

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE )  
1130 17th Street, NW )  
Washington, DC 20036 )

SIERRA CLUB )  
710 E. Garfield, #327 )  
Laramie, WY 82070 )

NATIONAL WILDLIFE REFUGE )  
ASSOCIATION )  
1001 Connecticut Ave. NW, Suite 905 )  
Washington, DC 20036 )

Plaintiffs, )

v. )

U.S. FISH AND WILDLIFE SERVICE )  
1849 C Street, NW )  
Washington, DC 20240 )

Defendant. )

Case No. 1:19-cv-00746-TSC

Hon. Tanya S. Chutkan

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**FIRST AMENDED AND SUPPLEMENTAL COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiffs in this case challenge the U.S. Fish and Wildlife Service’s (the Service’s) issuance on December 31, 2019 of an unlawful and inadequate Step-Down Plan for reducing the Service’s program for artificial feeding of wild elk wintering on the Jackson Hole National Elk Refuge, where feeding exposes the elk to a host of severe disease threats.

2. The Service began feeding elk on the National Elk Refuge at the beginning of the 20th century in an attempt to prevent starvation of elk overwintering on the Refuge and to address conflicts between elk and local ranchers. Though originally well-intentioned, today this

artificial feeding program threatens grave harm to elk on the Refuge and throughout the Greater Yellowstone Ecosystem, which encompasses the Refuge along with nearby Yellowstone and Grand Teton National Parks and surrounding public and private lands. Feeding causes elk to congregate in unnatural numbers and density on the Refuge, facilitating the spread of disease within the herd. In particular, the fed elk are at a high risk of contracting and transmitting chronic wasting disease (“CWD”), a debilitating and deadly condition similar to mad cow disease that for decades has been spreading westward across the state of Wyoming toward the Refuge. The Refuge feeding program, which is the largest single wildlife feeding operation in North America, therefore threatens to become a vector for contagion of lethal disease that could harm the Refuge and spread throughout the Greater Yellowstone Ecosystem to infect Wyoming, Montana, and Idaho elk populations.

3. Chronic wasting disease is no longer a “someday” threat to the Refuge and its elk. On November 21, 2018, the Wyoming Game and Fish Department confirmed detection of chronic wasting disease in a mule deer that was struck and killed by a vehicle within Grand Teton National Park, directly adjacent to the Refuge. This detection places CWD on the doorstep of the National Elk Refuge—if it is not already present but undetected there.

4. The solution to this imminent wildlife disease crisis is clear: the Service must stop feeding wild elk, thereby reducing the numbers and density of elk on the Refuge so that diseases cannot be so easily transmitted through the elk population. As the D.C. Circuit admonished in reviewing the Service’s National Elk Refuge feeding program in 2011, “unmitigated continuation of supplemental feeding would undermine the conservation purpose of the National Wildlife Refuge System” in violation of the National Wildlife Refuge System

Improvement Act (“Improvement Act”), Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified at 16 U.S.C. §§ 668dd-668ee). Defs. of Wildlife v. Salazar, 651 F.3d 112, 117 (D.C. Cir. 2011).

5. However, the Service’s recently issued Step-Down Plan fails to respond to the urgent need for reform of the Refuge feeding program or the mandates of the Improvement Act. Instead, in deference to objections from the State of Wyoming, the Step-Down Plan continues the Refuge supplemental feeding program virtually unchanged for at least the next two years. Even at that point, it offers only a speculative prospect that the agency may implement what it has described as its “principal strategy” for ultimately reducing elk reliance on artificial feeding—a short delay in the onset of winter feeding that the Service hopes may someday teach some future elk to seek natural winter forage rather than migrating annually to the Refuge’s artificial feedlines. Even if this strategy is ever implemented and proves to be effective, the Service has no rational basis to conclude that it will shield the Refuge elk population from looming wildlife disease threats. This is because the Service failed entirely to consider the fundamental question of what level of reduction in feeding is necessary to minimize disease prevalence and transmission risk sufficiently to prevent widespread infection of the Refuge elk with disease. In this regard, the agency’s Step-Down Plan defines success at a level of reduced feeding that would still leave nearly half of the Jackson elk herd—5,000 elk—densely concentrated on artificial feedlines for more than 50 days each winter. According to Dr. Thomas Roffe, the Service’s own former Chief of Wildlife Health for the administrative region that encompasses the National Elk Refuge, this level of artificial feeding “still leaves a substantial risk of catastrophic disease propagation” in the Jackson elk herd. Thomas J. Roffe, Ph.D., D.V.M., Draft Step-Down Plan, Bison and Elk Mgmt.: A Review 10-11 (Oct. 28, 2019) (“Roffe

