

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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WESTERN WATERSHEDS PROJECT )  
126 S. Main St., Ste. B2 )  
Hailey, ID 83333, )  
) )  
SIERRA CLUB )  
2101 Webster St., Ste. 1300 )  
Oakland, CA 94612, )  
) )  
WYOMING WILDLIFE ADVOCATES )  
1650 Prosperity Lane, )  
Wilson, WY 83014, )  
) )  
and )  
) )  
GALLATIN WILDLIFE ASSOCIATION )  
745 Doane Rd. )  
Bozeman, MT 59718, )  
) )  
Plaintiffs, )  
) )  
v. )  
) )  
THOMAS L. TIDWELL, Chief, )  
U.S. Forest Service )  
1400 Independence Ave., SW )  
Washington, DC 20250, )  
) )  
and )  
) )  
SONNY PERDUE, Secretary of Agriculture, )  
U.S. Department of Agriculture )  
1400 Independence Ave., SW )  
Washington, DC 20250, )  
) )  
Defendants. )

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Civ. No.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This action challenges the United States Forest Service’s (“USFS”) long-term approval of the widely criticized practice of “artificial feeding” of wild elk, which the D.C.

Circuit and courts within this district have found to cause harmful effects to the wild elk population and other valuable resources in Wyoming. More specifically, this action challenges the USFS's approval of the Wyoming Game and Fish Commission's ("WGFC") request to amend a special use permit to include Alkali Creek Feedground, which is located on National Forest System ("NFS") land in the Bridger-Teton National Forest ("BTNF"). This feedground is being used to artificially attract and feed the region's wild elk herd—known as the Jackson elk herd—with hay, rather than allowing the elk to naturally disperse on the landscape to locations where natural forage is available. The 3.7 million acre BTNF comprises a large part of the Greater Yellowstone Ecosystem ("GYE")—the last remaining intact ecosystem in the lower forty-eight states. The BTNF is adjacent to Grand Teton National Park ("GTNP") and the National Elk Refuge ("NER"), and together with these ecologically and culturally significant public lands, sustains populations of iconic wildlife species such as elk, bison, and grizzly bears that contribute to the ecological integrity of the GYE.

2. In the challenged permit, the USFS decided to perpetuate the artificial feeding of elk at Alkali Creek Feedground in winter rather than abandoning—or at least phasing out—this outdated and environmentally damaging practice. Artificial winter feeding creates unnaturally dense concentrations of elk, causing deleterious impacts to elk and the surrounding environment. In particular, continued feeding at Alkali Creek Feedground is highly likely to cause or contribute to an outbreak of lethal chronic wasting disease ("CWD"), the equivalent of "mad cow" disease in deer and elk, or other diseases, which would devastate elk populations and cause cascading impacts to the function and stability of the GYE.

3. A significant portion of the Jackson elk herd is concentrated at feedgrounds on the NER during the winter. Alkali Creek Feedground is situated between two areas: to the west

there is a region where CWD is endemic, and to the east is the NER. Elk are known to frequently travel between Alkali Creek Feedground and the NER. The presence of a single infected individual at Alkali Creek Feedground would likely result in the introduction of this deadly disease to the NER, and its transmission to a significant majority of the Jackson elk herd. Because CWD remains persistent in the environment after the host has died, the GYE would essentially be permanently contaminated with the disease.

4. Although the USFS was aware of the potentially devastating environmental impacts of its decision to authorize winter feeding at Alkali Creek Feedground, the agency failed to give full and accurate consideration to alternatives to, and the environmental impacts of, the proposed action. Specifically, the USFS: failed to fully present the actual purpose and need for the action to the public, precluding the public's ability to be fully involved in this highly significant decision; declined to rigorously explore and evaluate all reasonable alternatives to the proposed action; fell far short of taking the required "hard look" at the contributions of the preferred alternative to the risk of the introduction and spread of CWD in the Jackson elk herd; and eschewed its obligation to offer a meaningful analysis of the cumulative impacts of the region's feedgrounds on forest and wildlife resources. Additionally, since the USFS issued its Record of Decision ("ROD") in December 2015, the agency has failed even to satisfy the mandatory conditions set forth therein, including the requirement to prepare annual reports examining the management practices of all feedgrounds on the BTNF, and recommend needed changes based on those annual evaluations. Therefore, the USFS's Final Supplemental Environmental Impact Statement ("FSEIS"), ROD, and special use permit for Alkali Creek Feedground are contrary to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m.

5. The USFS's decision to continue authorizing extensive artificial feeding operations on NFS land in the BTNF is even more arbitrary when considered in conjunction with the National Park Service ("NPS") and the Fish and Wildlife Service's ("FWS") joint decision to phase out artificial feeding on the NER, which is adjacent to the BTNF, and only a few miles west of Alkali Creek Feedground. In the 2007 Final Bison and Elk Management Plan and Environmental Impact Statement ("2007 Bison and Elk Management Plan"), issued jointly by those two agencies, the NPS and the FWS committed to ending the practice of artificial feeding based on the widely accepted view in the scientific community that the indefinite operation of large feedgrounds constitutes an unacceptable risk to the elk herd, other wildlife, and the surrounding environment. This view has been endorsed by this Court and affirmed by the D.C. Circuit, which upheld the 2007 Bison and Elk Management Plan only because the federal agencies committed to bringing the admittedly deleterious practice to an end over time. *See Defs. of Wildlife v. Salazar*, 698 F. Supp. 2d 141, 148 (D.D.C. 2010), *aff'd* 651 F.3d 112, 117 (2011). However, the USFS failed to meaningfully consider its feeding actions within the context of the NPS/FWS decision, and instead elected to perpetuate the feeding regime on the BTNF despite its acknowledged adverse impacts and risks of ecological catastrophe. Moreover, the USFS, in effect, delegated both the decision regarding Alkali Creek Feedground, and the setting of management goals for the Jackson herd as a whole, to the WGFC. In so doing, the agency ignored its own statutory management obligations for NFS lands set forth in the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 472a, 521b, 1600-1614, the Multiple-Use and Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531, and their implementing regulations. For all of these reasons, the USFS failed to consider an important aspect of the problem, failed to offer a rational connection between the facts found and the choice made, and relied on factors

