacatur. Accordingly, the Court should deny Defendants' request for remand without vacatur and either proceed to briefing on the merits or order remand with vacatur.

I. DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR WOULD PREJUDICE PLAINTIFFS.

A. The Limited Scope of Defendants' Remand Motion Would Prejudice Plaintiffs.

Courts have broad discretion to grant or deny an agency's motion to remand.[11] In considering such a motion, Courts evaluate whether a voluntary remand motion is frivolous or made in bad faith,[12] and consider prejudice to non-moving parties.[13] Courts deny motions for voluntary remand to avoid undue prejudice.[14]

As a threshold matter, Defendants have failed to demonstrate voluntary remand is appropriate: "An agency's professed intent to revisit the challenged decision is a necessary condition to obtain remand …."[15] Here, Defendants seek remand without acknowledging — let alone committing to revisit — any of the legal problems or many of the decisions challenged by Plaintiffs. Defendants intend to revisit the rights-of-way and

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[11] *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436–37 (D.C. Cir. 2018) (partially denying agency's motion where remand for subset of issues would prejudice Plaintiffs).

[12] NAEC Mot. at 3.

[13] *Util. Solid Waste Activities Grp.*, 901 F.3d at 436.

[14] *See, e.g.*, *id.*; *see also Am. Waterways Operators v. Wheeler* (*Am. Waterways I*), 427 F. Supp. 3d 95, 98–100 (D.D.C. 2019) (denying remand where agency failed to identify new information, failed to concede legal error, and remand would prejudice some plaintiffs and leave others uncertain).

[15] *Am. Waterways I*, 427 F. Supp. 3d at 98–99 (citing *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017)).

NEPA analysis for only a limited subset of ANILCA Section 810 and NHPA legal flaws identified in the related case, *Alatna Village Council v. Heinlein*.[16] Defendants have not indicated their intent to revisit Plaintiffs' challenges to the NEPA analysis, the 404 permit decision, or their decisions made under ANILCA Title XI or FLPMA. Defendants do not cite any cases in which a Court has granted voluntary remand where an agency has not professed its intent to review the challenged agency actions.[17] Defendants have not explained why the limited voluntary remand is appropriate when they have not committed to revisiting the agency actions and decisions under NEPA, the CWA, ANILCA, or FLPMA challenged in this case.[18] Nor have Defendants suggested how the Court should treat Plaintiffs' challenges to these decisions, leaving Plaintiffs' claims "in limbo."[19]

The partial voluntary remand would be highly prejudicial to Plaintiffs because it would delay or even preclude Plaintiffs' ability to seek judicial review of the claims in this case. Plaintiffs advanced distinct, serious challenges to Defendants' approvals of the Ambler Road under multiple statutes,[20] but Defendants do not directly address a single claim. Plaintiffs do not dispute that the agencies' assessment of impacts to subsistence

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[16] *Supra* n.9.

[17] *Util. Solid Waste Activities Grp.*, 901 F.3d at 425–26, 436–37 (denying remand in part where agency would not resolve Plaintiffs' specific legal claims).

[18] AVC Mot. at 12 (arguing remand is appropriate where agency identifies "a substantial and legitimate" concern to cure).

[19] *Am. Waterways I*, 427 F. Supp. 3d at 99.

[20] *See generally* NAEC Br.

and cultural resources suffered serious legal flaws, which themselves warrant vacatur. While Defendants acknowledge they will supplement their analysis to address subsistence and cultural resources, there is no indication that analysis will address the numerous NEPA violations identified by Plaintiffs.[21] Failure to adequately review impacts to cultural resources, which Defendants admit, also violates NEPA.[22] Such a piecemeal approach, which could force Plaintiffs to wait years to adjudicate their claims, is prejudicial.[23] And as discussed below, it would foreclose review of Defendants' original challenged actions.[24]

The prejudice to Plaintiffs is underscored by what Defendants' motion does not say about the CWA and 404 permit. Plaintiffs challenged the Corps' compliance with the CWA and seek vacatur of the Ambler Road's 404 permit.[25] Plaintiffs raised numerous, serious violations of the CWA's substantive and procedural mandates.[26] But Defendants' motion fails to indicate that the Corps intends to revisit its decision. Defendants state in a footnote that, if Defendants obtain remand, the Corps would "consider what action is needed" and follow its own regulations regarding possible permit modifications.[27] That

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[21] AVC Mot. at 2, 11, 14–17 (admitting deficiencies in analysis of subsistence and cultural resource impacts); *see supra* Background (summarizing NAEC claims).