Review”). Nevertheless, the Service failed to consider this critical issue, much less to heed, or even acknowledge, Dr. Roffe’s warning.

6. As the recent confirmation of CWD in Jackson Hole has demonstrated, it is critical to act now to mitigate the effects of disease on the iconic Jackson Hole elk herd. The window for preventing, or at least minimizing, the impact of CWD on the Refuge and beyond is swiftly closing. Because the Service’s Step-Down Plan fails to rationally respond to the looming wildlife disease threat facing the Refuge, it violates the Improvement Act. Further, the Service’s failure to consider important factors bearing upon the environmental effects of, and alternatives to, the Step-Down Plan violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq. Because the Service’s unlawful conduct presents an imminent threat to one of our nation’s most revered wildlife populations and the National Elk Refuge itself, Plaintiffs now turn to this Court for relief.

### **JURISDICTION AND VENUE**

7. This action arises under the Improvement Act, NEPA, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, which waives the Service’s sovereign immunity, see id. § 702.

8. This Court has jurisdiction over Plaintiffs’ claims pursuant to 28 U.S.C. § 1331 (federal question), and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Plaintiffs Defenders of Wildlife and National Wildlife Refuge Association and Defendant U.S. Fish and Wildlife Service reside in this District.

## **PARTIES**

10. Plaintiff Defenders of Wildlife (“Defenders”) is a Washington D.C.-based non-profit membership organization dedicated to the protection of all native animals and plants in their natural communities, including on our country’s national wildlife refuges, the only system of federal lands dedicated specifically to the conservation and management of wildlife.

Defenders has more than 349,000 members across the nation.

11. Plaintiff Sierra Club is a national non-profit organization with 67 chapters and more than 3.5 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

12. Plaintiff National Wildlife Refuge Association (“NWRA”) is a Washington D.C.-based non-profit organization dedicated to protecting, enhancing, and expanding the National Wildlife Refuge System—lands set aside by the American people to protect our country’s diverse wildlife heritage. By combining policy, grassroots development, and public education objectives, NWRA works to strengthen the ecological integrity of our national wildlife refuges and thus to ensure a diverse spectrum of plants and wildlife well into the future. NWRA has among its membership and governing board numerous individuals who have repeatedly visited the iconic Jackson Hole National Elk Refuge.

13. Plaintiffs’ members use, live, work, hunt, and recreate in the Jackson Hole area and throughout the Greater Yellowstone Ecosystem. Members of each of the Plaintiff organizations visit the National Elk Refuge, Grand Teton National Park, and other areas within

the Greater Yellowstone Ecosystem to observe and conserve wildlife, natural landscapes, and unspoiled ecological processes.

14. The Service's authorization of continued feeding operations within the National Elk Refuge under the challenged Step-Down Plan perpetuates unnaturally high densities of elk on the Refuge, causing unnatural wildlife behaviors and amplifying the spread of wildlife disease, thereby resulting in significant, ecosystem-wide impacts. The legal violations alleged in this complaint accordingly cause direct injury to the aesthetic, conservation, recreational, scientific, educational, and wildlife preservation interests of the members of the Plaintiff organizations.