that Congress did not intend. Therefore, the USFS's FSEIS, ROD, and special use permit for Alkali Creek Feedground were issued contrary to the standards and procedures demanded by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

6. For these reasons as well as those set forth below, Defendants have acted in a manner that is "arbitrary and capricious, an abuse of discretion," and "otherwise not in accordance with law," and "without observance of procedure required by law," within the meaning of the judicial review provision of the APA, 5 U.S.C. § 706(2). Accordingly, the USFS's decision to grant the special use permit should be vacated and remanded. *Id.*

### **JURISDICTION**

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question).

### **PARTIES**

8. Plaintiff Western Watersheds Project ("WWP") is a non-profit corporation with over 5000 members and supporters, and field offices in several western states. WWP is dedicated to protecting and restoring watersheds and wildlife in the American West through education, public policy initiatives, and legal advocacy. WWP and its members have longstanding interests in improving public lands management throughout the western United States.

9. Plaintiff Sierra Club is a non-profit corporation with approximately 750,000 members in chapters and groups in all 50 states. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth and to educate and enlist humanity to protect and restore the quality of the natural and human environment. Sierra Club and its members are actively involved in species and habitat protection on public land throughout the country.

10. Plaintiff Wyoming Wildlife Advocates (“WWA”) is a non-profit corporation based in Wilson, Wyoming. WWA works to promote science-based wildlife management that fosters ecosystem health and a natural balance between species in the state of Wyoming. Since its inception, WWA has had an interest in protecting Wyoming wildlife and promoting public awareness and understanding of regional wildlife issues. WWA and its staff actively participate in the conservation of wildlife species in the BTNF and the GYE by submitting comments on state and federal land and wildlife management plans and decisions, and by participating in other public engagement opportunities surrounding those decisions. WWA promotes public awareness and understanding of regional wildlife issues through its newsletter and social media.

11. WWA staff and supporters frequent the BTNF, the NER, the GTNP, and other areas within the GYE for recreation, wildlife viewing, wildlife photography, and aesthetic enjoyment. WWA staff and supporters seek to view and enjoy the resident wildlife, including wolves, grizzly bears, bison, and elk.

12. Plaintiff Gallatin Wildlife Association (“GWA”) is a small non-profit volunteer wildlife organization of approximately fifty members. Headquartered in Montana, GWA is composed of dedicated hunters, anglers, and other wildlife advocates in Southwest Montana and beyond. GWA’s mission is to protect habitat and conserve fish and wildlife for this and future generations. GWA has longstanding interests in supporting the sustainable management of fish and wildlife populations through fair chase public hunting and fishing opportunities that will ensure these traditions are passed on for future generations to enjoy.

13. Members of the WWP, Sierra Club, and the GWA regularly visit and will continue to visit the BTNF (including Alkali Creek Feedground), the NER, the GTNP, and other areas within the GYE to observe and otherwise benefit from the elk population, native

landscapes, and unspoiled ecological processes. Plaintiffs' members enjoy activities on these lands including hiking, wildlife viewing, wildlife photography, and aesthetic enjoyment.

Members of each of the Plaintiff organizations have demonstrated interests in the preservation and protection of elk and other wildlife in the BTNF and GYE, and actively work to conserve the natural ecosystems and restore them to their natural splendor. The USFS's recent authorization of feeding operations at Alkali Creek Feedground will perpetuate unnaturally high densities of elk in the area around the feedground and the region, which will result in adverse local and regional environmental impacts, as well as unnatural wildlife behaviors, and will fuel the introduction and spread of incurable, fatal wildlife diseases, resulting in significant and deleterious ecosystem-wide impacts that jeopardize the interests of Plaintiff organizations' members.

14. The legal violations alleged in this complaint, traceable directly to Defendants' conduct, cause concrete injury to the aesthetic, conservation, recreational, scientific, educational, and wildlife preservation interests of the members of the Plaintiff organizations, including by adversely affecting the behavior of the elk and other wildlife that Plaintiffs enjoy observing and otherwise benefit from, and by creating an enormous risk of disease transmission in the elk and other wildlife populations that Plaintiffs enjoy and otherwise benefit from. These actual, concrete interests of Plaintiff organizations' members have been, are currently being, and, absent relief from this Court, will continue to be adversely and irreversibly injured by Defendants' failure to comply with federal law. Relief from this Court, including vacatur of the challenged permit pending full compliance with NEPA and other legal requirements, will remedy Plaintiffs' injuries.