[22] 40 C.F.R. § 1508.8(b); *see* 42 U.S.C. § 4331(b)(4); *Oglala Sioux Tribe v. U.S. NRC*, 896 F.3d 520, 530 (D.C. Cir. 2018).

[23] *Am. Waterways Operators v. Wheeler* (*Am. Waterways II*), 507 F. Supp. 3d 47, 58 (D.D.C. 2020).

[24] *Infra* n.33.

[25] NAEC Br. at 67.

[26] *Id*. at 35–54.

[27] AVC Mot. at 3 n.1.

is, Defendants do not indicate that any new process would be undertaken by the Corps during a remand — merely that the Corps would consider doing so. This does not satisfy a core condition of seeking remand in the first place: the agency's intent to revisit its decision.[28]

Defendants' narrow remand would also prejudice Plaintiffs' claims given the overlapping issues with the EIS's failure to take a hard look at impacts to aquatic resources under the Corps' jurisdiction. Defendants admit for purposes of ANILCA Section 810 that their "analyses lack meaningful discussion of Project-related water impacts," including fisheries impacts.[29] Several of Plaintiffs' claims against the Corps and BLM under NEPA and the CWA stem from the same inadequate analyses.[30] But Defendants do not acknowledge that these identified legal errors relate to the agencies' obligations under NEPA or the CWA or explain why they can disregard the connection between these claims and the identified legal errors, especially as the Corps did not commit to revisiting its decision. Essentially, Defendants seek a "second bite at the apple" to revisit their subsistence-related analysis of aquatic impacts without acknowledging how those errors extend out to the NEPA and CWA analyses.[31] Plaintiffs

[28] *Supra* n.15.

[29] AVC Mot. at 15.

[30] NAEC Br. at 19–20 (arguing Defendants failed to obtain baseline information on hydrological and fisheries resources in violation of NEPA); 47–49 (arguing EIS failed to consider aquatic resource impacts sufficient for 404 permit).

[31] *Am. Waterways I*, 427 F. Supp. 3d at 98 (denying motion for voluntary remand to avoid undue prejudice to Plaintiffs).

would be particularly prejudiced by a remand without an adjudication on the merits of these issues.

Plaintiffs would further be prejudiced by this partial remand because Defendants could avoid review of the initial, challenged agency actions. The D.C. Circuit's reversal of a District Court's voluntary remand grant is instructive on this point.[32] There, the Department of Energy sought a voluntary remand, not to reconsider the application decisions that plaintiff challenged, but to review any new applications that plaintiff may submit.[33] The Court recognized that "a voluntary remand request … may be granted only when the agency intends to take further action with respect to the *original agency decision on review*."[34] The Court found that the remand sought "did not return the 'core dispute' … back for further proceedings by the agency."[35]

Here, a partial remand to address narrow deficiencies would not return the core dispute back to the agencies. Interior will address limited legal issues raised in the *Alatna Village Council* case, on an unclear timeline, and the Corps' decision may not be revisited at all. Defendants' intent to prepare a narrow supplemental EIS[36] means the agencies may not require additional data or new applications consistent with ANILCA and FLPMA — all core claims at issue in Plaintiffs' case and decisions which they do not

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[32] *See Limnia, Inc.*, 857 F.3d 379.

[33] *Id.* at 387.

[34] *Id.* at 386 (denying remand where dispute related to sufficiency of original application).

[35] *Id.*

[36] AVC Mot. at 21.

intend to revisit.[37] The remand sought would not address the core disputes of this litigation and ultimately would prejudice Plaintiffs.

Plaintiffs are not aware of any cases where a court ordered voluntary remand over opposition so that some, but not all, defendants could reconsider narrow aspects of some decisions while ignoring other claims and decisions entirely.[38] Indeed, the Ninth Circuit recently reversed a District Court's order granting the Environmental Protection Agency's (EPA) motion for voluntary remand;[39] Plaintiffs opposed remand because EPA only sought to address violations of one statute, while ignoring Plaintiffs' challenges under another statute.[40] Here, a partial remand would be inappropriate because Defendants would potentially ignore Plaintiffs' challenges to their decisions under the CWA, ANILCA, and FLPMA, and most if not all the legal issues Plaintiffs raised under NEPA.