15. These interests of Plaintiffs' members have been, are being, and, unless the relief sought here is granted, will continue to be adversely and irreparably injured by the Service's failure to comply with federal law. These are actual, concrete injuries, traceable to the Service's conduct, that would be redressed by the requested relief. Plaintiffs have no adequate remedy at law.

16. Defendant U.S. Fish and Wildlife Service is the federal agency that administers the National Elk Refuge, including by managing and conducting the supplemental elk feeding program. The Service issued the challenged Step-Down Plan and related environmental analysis documents on December 31, 2019.

## **BACKGROUND**

### **I. SUPPLEMENTAL FEEDING ON THE NATIONAL ELK REFUGE**

17. The National Elk Refuge was set aside by Congress in 1912 as a "winter game (elk) reserve." Act of Aug. 10, 1912, Pub. L. No. 62-261, 37 Stat. 293 (codified as amended at 16 U.S.C. § 673). Situated in Jackson Hole, just north of the town of Jackson, Wyoming, the

Refuge is flanked by the dramatic expanses of the Teton and Gros Ventre mountain ranges and adjoins Grand Teton National Park. Its land has long provided critical winter habitat for populations of elk, bison, and other wildlife migrating down from the higher elevations of the Greater Yellowstone Ecosystem. The combination of stunning scenery, spectacular wildlife, and ease of public access makes the National Elk Refuge one of the flagships of the National Wildlife Refuge System.

18. The Service has fed elk wintering on the National Elk Refuge since the beginning of the 20th century. As originally conceived, feeding was intended to prevent excessive starvation among one of the last remaining large elk herds in North America and reduce conflicts between elk and local ranchers.

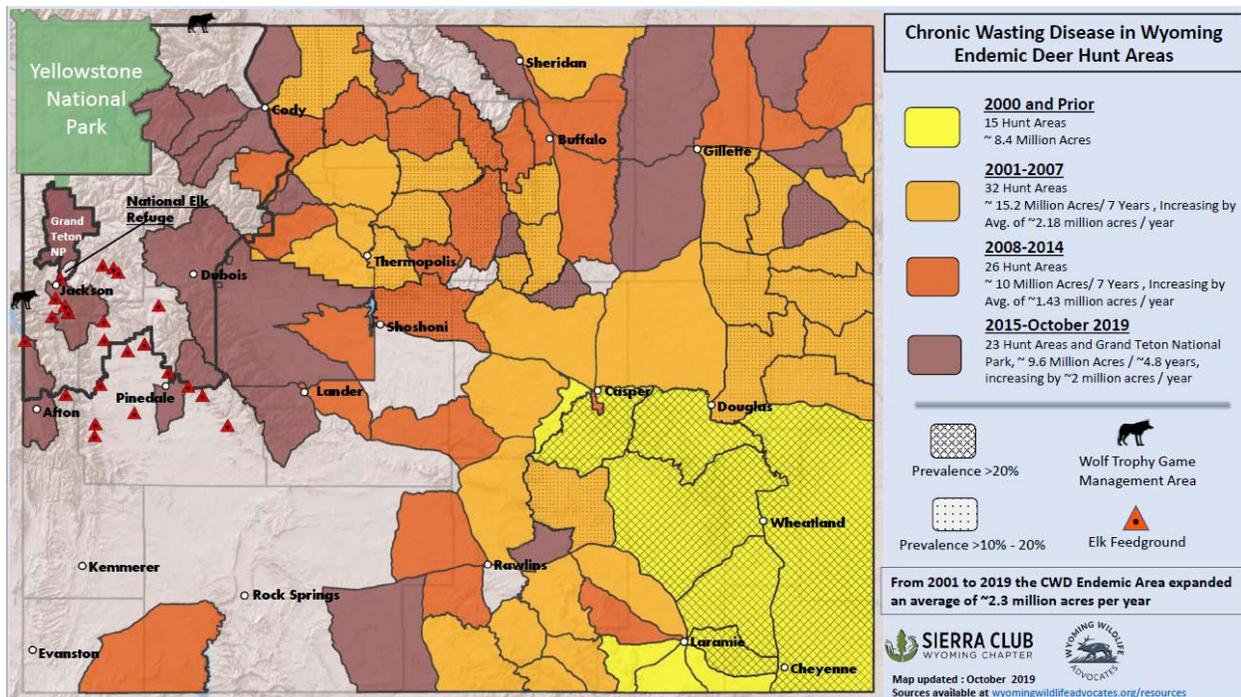
19. “[T]his practice, though born of benevolence, causes significant problems.” Defs. of Wildlife, 651 F.3d at 113. As much as 80 percent of the elk herd in the region in and around Jackson crowds on to the Refuge’s feedlines virtually every winter, amounting to between approximately 7,000 and 9,000 elk in recent years. This unnatural concentration of elk increases the prevalence of debilitating diseases such as brucellosis, which causes infected females to abort their first calves: while brucellosis infects about 2% of elk in a naturally behaving herd, 17% of elk wintering on the Refuge have contracted this disease. Crowding on feedlines also makes the Refuge elk more vulnerable to diseases including tuberculosis, septicemic pasteurellosis, and necrotic pododermatitis, among others.