15. Defendant Thomas L. Tidwell is the Chief of the USFS and is directly responsible for the supervision, management, and control of the units of the National Forest System (NFS), including the BTNF. Accordingly, he is responsible for overseeing the USFS's decision challenged in this action and is sued solely in his official capacity

16. Defendant Sonny Perdue is the Secretary of Agriculture and is ultimately responsible for overseeing the work of the USFS, an agency within the Department of Agriculture. He is sued solely in his official capacity.

### **STATUTORY AND REGULATORY FRAMEWORK**

#### **A. The National Environmental Policy Act**

17. NEPA, 42 U.S.C. §§ 4331-4370m, is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Its purposes are to “help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment,” and to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” *Id.* §§ 1500.1(b) - (c).

18. The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA, *see* 40 C.F.R. §§ 1500-1508, which are “binding on all federal agencies.” *Id.* § 1500.3.

19. To accomplish its underlying goals, NEPA requires federal agencies to prepare a “detailed statement” regarding all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). This statement—known as an Environmental Impact Statement (EIS)—must describe (1) “the environmental impact of the proposed action,” (2) “the adverse environmental effects which cannot be avoided,” and (3) “alternatives to the



proposed action.” 42 U.S.C. § 4332(C)(i)-(iii). NEPA further provides that agencies “shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” *Id.* § 4332(E). This analysis of a reasonable range of alternatives to the agency’s proposed action is the “heart” of an EIS. 40 C.F.R. § 1502.14.

20. In preparing EISs and in otherwise implementing NEPA, agencies must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). Both the draft and final EIS must be circulated for public comment, and the agency must respond to comments received. *Id.* § 1503.4. The CEQ regulations further provide that federal agencies “shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” *Id.* § 1500.2(d). As the regulations themselves provide, “public scrutiny [is] *essential* to implementing NEPA.” *Id.* § 1500.1(b) (emphasis added).

21. Each EIS must consider the underlying federal “purpose and need” for the proposed action, and “rigorously explore and objectively evaluate” the projected environmental impacts of “*all* reasonable alternatives” for completing the proposed action. 40 C.F.R. §§ 1502.13, 1502.14 (emphasis added). These two requirements are interrelated, as the statement of purpose and need determines the scope of the range of reasonable alternatives to be considered.

22. In evaluating the alternatives of a proposed action, NEPA requires that agencies take a “hard look” at the environmental effects of the proposed action as compared with alternatives. *See* 40 C.F.R. §§ 1502.1, 1502.16. The EIS must assess the direct, indirect, and cumulative impacts of the proposed action on the environment, including adverse environmental

effects that cannot be avoided, *id.* § 1508.25. Direct effects are those “caused by the action and occur at the same time and place,” while indirect effects are those “caused by the action” that occur “later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8. Cumulative impacts are those that result from the “incremental impact[s]” of the proposed action when added to the impacts of other past, present, and reasonably foreseeable future actions, whether undertaken by other federal agencies or private third parties. *Id.* § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

23. At the time of its decision, the agency must prepare and issue “a concise public record of decision.” 40 C.F.R. § 1505.2. The ROD must state the agency’s decision, identify the alternatives considered, and describe the means adopted to avoid or minimize environmental harm. *Id.* Additionally, the ROD may provide for monitoring to ensure the agency’s decision is appropriately carried out, and may also establish mitigation and other conditions that, if incorporated into the ROD as part of the decision, “*shall* be implemented.” *Id.* § 1505.3 (emphasis added).

**B. The National Forest Management Act And Multiple-Use and Sustainable Yield Act**

24. In enacting the NFMA and MUYSA, Congress set forth factors that the USFS must consider when administering the NFS and its resources. When issuing site-specific management decisions, the USFS must take into account its statutory obligations to: provide for healthy and diverse forest ecosystems; ensure the sustained yield of forest resources, including wildlife; and balance environmental and commercial considerations. 16 U.S.C. §§ 528, 529, 1604(g)(3)(B).

25. NFMA and its regulations require the USFS to develop and implement land and resource management plans for units of the National Forest System. 16 U.S.C. § 1604(a). The plans must reflect the agency's consideration of its statutory mandates to develop and administer the national forests to secure water flows and provide a continuous supply of timber, and provide for a "diversity of plant and animal communities based on the suitability and capability" of the specific forest unit to enable the agency to meet its multiple-use objectives. *Id.* § 1604(g)(3)(B).

26. The MUSYA further provides that in managing NFS land and resources, the USFS must: balance the competing uses for outdoor recreation, range, timber, watershed, and wildlife and fish purposes; and provide for multiple use and sustained yield of the various products and services obtained from the National Forest lands. 16 U.S.C. §§ 475, 528, 529.

27. Pursuant to the MUSYA, the USFS has promulgated regulations governing special use permits, which provide minimum requirements that each applicant must meet. 36 C.F.R. § 251.54. Specifically, the USFS must ensure that: "the proposed use is consistent with" applicable Federal "laws, regulations, orders, and policies," including NFMA, the MUSYA, and statutes establishing and governing national forests, and "with applicable State and local health and sanitation laws"; "[t]he proposed use is consistent or can be made consistent with standards and guidelines in the applicable [forest management plan]"; and "[t]he proposed use will not pose a serious or substantial risk to public health or safety." *Id.* § 251.54(1)(e)(i)-(iii).