Because the partial remand would prejudice Plaintiffs, Defendants' motion should be denied.

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[37] NAEC Br. at 17–21 (lack of baseline data violated NEPA); *id.* at 44–49 (lack of sufficient information to determine significant degradation violated CWA); *id*. at 55–58 (failure to require consolidated applications violated Title XI); *id.* at 61–63 (failure to require project plans violated FLPMA).

[38] *See Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying motion for partial voluntary remand).

[39] Order at 2, *Ctr. for Food Safety v. Wheeler* (*Food Safety I*), Nos. 19-72109 & 19-72280 (9th Cir. Jan. 12, 2021) (denying motion for voluntary remand without vacatur and ordering merits briefing).

[40] Pet'rs' Opp'n to Mot. for Voluntary Remand Without Vacatur, *Food Safety I*, Nos. 19-72109 & 19-72280 (9th Cir. Dec. 7, 2020).

B. Remand Without Vacatur Would Further Prejudice Plaintiffs.

Defendants' request to depart from the default remedy of vacatur would further prejudice Plaintiffs. Defendants claim suspension of the rights-of-way "will defer any further project activity until remand and reconsideration are completed."[41] These statements are vague and misleading.

First, suspension of the rights-of-way would only cover the limited portions of the project crossing federal land — 24% of the road corridor.[42] Defendants do not address how remand without vacatur would impact activities on the remaining 76% of the road corridor. Defendants also ignore that the Corps has not committed to suspend or revoke its 404 permit,[43] which would allow ground-disturbing activities to proceed on approximately 150 miles of State and Native Corporation lands not subject to any right-of-way suspensions. As Plaintiffs explained, the Ambler Road has the potential to cause significant degradation of aquatic resources,[44] could violate air quality standards,[45] and significantly impair permafrost and nearby waterways even at the project's earliest stages.[46] AIDEA's construction efforts would include land-clearing, earth-disturbing and earth-moving work, and blasting.[47] Leaving the 404 permit in place means those types of

[41] AVC Mot. at 21–22 (citing Beaudreau Decl. ¶ 12).
[42] *Id.* at 7 n.6.
[43] *Id*. at 3 n.1.
[44] NAEC Br. at 38–43.
[45] *Id*. at 31–35.
[46] *Id*. at 27–31.
[47] BLM_0102326.

activities could proceed on non-federal lands. The potential for prejudice is especially high since Defendants provided no timeline for the requested remand, which could potentially take years. Defendants' claim that the right-of-way suspensions would "preserve the environmental status quo" during the remand is patently false and should be rejected.[48]

The recently filed suspension letters reinforce that additional activities could proceed on federal lands and undercut Defendants' argument that suspension is an adequate substitute for vacatur.[49] The suspension letters indicate AIDEA could seek authorizations from the agencies separate from the right-of-way permits, such as special use permits, to conduct activities on federal lands.[50]

Finally, Plaintiffs would be prejudiced by any remand that allows AIDEA's permits to remain in place because it has the potential to further entrench Defendants' position on this project. There is a significant risk that AIDEA would continue activities and the permitting process on State lands during remand,[51] which could limit Defendants' ability to consider and adopt necessary changes to the project design or alignment in new decisions. As discussed further below, absent vacatur, the remand process would also not

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[48] Beaudreau Decl. ¶ 12.

[49] Suspension of Right-of-Way Grant (ECF No. 125-1) [hereinafter BLM Letter]; Suspension of Right-of-Way Permit (ECF No. 125-2) [hereinafter NPS Letter].

[50] BLM Letter at 2; NPS Letter at 2.

[51] *See, e.g.*, Public Notice: AIDEA Application for Ambler Road Private Exclusive Easement, https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=205286 (last visited Mar. 21, 2022) (indicating AIDEA is applying for easement across state lands).

allow for the meaningful decision-making process contemplated by NEPA or ANILCA.[52] The potential for Defendants to be limited in their ability to change decisions is particularly high here, given the narrow scope of the requested remand and failure to address the 404 permit.