20. The most urgent threat to the Refuge elk, however, is chronic wasting disease. Chronic wasting disease is similar to mad cow disease in domestic cattle and Creutzfeldt-Jakob disease in humans (which was transmitted to humans from animals). This disease is always fatal

in elk and other members of the deer family, known as cervids (e.g., mule deer, white-tailed deer, and moose). There is no known effective vaccine or treatment.

21. Healthy animals contract chronic wasting disease through exposure to prions, which are abnormal proteins that are carried and shed by infected animals. Once prions enter the soil—which may occur when infected animals shed saliva or other body fluids or feces into the environment, or die and decompose—the proteins may be taken up by plants, then spread to deer, moose, and elk that consume the contaminated plants. CWD prions are extremely difficult to remove from the environment; they may persist in soil and plants for decades after they are first introduced to an area. Thus, introduction of chronic wasting disease into the Refuge elk population threatens to kill infected elk, as well as deer and moose, and convert the very Refuge itself into a toxic disease contamination site.

22. Chronic wasting disease was first found in wild elk in Wyoming in the 1980s. Since then, the disease has spread inexorably from southeast Wyoming towards the Greater Yellowstone Ecosystem and the Refuge:



23. Supplemental feeding, which tends to concentrate elk in unnatural numbers and densities on the Refuge, threatens to exacerbate the spread of CWD among Refuge elk and, when infected elk disperse at the end of the winter, throughout the Greater Yellowstone Ecosystem.

According to a January 20, 2017 report by a Refuge biologist:

Elk are fed on the same 5,000 acres of [the Refuge] each year, and given the persistence of CWD prions in the environment, these areas will likely become heavily contaminated with the CWD prion over time if status quo management continues. 60-80% of the Jackson elk herd use [National Elk Refuge] feedgrounds each winter, which will regularly expose these elk to CWD prions at these sites. Various elk migration studies and research on another disease prevalent on [the Refuge], (brucellosis), suggest that the current feeding regime and its associated high concentrations of elk could be a source of CWD infection for cervids throughout the Greater Yellowstone Ecosystem.

National Elk Refuge Biological Update 3 (Jan. 20, 2017).

24. Fortunately, chronic wasting disease has not yet been detected among elk on the National Elk Refuge. However, chronic wasting disease has now arrived on the Refuge's doorstep. On November 21, 2018, the Wyoming Game and Fish Department confirmed detection of chronic wasting disease in a mule deer that was struck and killed by a vehicle within Grand Teton National Park, which adjoins the Refuge. While this finding represents the closest detection of CWD to the National Elk Refuge, wildlife officials also confirmed CWD in 2019 in a wild elk in a portion of the Greater Yellowstone Ecosystem in southwest Montana, indicating the presence of CWD within Greater Yellowstone elk as well as deer populations. Meanwhile, the Refuge's supplemental feeding program continues.