**C. The Administrative Procedure Act**

28. Under the APA, a reviewing court "shall" set aside agency actions, findings, or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or when they are adopted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). An agency action is arbitrary and capricious if the agency

“relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,” or if the agency’s decision “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

29. When reviewing agency action under the APA, the court must ensure that the agency reviewed the relevant data and articulated a satisfactory explanation establishing a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfr. Ass’n*, 463 U.S. at 43. The agency’s failure to do so renders its decision arbitrary and capricious. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

#### **FACTS GIVING RISE TO PLAINTIFFS’ CLAIMS**

##### **A. Artificial Elk Feeding, the 2008 Feedgrounds EIS, and the National Elk Refuge’s Planned Feeding Phase-Out.**

30. The Jackson elk herd comprises one of the largest concentrations of elk in North America. The elk herd features prominently in the region’s history, culture, and economy. The artificial feeding of elk began in the early 1900s in response to high winter mortality. The practice has continued on federal lands in the BTNF and in the neighboring NER, and has consistently been referred to as a “program” by the responsible federal and state agencies.

31. Today, the artificial feeding program is primarily driven by a desire to prevent elk from entering private lands and feeding on privately-owned haystack yards. According to the Department of the Interior—the parent agency for both NPS and the FWS, the agencies responsible for managing the elk populations in the GTNP and NER—artificial feeding leads to a seasonal concentration of elk and bison which is “an unnatural situation that has contributed to . . . an increased risk of potentially major outbreaks of exotic diseases,” including CWD, and

“damage to and loss of habitat.” 2007 Bison & Elk Mgmt. Plan, at vi. However, despite the widely accepted knowledge that artificial feeding causes significant problems for wildlife in the GYE—which includes the BTNF—the USFS continues to authorize the practice on NFS lands.

32. Recognizing the disease and other risks inherent in continuing to concentrate large numbers of elk on feedgrounds, in 2007, the NPS and the FWS jointly issued the Bison and Elk Management Plan (“2007 Bison and Elk Management Plan”), which called for an increase in forage production and an eventual phase-out of artificial feeding on the NER.

33. The 2007 Bison and Elk Management Plan was challenged in this Court by conservationists for failure to specify a time certain for ending the harmful practice of artificial feeding. *See Defs. of Wildlife v. Salazar*, 698 F. Supp. 2d 141 (D.D.C. 2010), *aff’d* 651 F.3d 112 (2011). Although the plan was ultimately upheld, both this Court and the U.S. Court of Appeals for the District of Columbia Circuit strongly suggested that it would be arbitrary and capricious for the NPS and the FWS to “categorically refuse[] to phase out the winter feeding program [on the NER] in spite of all the evidence in the record about the dangers of [artificial] feeding.” 698 F. Supp. 2d at 148; 651 F.3d at 117. In a recent brief filed in the ongoing appeal of *Mayo v. Jarvis*, No. 16-5282, a case challenging the annual elk hunt in the GTNP, the NPS and the FWS represented to the D.C. Circuit that an implementation plan to phase out artificial feeding on the NER is currently under development and will be released later this year. *See Answering Br. for Fed. Appellees, Mayo v. Jarvis*, No. 16-5282 (D.C. Cir. Mar. 2, 2017).

**B. CWD Disease Transmission Within Concentrated Elk Populations**

34. CWD is a chronic, fatal disease that affects the central nervous system of ungulates, including elk, mule and white-tailed deer, and moose. CWD is a transmissible spongiform encephalopathy (“TSE”) caused by an abnormal, non-living prion protein. Its effects

on infected individuals are devastating; the onset of disease is slow, and those infected “experience progressive loss of body condition, reluctance to move unless approached closely, increased drinking, depression, and eventually death.” FSEIS App’x 7 at 2. All animals that present with clinical signs of CWD eventually die. Although the specific mode of transmission has not been identified, evidence indicates that the disease is transmitted through contact with infected animals or carcasses, and through contact with soil, plants, or feed contaminated with the urine, feces, and/or saliva of infected animals. The long latency period (twelve to thirty-four months) allows for a substantial portion of the population to become infected before the presence of the disease is even detected. Further, recent research has shown that the infectious CWD prions “likely outlive their hosts” and persist in the environment once introduced. *Id.* at 5. Studies suggest that infectious CWD prions persist in the soil for many years, and can infect individuals that graze on infected soil. Therefore, uninfected animals are at risk of contracting CWD from the surrounding environment long after the infected individual has passed through or died. There is no known vaccine or cure for CWD; the best tools available to managers to mitigate the impacts of CWD are decreasing the concentration of elk, allowing elk and deer to spread out naturally across the landscape, and allowing natural predators to remove infected individuals, thereby reducing the potential for elk-to-elk contact between uninfected and infected individuals.

35. Although CWD has yet to be discovered among the Jackson elk herd, the disease “has been moving across the state in recent years.” FSEIS at 83. Indeed, its presence has been detected in deer within forty miles of Alkali Creek Feedground.

36. The artificial congregation of elk at feedgrounds poses a distinct threat to the elk population. In fact, it is widely acknowledged by experts that “congregating elk at very high

densities at feedgrounds is likely to increase the spread of disease because of an increased number and rate of potential infectious contacts with infected individuals and an infected environment.” FSEIS App’x 7 at 1. CWD infection rates of well over fifty percent have been documented within confined elk and deer populations.