In sum, Plaintiffs would be prejudiced by a partial remand without vacatur that leaves AIDEA's permits in place, where the Corps does not reconsider its 404 permit, and where there are no assurances that public resources will be fully protected in the interim.

C. Completing Briefing on the Merits Would Not Prejudice Any Party.

Defendants have not indicated any reason why they would be prejudiced if the Court requires the completion of briefing on the merits. Because Defendants' response brief was due on February 22, 2022, the date they sought remand, they would suffer little to no prejudice in being ordered to proceed with merits briefing, as it is likely that the brief is largely already written.[53]

Judicial economy would also be better served resolving the case on its merits instead of singling out a narrow set of issues on remand and leaving the remaining issues in this case unresolved, as Defendants propose. Defendants fail to justify their assertion

[52] *See infra* Part II.B.

[53] *Cf.* Order re: Mtn. to Stay at 12, *Alaska Wildlife All. v. Haaland*, No. 3:20-cv-00209-SLG (D. Alaska Mar. 15, 2022) (ECF No. 61) (indicating Defendants would not be prejudiced by requiring briefing).

that avoiding consideration of Plaintiffs' merits arguments conserves judicial resources.[54] It would be more efficient for this Court to rule on the merits and provide specific instruction for what Defendants should reconsider on remand in addition to what Defendants identified.[55] In light of Defendants' failure to acknowledge legal flaws raised by Plaintiffs, and failure to acknowledge there could be on-the-ground impacts during the remand, Plaintiffs would almost certainly need to return to this Court for further proceedings in the absence of a ruling from the Court. Defendants argue that Plaintiffs can simply sue again later, after the agencies potentially issue new decisions,[56] but that does not conserve judicial resources.

Overall, Defendants' request for a limited remand without vacatur would delay adjudication of Plaintiffs' claims, waste judicial resources, and risk significant environmental damage. Accordingly, this Court should deny the motion and either order completion of the merits briefing or order remand with vacatur, as discussed next.

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[54] NAEC Mot. at 3; AVC Mot. at 21.

[55] *Am. Waterways II*, 507 F. Supp. 3d at 58 (explaining that, if the Court remands only one claim, the agency would "lack guidance on the validity of [plaintiff's] other challenges, and the parties potentially could be mired in piecemeal litigation over EPA's determination for years to come. No one benefits from such an approach.").

[56] AVC Mot. at 22.

II. THE COURT SHOULD APPLY THE PRESUMPTIVE REMEDY OF VACATUR.

A. Vacatur Is the Presumptive Remedy.

Vacatur is the default, presumptive remedy under the APA for an invalid agency action.[57] The APA mandates that, when agency action violates the law, "[t]he reviewing court shall … hold unlawful and set aside [the] agency action."[58] The Court should apply the presumptive remedy and vacate the rights-of-way, 404 permit, and other underlying decisions.[59]

The Ninth Circuit has only authorized remand without vacatur in "rare" or "limited" circumstances,[60] and only when the agency can show that "equity demands" a departure from the presumptive remedy.[61] Defendants have the heavy burden to show why anything less than vacating the unlawful agency action is the proper remedy.[62] To analyze whether the rare circumstances for remand without vacatur are present, courts apply a two-part test where they "weigh the seriousness of the agency's errors against the

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[57] *See Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018).

[58] 5 U.S.C. § 706(2).

[59] *See, e.g.*, *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 751 (9th Cir. 2020).

[60] *Pollinator Stewardship Council v. EPA* (*Pollinator*), 806 F.3d 520, 532 (9th Cir. 2015) ("limited circumstances"); *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("rare circumstances").

[61] *Pollinator*, 806 F.3d at 532 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

[62] *All. for the Wild Rockies*, 907 F.3d at 1121–22.

disruptive consequences of an interim change that may itself be changed."[63] Regarding the disruptive consequences of vacatur, the critical focus is on whether vacatur would cause environmental harm and courts have "chosen to leave a rule in place when vacating would risk such harm."[64]

Defendants incorrectly assert based on two D.C. District Court cases that this Court must reach the merits to vacate.[65] That position is contrary to both the case law in this Circuit and the government's position in other litigation — e.g., where it recently asked the court to vacate a right-of-way that suffered from inadequate NEPA and NHPA reviews.[66] When considering vacatur of agency actions prior to a decision on the merits, the normal vacatur test applies.[67]

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[63] *Nat'l Fam. Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

[64] *See Pollinator*, 806 F.3d at 532 (vacating rule that could harm bees because leaving rule in place "risks more potential environmental harm than vacating it"); *Ctr. for Food Safety v. Vilsack* (*Food Safety II*), 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("[T]he Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely [when] serious irreparable environmental injury [will occur if the decision is vacated].").