## **II. THE D.C. CIRCUIT WARNS THE SERVICE THAT IT MUST END THE SUPPLEMENTAL FEEDING PROGRAM**

25. The Service, as steward of the nation's wildlife refuges, is required under the National Wildlife Refuge System Improvement Act to "provide for the conservation of fish, wildlife, and plants, and their habitats within the [National Wildlife Refuge] System" by "sustain[ing] and, where appropriate, restor[ing] and enhanc[ing], healthy populations of fish, wildlife, and plants." 16 U.S.C. §§ 668dd(a)(4)(A), 668ee(4) (emphasis added). Consistent with this mandate, the Service is further obligated to "ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans." *Id.* § 668dd(a)(4)(B) (emphases added).

26. To promote this conservation mandate, the Improvement Act further requires the Service to issue a "comprehensive conservation plan" for managing each refuge. *Id.* § 668dd(e)(1)(A). Under the Act, the Service "shall manage the refuge ... in a manner consistent with the plan." *Id.* § 668dd(e)(1)(E).

27. Supplemental feeding, which promotes the spread of dangerous diseases among the very elk that the Refuge was created to protect and threatens to contaminate the Refuge itself with contagious disease materials (including chronic wasting disease prions), violates this mandate for the Service to ensure the environmental health and biological integrity of the elk and their environment.

28. The Service addressed its obligations under the Improvement Act in light of the disease threat presented by the Refuge supplemental feeding program by issuing a Bison and Elk Management Plan for the National Elk Refuge in 2007. The Bison and Elk Management Plan constitutes a portion of the "comprehensive conservation plan" required by the Improvement Act: in the 2007 plan itself, the Service stated that the Bison and Elk Management Plan "will be incorporated as part of the comprehensive conservation plan." U.S. Fish & Wildlife Serv. &

Nat'l Park Serv., Bison & Elk Mgmt. Plan 13 (Apr. 2007) ("Bison and Elk Management Plan"); see also 16. U.S.C. § 668dd(e)(1)(A). In 2015, the Service adopted a comprehensive conservation plan for the Refuge that states that the Service will "[a]daptively manage bison, elk, and other wildlife populations and habitats as outlined in the Bison and Elk Management Plan." U.S. Fish & Wildlife Serv., Nat'l Elk Refuge, Comprehensive Conservation Plan 95 (Sept. 2015) ("Comprehensive Conservation Plan"); see also id. at xi ("This comprehensive conservation plan will complement, not replace, the Bison and Elk Management Plan.").

29. The Bison and Elk Management Plan established an objective for the Service to "develop a structured framework, in collaboration with the Wyoming Game and Fish Department, of adaptive management criteria and actions for transitioning from intensive supplemental winter feeding of bison and elk herds to greater reliance on natural forage on the refuge," and to "[e]stablish objective criteria for when supplemental feeding will begin and end in years when needed on the refuge." Bison and Elk Management Plan at 135. The plan stated that, based on such objective criteria in the structured framework, the Service would "implement actions" to transition away from supplemental feeding. Id. at 136. Such actions could include the following measures: "delay[ing] the onset of feeding each year, decreas[ing] the average daily ration per elk or bison ... , decreas[ing] the number of days of supplemental feeding, decreas[ing] the frequency of years of providing supplemental feed, increas[ing] [elk] harvest levels, and implement[ing] mitigation measures ... to reduce conflicts created by the redistribution of elk and bison." Id. at 136-37. The plan called for a "complete transition to free-standing forage if and when several established criteria are met, including support from the Wyoming Game and Fish Department." Id. at 137.

30. The 2007 plan called for the Service to develop this framework “[b]y year one” of the plan’s implementation, meaning 2008. Id. at 135. It set a goal of reducing the number of elk wintering on the Refuge to 5,000. The plan did not specify a deadline for the Service to end supplemental feeding on the Refuge nor establish any timeline for implementing the plan’s actions to transition away from supplemental feeding.