37. Should CWD arrive in the area, its impacts on the Jackson herd—and, by extension, the broader ecosystem—would be devastating. Feedgrounds such as the one at Alkali Creek “could become continuous sources of disease transmission from animal to environment and back to animal.” FSEIS App’x 7 at 5. The USFS itself acknowledges that because CWD is easily transmitted and is likely “functionally related to ungulate density,” the artificial concentration of elk at Alkali Creek Feedground will contribute to the prevalence, incidence, and persistence of the disease. FSEIS at 106. While the density of free ranging elk in western Wyoming is estimated to range, on average, from 0.26 elk/km<sup>2</sup> to 0.31 elk/km<sup>2</sup>, on feedgrounds the density of elk can exceed 25,000 elk/km<sup>2</sup>. FSEIS App’x 7 at 10. The introduction and establishment of CWD in such an environment threatens to decimate the Jackson herd, resulting in extensive mortalities within the BTNF, the NER, and the GYE as the Jackson herd moves between feedgrounds and intermingles with other wildlife populations.

**C. Alkali Creek Feedground**

38. Alkali Creek Feedground is located in the Gros Ventre watershed. The feedground is adjacent to the Gros Ventre Wilderness, and lies within one mile of the Gros Ventre River.

39. After emerging from its high mountain headwaters, the Gros Ventre River flows generally to the southwest, with the NER near its confluence with the Snake River in Jackson

Hole, WY. Elk regularly travel between the NER and the Alkali Creek Feedground areas in the Gros Ventre Valley.

40. In 2012, the WGFC counted 3300 elk in the Gros Ventre Valley. This number is well below the carrying capacity of the native winter range. The USFS acknowledged that “[a]dequate amount of winter range appears to be available for the 3000 elk that currently use the Gros Ventre Valley, especially in mild or average winters.” FSEIS App’x 8 at 64. Therefore, the “primary use” of Alkali Creek Feedground is not to maintain or increase the elk population, but “to prevent movement of elk” to private lands and to the NER. *Id.*

41. Alkali Creek Feedground is located in a “natural bottleneck for elk movement and along a natural elk travel way,” FSEIS at 114, and “is the most strategically-positioned to limit elk movements.” FSEIS at 83. It is also the “most westerly” feedground of the three in the Gros Ventre watershed, and is the closest to both private lands and the NER. FSEIS at 82-83. According to the USFS, siting a feedground at the Alkali Creek location is desirable because the other two feedgrounds in the Gros Ventre watershed “are less effective in limiting elk movement” to the NER and private lands. FSEIS at 108.

42. In 2012, some 2345 elk were recorded as having fed at Alkali Creek. FSEIS App’x 1 at 2. Feeding begins in late December at the earliest, and extends to mid-April at the latest.

43. While the feedgrounds may help control elk movement, they do not *prevent* elk movement. As the USFS acknowledges, “[i]nterchange between the elk that use the Gros Ventre watershed . . . and the [NER] is well documented.” FSEIS at 82. Indeed, “[s]ome elk *routinely* migrate out of the Gros Ventre watershed to the vicinity of Kelly, Wyoming, and on to the [NER], and the reverse movement occurs as well.” *Id.* (emphasis added). Since 1999, increased



wolf pressure has heavily influenced elk movement, often driving elk to congregate into even larger groups and move between feedgrounds and onto the NER. *Id.*

44. Between March and December 2012, up to 700 elk were observed moving down the Gros Ventre watershed towards the NER. FSEIS App'x 8 at 59-60. 700 elk represents twenty-five percent of the Gros Ventre herd. *Id.*

45. Alkali Creek Feedground is situated between the NER and the CWD endemic area west of Dubois, Wyoming. CWD has been detected in mule deer within forty miles of Alkali Creek Feedground.

**D. The Alkali Creek Feedground Supplemental EIS and ROD**

46. In 2012, the USFS issued a notice of intent to supplement the 2008 EIS to provide the long-awaited analysis for and decision on the WGFC's request for a special use permit to operate Alkali Creek Feedground. A Draft EIS was published on April 16, 2013. The resulting FSEIS and Draft ROD were published on January 23, 2015.

47. In the FSEIS, the USFS asserted that the proposed action—the issuance of a special use permit to the WGFC to continue to operate Alkali Creek Feedground—was needed because: (1) the WGFC “wishe[d]” to prevent movement of elk from the BTNF to private land or the NER; and (2) the BTNF forest plan directed the agency to support the WGFC's population management objectives for game species.

48. The FSEIS analyzed in depth only two alternatives—the No Action Alternative of denying the permit and the Preferred Alternative of issuing the permit. Although commenters proposed many other feasible alternatives—including phasing out artificial feeding, improving winter range and protecting migration routes, and improving coordination with the WGFC, the NPS, and the FWS to better define and achieve regional elk population objectives for federal

lands in the region without artificial feeding—the USFS refused to explore them more thoroughly. In dismissing these proposals, the USFS stated simply that its action would not “affect several of the impacts” associated with artificial feeding because the WGFC “informed the [USFS]” that it “intend[s] to continue” operating feedgrounds on other private, federal, and state lands. FSEIS at 17. The USFS did not explain what “several” impacts it considered, or how it determined that those impacts would not be affected.

49. Although the FSEIS acknowledged that Alkali Creek Feedground “could become a reservoir for CWD infection,” the agency assumed that the continuation of operations there for the next eleven years, by itself, would make only a negligible contribution to the risk of disease introduction and spread. *Id.* at 114. The agency stated at several points that “the effect of a CWD infection on elk numbers in the Gros Ventre watershed does not change substantially between” the No Action and Preferred Alternative because “other feedgrounds in the area would remain operational.” *See, e.g., id.* at 114, 116. By equating the impacts from the operation of Alkali Creek Feedground to those from the operation of all feedgrounds, the FSEIS did not account for the role that this particular feedground plays in increasing the risk of infection to this herd.