[65] AVC Mot. at 21. The facts of *Carpenters Indus. Council v. Salazar* are also distinguishable because the court in that case was concerned vacatur would allow for repeal of a rule without public notice and comment, contrary to the Administrative Procedure Act. 734 F. Supp. 2d 126, 135–36 (D.D.C. 2010); *Wildearth Guardians v. Bernhardt*, No. 20-56 (RC), 2020 U.S. Dist. LEXIS 197810, at *3–4 (D.C. Dist. Oct. 23, 2020) (relying on *Carpenters*).

[66] *See, e.g.*, Defs.' Notice of Mot. for Voluntary Remand & Mem. in Supp., *Native Am. Land Conservancy v. Haaland*, Case No. 5:21-cv-00496-GW-AS (C.D. Cal. Dec. 3, 2021).

[67] *In re Clean Water Act Rulemaking* (*Rulemaking*), Nos. C 20-04636 WHA, C 20-04869 WHA, C 20-06137, 2021 U.S. Dist. LEXIS 203567, at *27–28 (N.D. Cal. Oct. 21, 2021) (finding same factors for vacatur apply when considering voluntary remand prior

District courts within the Ninth Circuit "have consistently acknowledged they have the authority to vacate actions upon remand prior to a final determination of the action's legality."[68] Vacatur "of an agency action without an express determination on the merits is well within the bounds of traditional equity jurisdiction."[69] Equity concerns are particularly heightened here, where Defendants seek to avoid judicial review of some matters and there is potential prejudice from denying plaintiffs "the opportunity to vindicate their claims in federal court."[70] Even without a merits decision, vacatur of the rights-of-way, 404 permit, and related decisions is the appropriate remedy.

B. Defendants Failed to Meet the High Bar to Show the Default Remedy of Vacatur Is Not Warranted.

Defendants failed to carry their heavy burden to show that this is a rare circumstance where the court should not vacate the underlying decisions or where "equity

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to a merits decision); *Pasqua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 U.S. Dist. LEXIS 163921, at *12 (D. Ariz. Aug. 30, 2021) (indicating "in the Ninth Circuit, remand with vacatur may be appropriate even in the absence of a merits adjudication").

[68] *Rulemaking*, 2021 U.S. Dist. LEXIS 203567, at *27; *see also Pasqua Yaqui Tribe*, 2021 U.S. Dist. LEXIS 163921, at *12; *All. for the Wild Rockies v. Marten*, No. CV 17-21-M-DLC, 2018 U.S. Dist. LEXIS 98555, at *7 (D. Mont. June 12, 2018); *N. Coast Rivers All. v. Dep't of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 U.S. Dist. LEXIS 174481, at *16 (E.D. Cal. Dec. 16, 2016) (applying "same equitable analysis used to decide whether to vacate agency action after a ruling on the merits" (cleaned up)); *Navajo Nation v. Regan*, No. 20-CV-602-MV/GJF, 2021 U.S. Dist. LEXIS 184147, at *7 (D.N.M. Sept. 27, 2021) (stating discretion to grant vacatur exists regardless of whether the court has reached a decision on the merits).

[69] *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011).

[70] *Rulemaking*, 2021 U.S. Dist. LEXIS 203567, at *26.

demands" remand without vacatur.[71] Rather than acknowledge the applicable legal standard, Defendants claim the right-of-way suspensions are an adequate substitute.[72] Suspension of the rights-of-way for a limited portion of the project is not sufficient to override the default remedy of vacatur.