31. Recognizing that swift action was needed to prevent chronic wasting disease from spreading to the Refuge and its winter elk population, several conservation organizations, including two of the plaintiffs in this case, challenged the Service’s 2007 plan in this District. The plaintiffs in that case argued that the Service’s decision to continue winter-time supplemental feeding, with no commitment to terminate the program by a specified deadline, was arbitrary and unlawful under the Improvement Act. The plaintiffs also argued that the Service unlawfully gave Wyoming officials the power to veto any plan the Service might propose to end supplemental feeding. Defs. of Wildlife, 651 F.3d at 116, 118.

32. The district court granted summary judgment for the Service in 2010, and the D.C. Circuit affirmed in 2011. Nevertheless, the Court of Appeals agreed with the plaintiffs in that case that continuation of the Refuge supplemental feeding program was inconsistent with the Service’s statutory duties:

[T]he whole point of a National Elk Refuge is to provide a sanctuary in which populations of healthy, reproducing elk can be sustained. See 16 U.S.C. § 673a (creating a “refuge” for the elk). The Refuge can hardly provide such a sanctuary if, every winter, elk and bison are drawn by the siren song of human-provided food to what becomes, through the act of gathering, a miasmatic zone of life-threatening diseases.

Id. at 116 (emphasis in original). Accordingly, the D.C. Circuit concluded, “[t]here is no doubt that unmitigated continuation of supplemental feeding would undermine the conservation purpose of the National Wildlife Refuge System.” Id. at 117.

33. Further, while rejecting the plaintiffs’ contention that the Service acted unlawfully by adopting a plan that contained no deadline for ending supplemental feeding, the D.C. Circuit stated that the Service’s Bison and Elk Management Plan for the National Elk Refuge “might well have been unreasonable had the agencies categorically refused to phase out the winter feeding program”:

The [plaintiffs] are understandably concerned that [the plan’s] flexibility could be used to continue the practice indefinitely. But the agencies must proceed in a manner that is consistent with the science and accounts for the risks posed by supplemental feeding. ... It is highly significant and indeed dispositive to us, as it was to the district court, that the agencies are committed to ending supplemental feeding. We do not know precisely how they will proceed, and that makes it impossible, at this stage, to declare that their plan is arbitrary and capricious simply because it does not specify a particular date by which the practice will cease. Should the agencies act unreasonably in establishing criteria for the transition or in otherwise carrying out the plan, that will be a different issue for another panel.

Id. (quotation omitted).

34. The D.C. Circuit also relied on the Service’s assurance that the 2007 Bison and Elk Management Plan “confers no veto” on the State of Wyoming. Id. at 118. “We take the Secretary at his word that Wyoming has no veto over the Secretary’s duty to end a practice that is concededly at odds with the long-term health of the elk and bison in the Refuge.” Id.

### **III. THE SERVICE DELAYS ADOPTION OF ANY PLAN TO MODIFY SUPPLEMENTAL FEEDING**

35. For more than twelve years after adoption of the 2007 Bison and Elk Management Plan and more than eight years following the D.C. Circuit’s decision, the Service failed to take the action it promised to issue a “structured framework” for reducing supplemental feeding at the National Elk Refuge—a framework that the agency subsequently described as a “Step-Down Plan.”

36. As documents obtained by Plaintiffs through the Freedom of Information Act demonstrate, this failure was largely due to the Service's apparently complete deference to objections raised by officials from the Wyoming Game and Fish Department.

37. After the Service issued the 2007 Bison and Elk Management Plan, development of the promised Step-Down Plan was initially delayed for six years. After conservation groups challenged the 2007 Bison and Elk Management Plan, the Service "decided not to move forward with the [Step-Down Plan] ... process until after the conclusion of this lawsuit." Will Meeks, Assistant Reg'l Dir., Response to Lloyd Dorsey's Questions in His Request for a Tel. Conversation with the Reg'l Dir. 2 (July 1, 2013). The Service made this decision to delay its development of the promised Step-Down Plan notwithstanding that the conservation groups' lawsuit sought to hasten the Service's action to transition away from intensive supplemental feeding on the Refuge, not to delay it. When the lawsuit ended in 2011, the Service delayed another two years, citing the fact that the National Elk Refuge was in the middle of another planning process "and did not have the resources to simultaneously develop the [Step-Down Plan]." Id.