50. Despite Alkali Creek Feedground being the “most strategically-positioned” of the three Gros Ventre feedgrounds to help control elk movement in the watershed, the FSEIS concluded without explanation that the cessation of feeding there “would likely not reduce the chances that CWD would become established in the Jackson herd.” *Id.* at 83. The USFS declined to assess whether the siting of this specific feedground between the CWD endemic area and the GTNP and NER increases the risk of infection by potentially attracting elk and other ungulates from both locations.

51. In the FSEIS, the USFS failed to address the NPS and FWS's commitment to phasing out artificial feeding on the adjacent NER, despite ostensibly tiering to the 2007 Bison and Elk Management Plan. Although the USFS "agree[d]" that the document "should be added to the list of actions considered in the Cumulative Effects Analysis," FSEIS App'x 8 at 78-79, the agency did not meaningfully assess how the NPS and FWS's commitment to phasing out artificial feeding would impact and/or alter the assumptions underlying the USFS's own analysis of the environmental consequences of, and reasonable alternatives to, operating feedgrounds on NFS land for the foreseeable future.

52. The FSEIS also failed to discuss the overall, combined impacts and interregional effects expected from the operation Alkali Creek Feedground along with the other feedgrounds in WGFC's feeding program. The FSEIS consistently refers to artificial feeding as a winter elk management "program," *see* FSEIS at 1, and acknowledges that the elk do not respect boundaries. However, in its cumulative impacts analysis, the FSEIS only examines the impacts of Alkali Creek Feedground in the context of the two other two feedgrounds in the Gros Ventre watershed. Although Plaintiffs specifically urged that the impacts of Alkali Creek Feedground be considered cumulatively with the impacts of the other feedgrounds in the same "program" that operate concurrently on adjacent land and implicate the same disease risks, the USFS declined to address any impacts from those other feedgrounds.

53. At several points in the FSEIS, the USFS insisted that it "does not have the authority to direct the [WGFC] to stop all feeding outright" and suggested that the WGFC has exclusive jurisdiction over state wildlife, even on federal land. *See, e.g.*, FSEIS at 17; FSEIS App'x 8 at 42. In responses to comments, the FSEIS states unequivocally that "[i]t would be within [the] WGFC's purview, not the [USFS's], to consider transitioning elk to natural forage

instead of feeding them in the winter.” FSEIS App’x 8 at 42. The FSEIS further implies that the USFS *must* approve the special use permit because the WGFC needed to meet its management objectives, and because the FWS needed to meet its management objectives for the NER. *See id.* at 64, 67. At no point did the USFS examine whether the WGFC’s management objectives were compatible with federal law and management objectives. Nor does the FSEIS contain evidence of coordination with the NPS and the FWS to ensure compatibility with the planned phase-out of artificial feeding on the NER.

54. On March 16, 2015, Plaintiffs submitted objections to the FSEIS and Draft ROD, pursuant to 36 C.F.R. § 218 *et seq.*, highlighting their environmental and procedural concerns with the FSEIS and thereby exhausting their administrative remedies for this action. The USFS and Plaintiffs attempted to resolve the objections through a meeting, but were unsuccessful.

55. On December 1, 2015, eleven months after the release of the FSEIS, the USFS issued the Final ROD and an “Erratum” to the FSEIS. In the Erratum, the USFS significantly revised its “statement of purpose and need” for the analysis, providing simply that “[t]his action is needed, because the existing authorization for Alkali Creek Feedground will expire on 12/31/2015.” Erratum at 2. This new statement of objectives is far broader (and more amorphous) than the original, and deviates sharply from the goals that purportedly informed the agency’s analysis in the FSEIS. However, the USFS did not revisit its alternatives discussion to assess the reasonableness of certain alternatives in light of its newly revised goals. As a result, the range of alternatives considered were circumscribed by the USFS’s purpose and need statement as originally articulated in the FSEIS. The Erratum was issued on the same day as the ROD, and was not circulated for public comment, or indeed, subjected to any public scrutiny before the ROD was issued.

56. The ROD sets forth the USFS's decision to amend the 2008 WGFC feedground special use permit to add authorization for feeding at Alkali Creek Feedground, but stated it would not actually amend the permit until a new CWD management plan was updated and determined to be adequate.

57. The ROD also requires the USFS to "review the management practices of all feedgrounds on the [BTNF] annually and prepare a report recommending any needed changes." ROD at 4.

58. The USFS issued a one-year special use permit to the WGFC for feeding at Alkali Creek Feedground on December 22, 2015.

59. On April 22, 2016, the WGFC adopted the CWD Management Plan. Despite a lukewarm review by USFS officials, the agency approved the plan.

60. On December 9, 2016, the USFS issued the amendment to the twenty-year special-use authorization, which is challenged herein. The amendment authorizes the WGFC to conduct artificial feeding at Alkali Creek Feedground until 2028.

61. Despite the ROD's requirement to issue annual reports examining the management practices of all feedgrounds on the BTNF, upon information and belief, the USFS has not done so.