Defendants' arguments that Plaintiffs will not suffer prejudice and that vacatur is not necessary because the rights-of-way will be suspended turns the vacatur test on its head by ignoring that courts only depart from the default remedy of vacatur in narrow situations, such as where vacatur itself is likely to cause environmental harm.[73] Here, vacatur would prevent environmental harm during the remand and would further the policies behind NEPA and ANILCA, which require Defendants fully consider the impacts of a project prior to making a decision.[74]

Under the first prong of the vacatur test, the decision whether to vacate depends on the seriousness of the agency's errors.[75] The legal errors here are serious and Defendants do not argue otherwise. Defendants acknowledged that they identified "substantial concerns" and "legal flaws" with their ANILCA 810 analysis and NHPA process.[76] In

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[71] *Pollinator*, 806 F.3d at 532 (quoting *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405).

[72] AVC Br. 21–23.

[73] *Pollinator*, 806 F.3d at 532.

[74] 40 C.F.R. § 1502.5 (indicating a purpose of NEPA is to ensure impacts are analyzed prior to a decision); 16 U.S.C. § 3120 (outlining both substantive and procedural requirements regarding impacts to subsistence and ways to minimize impacts prior to allowing use).

[75] *Allied-Signal v. U.S. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993).

[76] AVC Mot. at 2; Beaudreau Decl. ¶ 3.

light of those deficiencies, Interior intends to supplement the EIS "to more thoroughly assess the impacts and resources identified as areas of concern in this litigation" and would then affirm, amend, or terminate the rights-of-way.[77]

Even though Defendants overlook a number of significant legal issues raised by Plaintiffs, the legal violations that they do admit are serious legal errors indicating vacatur is the appropriate remedy. This is not a situation where the agency on remand can simply provide a clarification or correct a minor procedural error; it will need to engage in a substantive, supplemental analysis to address the significant baseline data and analytical gaps that should have been addressed prior to the agency making a decision. The errors Defendants acknowledge directly relate to an even broader set of legal problems with their Ambler Road approvals, including with the adequacy of the underlying NEPA analysis.

Defendants also acknowledge that the new analysis may change their decisions.[78] The vacatur analysis does not limit vacatur to only those situations where the agency is required to reach a different decision on remand. Instead, as the Ninth Circuit explained, so long as "a different result may be reached" on remand, the Court should vacate.[79]

Vacating will also ensure that any further analysis on remand will not be used only to rationalize a decision that was already made and suffered from legal flaws. Allowing Defendants to address the issues it has identified for remand and prepare a supplemental

[77] Beaudreau Decl. ¶ 10; AVC Br. at 2–3.
[78] AVC Br. at 2–3.
[79] *Pollinator*, 806 F.3d at 532.

NEPA analysis without vacatur would be contrary to the purpose of NEPA. The purpose of NEPA is to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[80] The NEPA process must occur "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made."[81]

Remand without vacatur would not allow for the meaningful decision-making process contemplated by NEPA or ANILCA because "[o]nce large bureaucracies are committed to a course of action, it is difficult to change that course — even if new, or more thorough, NEPA statements are prepared."[82] Allowing Defendants to prepare a supplemental NEPA analysis without vacating all the original, legally flawed decisions and requiring them to address the data and analytical gaps will only further undermine the purposes of NEPA, NHPA, and ANILCA in a context where the agency has already admitted serious legal error. Vacatur of an unlawful NEPA decision is vital because it forces the agency to make a new decision, after a public process, with an informed understanding of the environmental effects, and "under circumstances that ensure an

[80] 40 C.F.R. § 1500.1(b).
[81] *Id.* § 1502.5.
[82] *Massachusetts v. Watt*, 716 F.2d 946, 952–53 (1st Cir. 1983).

objective evaluation free of the previous taint."[83] Conversely, leaving an unlawful decision in place allows an agency "to rationalize or justify decisions already made."[84]

Under the second vacatur factor, this is also not a situation where the disruptive consequences warrant a departure from the default remedy. The critical consideration under the second factor is whether vacatur would cause more environmental harm than it would prevent or where the objective of the underlying statute would be thwarted.[85] Defendants claim the right-of-way suspensions will protect against environmental harm,[86] but overstate the effect of the right-of-way suspensions. As discussed earlier, the rights-of-way only cover federal land and would leave the vast majority of the road corridor vulnerable to disturbance and on-the-ground harm — particularly with the 404 permit left in place.[87] On that basis alone, vacatur is warranted.[88] Additionally, the fact that activities could proceed on other lands would only further commit Defendants to a particular course of action, as described above.[89]

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[83] *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (setting aside decision with NEPA violations and ordering new NEPA process before agency issues decision); *see also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006) (vacating for NEPA violations).