38. The Step-Down planning process began, according to Service emails, sometime in 2013. Between May 2013 and April 2014, the Service held several meetings to discuss the contents of the Step-Down Plan with stakeholders.

39. Plan development stalled, however, between May and October 2014, largely because of Wyoming's "strenuous resistance to any serious discussion about ending supplemental feeding." Steve Kallin, Nat'l Elk Refuge Project Leader, Nat'l Elk Refuge / Adaptive Mgmt. Plan Briefing Statement Topics for Conference Call with Reg'l Dir. 2 (Nov. 14, 2014). In November 2014, Wyoming suggested that, rather than aim to reduce the need for

winter supplemental feeding by reducing the size of the Jackson elk herd, the Service should adopt changes in the feeding schedule that would redistribute the elk, causing fewer elk to winter on the Refuge.

40. The Service moved forward with Wyoming's proposal. A draft of the Step-Down Plan produced in July 2015 provided that the start of supplemental feeding would initially be delayed approximately two weeks, "depending on several variables," such as forage availability. Nat'l Elk Refuge, Grand Teton Nat'l Park, Draft Bison & Elk Mgmt. Step Down Plan 14 (July 24, 2015) ("July 2015 Draft Step-Down Plan"). The Service also proposed to end the supplemental feeding season a week earlier than its traditional practice. The Service believed shortening the feeding season would condition elk to seek food on native winter range off of the Refuge, and thus redistribute the Jackson elk population so that fewer elk would congregate on the Refuge and less supplemental feeding would be required.

41. On August 3, 2015, when the Step-Down Plan "was nearing completion," the Service sent a draft to the Wyoming Game and Fish Department's Wildlife Administration office in Cheyenne, Wyoming. Steve Kallin, Nat'l Elk Refuge Project Leader, Step Down Plan Conference Call Outline 2 (Dec. 3, 2015). After an unexplained three-month delay, Wyoming Game and Fish Department officials told the Service on November 13, 2015 that they would not support the Plan. When asked what alternative management strategies Wyoming would support, the Wyoming game officials had no immediate suggestions.

42. On November 18, 2015, Wyoming officials indicated that they would support the proposed Step-Down Plan if, instead of beginning with a two-week delay in feeding initiation, the Service "buil[t] in flexibility so the start date can be adaptively adjusted to prevent elk from leaving the [Refuge] and causing conflicts with ranchers & private landowners." Id. at 4.

Alternatively, Wyoming officials stated that they would support “a ‘one week delay’ in feeding initiation and a ‘two week’ early cessation of feeding.” Id. Wyoming officials opined that “these efforts would demonstrate sufficient effort toward achieving the goals in the [Bison and Elk Management Plan] the next time it is challenged in court.” Id. Service staff noted, however, that Wyoming’s suggestions “would impact the key components of the Step Down Plan and would likely result in no meaningful changes in elk redistribution.” Id.