62. CWD has continued to move steadily across the state. Between 2001 and 2017, the CWD endemic area expanded an average of two million acres per year. *See* Exhibit A. This is a particular cause for concern given the high concentration of elk observed at feedgrounds on the NER. This past winter, 8879 elk were counted on feed on the NER, which represents over *eighty percent* of the Jackson elk herd. Mike Koshmrl, *Final Refuge Elk Count: 8880*, Jackson Hole News & Guide (Mar. 2, 2017), <http://www.jhnewsandguide.com/news/environmental/final->

refuge-elk-count/article\_94832511-8fa2-5b0c-9bea-5a18cad30a88.html. Thus, the introduction of CWD to the NER could result in the infection of essentially the entire Jackson elk herd, unless steps are taken to expeditiously reduce the artificial feeding (and the artificially high concentrations) of elk. The frequency with which elk travel between Alkali Creek Feedground and the NER, coupled with the siting of Alkali Creek Feedground between the NER and the CWD endemic area—which is *less than forty miles* from the feedground—adds to the urgency of developing a management plan that fully analyzes and addresses the local and regional environmental impacts of artificial feeding.

### **PLAINTIFFS' CLAIMS FOR RELIEF**

#### **Claim 1 – Violations of NEPA**

63. This First Claim for Relief challenges Defendants' violations of the National Environmental Policy Act, 42 U.S.C. § 4321-4370m, and NEPA's implementing regulations in approving the FSEIS, ROD, and amended special use permit. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706. Defendants violated NEPA and federal regulations in multiple respects through issuance of the challenged decisions, including but not limited to the following.

64. By summarily dismissing from detailed discussion feasible alternatives that would meet the action's federal purpose—i.e., management of the elk herd in accordance with the agency's statutory mandates and forest policies—the USFS violated its obligations under NEPA to “study, develop, and describe appropriate alternatives to recommended courses of action,” 42 U.S.C. § 4332(E), and to “[r]igorously explore and objectively evaluate *all* reasonable alternatives,” 40 C.F.R. § 1502.14 (emphasis added). The USFS's refusal to give detailed consideration to phasing out artificial feeding—or indeed, to *any* other alternatives besides the

Preferred Action and the No Action alternative—cannot be reconciled with the agency’s legal duty to give due consideration to *all* reasonable alternatives, *see* 40 C.F.R. § 1502.14, nor can it be reconciled with the D.C. Circuit’s ruling in *Defenders of Wildlife*, which provided that to “categorically refuse” to phase out artificial feeding on federal lands would be “unreasonable” in light of the harmful impacts, 651 F.3d at 117. Therefore, the USFS’s discussion of alternatives must be overturned as “arbitrary, capricious, an abuse of discretion” and otherwise “not in accordance with law” within the meaning of the APA, 5 U.S.C. § 706(2).

65. By failing to solicit public comments on the substantial changes to the statement of purpose and need made in the Erratum to the FSEIS, the USFS violated its obligation under NEPA and its implementing regulations to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b). The statement of purpose and need “delimit[s] the universe” of reasonable alternatives. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). Despite significantly revising its original statement of objectives in a way that resulted in a statement that was far broader (and far more amorphous), the USFS failed to reevaluate its range of alternatives in light of its newly stated goals. The agency’s action is even more untenable given that the agency made the alterations not between the draft and final EIS, but in a so-called “Erratum” to the final EIS issued on the same day as the ROD, undermining the NEPA process by precluding public comment, and violating the spirit and intent of the public participation provisions of NEPA and its implementing regulations. The USFS’s actions do not evince a diligent effort to “encourage and facilitate public involvement” “to the fullest extent possible,” as required by CEQ regulations. 40 C.F.R. § 1500.2. To the contrary, the USFS’s actions allowed the agency’s action to avoid the “public scrutiny” that is “essential to implementing NEPA.” *Id.*

§ 1500.1(b). Therefore, the USFS violated NEPA's public comment requirement, and its actions are "arbitrary, capricious, an abuse of discretion" and otherwise "not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2).

66. By discounting, dismissing, and minimizing the impact of the operation of Alkali Creek Feedground "itself" on the risk of the introduction and spread of CWD in the Jackson elk herd, the USFS failed to take the legally mandated "hard look" at the contributions of the Preferred Alternative to the adverse impacts on the elk herd and surrounding environment. *See* 40 C.F.R. §§ 1502.1, 1502.16. By equating the impacts from the operation of Alkali Creek Feedground to those from the operation of all feedgrounds, the USFS failed to account for the role that this particular feedground will likely play in increasing the risk of infection, and gave only cursory consideration to those impacts before summarily dismissing them without the in-depth analysis that such a major impact demands. *See* 40 C.F.R. § 1502.2(b) (requiring agencies to discuss impacts "in proportion to their significance"). Therefore, the USFS violated NEPA and its implementing regulations, and its actions are therefore "arbitrary, capricious, an abuse of discretion" and otherwise "not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2).

67. When the USFS entirely failed to account for the NPS and the FWS's joint decision to phase out artificial feeding on the NER, despite ostensibly tiering to that decision document, the USFS violated NEPA by ignoring reasonably foreseeable environmental impacts, and insisting without explanation that they were not of concern. *See* 40 C.F.R. §§ 1502.15, 1508.8(b) (requiring agencies to account for those effects that are "later in time or further removed in distance, but are still reasonably foreseeable"). The USFS's conclusory statements demonstrate that the agency did not take a "hard look" at the environmental consequences of its



action. As a result, the USFS violated NEPA and its implementing regulations by arbitrarily and capriciously failing to both consider an important aspect of the problem, and offer a reasonable explanation for its decision. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43.