[84] *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (quoting 40 C.F.R. § 1502.5).

[85] *Pollinator*, 806 F.3d at 532; *Food Safety II*, 734 F. Supp. 2d at 951 (indicating Ninth Circuit has only found remand without vacatur warranted when "serious irreparable environmental injury" will occur with vacatur).

[86] AVC Mot. at 21–23.

[87] *Supra* Part I.B.

[88] *See Pollinator*, 806 F.3d at 532.

[89] *Supra* Part I.B.

To the extent Defendants allege economic harm or other disruptive consequences, those do not rise to the level contemplated by the Ninth Circuit to warrant remand without vacatur. Even a showing of serious economic disruptions would not necessarily be a sufficient basis for leaving the decisions intact.[90] Here, Defendants' own statements about how AIDEA would have "tempered any expectations" for this project and that the project "depend[s] on an uncertain and lengthy timeline" indicate that any claimed disruptive consequences are not so severe that they warrant a departure from the default remedy.[91] Defendants also claim AIDEA has "expended funds and resources," but if an unsupported statement about an expenditure of an unspecified amount of funds is sufficient to override the default remedy of vacatur, the otherwise narrow exception to vacatur would swallow the rule.[92]

Overall, Defendants have failed to meet the high burden to show that this is one of the rare circumstances where the Court should depart from the default remedy of vacatur. The errors are serious and the disruptive consequences do not rise to the level contemplated by the Ninth Circuit for overriding vacatur. This Court should accordingly vacate the rights-of-way, 404 permit, and related decisions if the Court grants the motion for voluntary remand.

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[90] *Nat'l Fam. Farm Coal.*, 960 F.3d at 1144–45 (vacating despite substantial economic consequences).

[91] AVC Mot. at 22.

[92] *Id.*; *supra* n.57 (explaining vacatur is default remedy).

III. ABSENT VACATUR, THE COURT SHOULD RETAIN JURISDICTION OVER THIS LAWSUIT.

If the Court grants Defendants' motion and does not vacate, the Court should retain jurisdiction over this lawsuit. Courts "regularly retain jurisdiction until a federal agency has complied with its legal obligations, and have the authority to compel regular progress reports in the meantime."[93] Although Defendants indicated Interior is "committed" to addressing the legal violations and publishing a supplemental EIS in a "timely manner,"[94] there have already been significant delays in this case to date that make this open-ended timeframe concerning.[95] Absent vacatur, it is especially important for the court to retain jurisdiction, given the high potential for prejudice from the limited remand proposed by Defendants.[96]

If the Court grants Defendants' motion for only a narrow remand without vacatur, Plaintiffs request that the court retain jurisdiction, require Defendants provide a schedule for completion of the remand process, and require Defendants provide regular status reports on their progress. Plaintiffs also retain their right to seek any relief necessary to protect their interests during the course of the remand.

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[93] *Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001).

[94] Beaudreau Decl. ¶ 11.

[95] Plaintiffs filed their Amended Complaint on August 13, 2020. Since then, there were delays with Defendants' completion of the administrative record and Defendants asked for multiple extensions for their briefing deadline. Pls.' Resp. to Defs.' Mot. for Extension of Time to File Resp. (ECF No. 110).

[96] *See supra* Part I.A–B.

CONCLUSION

This Court should deny the motion for voluntary remand without vacatur because Defendants' request for partial remand would unduly prejudice Plaintiffs and the Defendants have not met the high bar to depart from the default remedy of vacatur. Plaintiffs respectfully request this Court either order the completion of summary judgment briefing or order remand with vacatur of the rights-of-way, the 404 permit, and related decisions at issue in this case.

Respectfully submitted this 22nd day of March, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3) I certify that this brief complies with the type-volume limitations of Local Civil Rule 7.4(a)(2) because this memorandum contains 5637 words, excluding items exempted by Local Civil Rule 7.4(a)(4).

s/ Suzanne Bostrom
Suzanne Bostrom

CERTIFICATE OF SERVICE

I certify that on March 22, 2022, I caused a copy of the PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR VOLUNTARY REMAND to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system.

s/ Suzanne Bostrom
Suzanne Bostrom