68. By failing to take a “hard look” at the incremental impacts of the operation of Alkali Creek Feedground when added to the impacts of other past, present, and reasonably foreseeable actions undertaken by federal agencies *and* private parties, the USFS violated its obligation under NEPA to evaluate the “cumulative impacts” of a proposed action. 40 C.F.R. §§ 1508.7, 1508.25. The USFS’s discussion of cumulative impacts is legally deficient for several reasons, including, but not limited to the following: (1) the improperly narrowed scope of the geographic area in which the effects of Alkali Creek Feedground will be felt, which serves to exclude from consideration other past, present, or likely future actions that occur *in the same geographic area*, and will combine with the impacts of the proposed action; (2) the failure to take a “hard look” at the impacts that are expected in the area from the operation of Alkali Creek Feedground; (3) the failure to reasonably identify the other actions that have had/are expected to have impacts in the same area; (4) the failure to take a “hard look” at the expected impacts from those other actions and their effects on the implementation of the USFS’s decision; and (5) the failure to adequately disclose and discuss the overall, combined impacts of the WGFC’s artificial feedground program—which includes those feedgrounds that the WGFC operates on adjacent federal and private land—and the NPS and FWS’s plan to phase out artificial feeding on the NER. *See Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 345 (D.C. Cir. 2002). Although the USFS purports to address cumulative impacts, those sections of the FSEIS offer no actual analysis, only conclusory assertions. As a result, the USFS’s ability to fully address and mitigate the impacts from the proposed action was severely hampered. Such cursory treatment

of cumulative impacts is insufficient under NEPA and its implementing regulations and is therefore “arbitrary, capricious, an abuse of discretion” and otherwise “not in accordance with law” within the meaning of the APA, 5 U.S.C. § 706(2).

69. By failing to prepare an annual report reviewing the management practices of feedgrounds operating on NFS lands in the BTNF, the USFS violated its obligation under NEPA to abide by its own mandatory conditions set forth in the Alkali Creek Feedground ROD. 40 C.F.R. §§ 1505.2, 1505.3. Therefore, the agency’s failure to satisfy this binding condition is “arbitrary, capricious, an abuse of discretion” and otherwise “not in accordance with law” within the meaning of the APA, 5 U.S.C. § 706(2), and the ROD and permit issued pursuant to it must be set aside. Alternatively, the USFS has unlawfully withheld and unreasonably delayed action required by law and by the agency’s own binding ROD by failing to prepare and issue these annual reports, in violation of 5 U.S.C. § 706(1).

**Claim 2 – Violations of the APA**

70. By failing to articulate a reasoned explanation for its decision to permit artificial feeding on federal lands for the foreseeable future in light of the NPS and the FWS’s 2007 decision to phase out artificial feeding on the NER, the USFS acted arbitrarily and capriciously. The USFS asserted that the operation of Alkali Creek Feedground, by itself, will have a negligible impact on the elk herd and surrounding environment. However, Alkali Creek Feedground is not occurring by itself, and this assertion directly conflicts with the view of other federal agencies—that the indefinite operation of large feedgrounds constitutes an unacceptable risk to the elk herd and surrounding environment. *See Defs. of Wildlife*, 651 F.3d at 117. The USFS has failed to provide a rational explanation for why it determined to authorize the continued operation of Alkali Creek Feedground when faced with overwhelming evidence of the

harm caused by artificial feeding, as well as commitments by its sister agencies to phase out artificial feeding to reduce harm to the elk herd. Therefore, the agency's action is arbitrary and capricious within the meaning of the APA, 5 U.S.C. § 706(2). *See id.*

**71.** By deferring the decision regarding Alkali Creek Feedground and management goals for the Jackson herd to the WGFC, the USFS ignored its own statutory management obligations for NFS lands and improperly relied on factors that Congress did not intend for it to consider. *See Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43. With the NFMA and MUUSA, Congress articulated factors for the USFS to rely upon when administering the NFS and its resources. *See* 16 U.S.C. §§ 528, 529, 1604(g)(3)(B); 36 C.F.R. § 251.54. Although these mandates bestow discretion on the USFS to balance multiple-use needs, they do not permit the USFS to simply defer management of NFS land and resources to a state agency. By failing to examine the proposal in the context of its own management obligations and instead deferring completely to Wyoming's objectives to make its decision, the USFS arbitrarily and capriciously relied on factors Congress did not intend for it to consider, in violation of the APA, 5 U.S.C. § 706(2). *See Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request that this Court:

- (1) Declare that the USFS's decision to amend the WGFC's special use permit to allow operation of Alkali Creek Feedground as described herein, violates NEPA and the APA;
- (2) Set aside and remand the FSEIS, the ROD, and the special use permit pending preparation of a new EIS and ROD consistent with the requirements of NEPA, the NFMA, the MUSYA, and the APA;

(3) Enjoin Defendants from authorizing the continued operation of Alkali Creek Feedground until they have fully complied with all of their obligations under NEPA, the NFMA, the MUSYA, and the APA;

(4) Compel Defendants to comply with their legal obligations and mandatory requirements in their own ROD by preparing and issuing annual reports examining the management practices of all feedgrounds on the BTNF, and recommending needed changes based on those annual evaluations;

(5) Award Plaintiffs their attorneys' fees and costs; and

(6) Grant Plaintiffs such other and further relief that the Court may deem is just and proper.

Respectfully submitted this 5th day of June, 2017.

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