43. Despite these staff concerns, the Service acquiesced to Wyoming’s new proposal. A version of the draft Step-Down Plan dated October 2016 eliminated the two-week delay in the onset of supplemental feeding originally proposed by the Service, providing instead that “the initiation of feeding will be delayed for short durations of time (days).” Nat’l Elk Refuge, Grand Teton Nat’l Park, Draft Step-Down Plan, Bison and Elk Mgmt. ix (Oct. 2016) (“October 2016 Draft Step-Down Plan”). The October 2016 Plan also softened the requirement that feeding terminate one week earlier: while a July 2015 draft of the plan provided that “[i]nitially, the termination of feeding . . . will occur about one week earlier,” July 2015 Draft Step-Down Plan at 15 (emphasis added), the October 2016 draft stated that “[i]n the early years of Step-Down Plan implementation, the seasonal termination of feeding is expected to occur about a week earlier than current conditions.” October 2016 Draft Step-Down Plan at x (emphasis added). As an outside expert who reviewed the October 2016 draft at the request of the Service noted, “there does not appear to be any firm commitment to reducing feeding as the narrative is vague with regard to the magnitude of reduction in days of feeding . . . .” Key Items from Peer Review 1 (Aug. 9, 2016) (comments from Bob Garrott, Montana State University).

44. In late September 2016, the Service decided to “take a ‘strategic pause’” before circulating the latest draft of the Step-Down Plan for public comment. Email from Steve Kallin

to Dale Deiter, et al. (Sep. 28, 2016). The Service cited “[b]ad timing in the Election Cycle” and the need to provide more time for public comment. Id. Service staff “anticipate[d] the process to resume after completion of the next supplemental feeding season.” Id.

45. However, more than two years passed without the Service either issuing its Step-Down Plan or otherwise publicly taking any steps to fulfill the promise that the Service made in 2007 to issue that plan by 2008.

46. The Service’s failure to fulfill its promises again came before the D.C. Circuit in 2017, when that Court addressed a different facet of elk management in Jackson Hole, Wyoming, concerning federal agency authorizations for recreational elk hunting. See Mayo v. Reynolds, 875 F.3d 11 (D.C. Cir. 2017). In the course of resolving that dispute, the D.C. Circuit noted the Service’s promise in the 2007 Bison and Elk Management Plan to phase out the supplemental feeding program and commented that the Service “failed to meet the 2007 Plan’s objective to wean the herd from supplemental feed.” Id. at 14. The D.C. Circuit also stated that, “[a]lthough the [Service] never committed to ending supplemental feeding by any specific date, its failure to decrease supplemental feeding obviously is not in keeping with one of the goals of the [2007 Bison and Elk Management Plan].” Id. at 24.

47. Despite the Service’s inaction in implementing the Bison and Elk Management Plan, the threat of CWD and the need to end supplemental feeding on the Refuge have become even more pressing in recent years. As a Refuge biologist wrote in January 2017: “Although the exact time frame is unclear, introduction of CWD into the Jackson elk herd appears inevitable and could occur at any time.” National Elk Refuge Biological Update 3 (Jan. 20, 2017).

48. By 2018, whatever time the Service may have thought it had to preemptively address the threat of chronic wasting disease in Jackson Hole had run out. The November 21,

2018 detection of chronic wasting disease in a mule deer in Grand Teton National Park places CWD adjacent to the Refuge, in an area where elk, deer, and moose can and do easily cross the boundary between the two jurisdictions. Accordingly, immediate action was required to abate the threat of chronic wasting disease at the National Elk Refuge and the Greater Yellowstone Ecosystem as a whole, and further delay threatened the integrity of some of our nation's most revered public landscapes and wildlife. Nevertheless, it appeared any movement by the Service to issue the promised Step-Down Plan in 2018 remained stymied by the agency's continuing deference to objections from Wyoming officials.

49. In this regard, when a new Refuge manager in January 2018 corresponded with other Service officials about continuing efforts to "pin [Wyoming officials] down on what is remaining in the step down plan that the State may find objectionable," the Refuge manager stated:

It's my understanding that we have, through successive iterations of the plan, made numerous changes at the State's request so that it is now (by some opinions) virtually toothless. I'm not sure there are any teeth left to pull, but we'll see what [a Wyoming official] has to say.

Email from Brian Glaspell, Refuge Manager, Nat'l Elk Refuge, to Will Meeks, Assistant Reg'l Dir., Nat'l Wildlife Refuge Sys. (Jan. 8, 2018).

#### **IV. THIS LITIGATION SPURS THE SERVICE TO FINALLY MOVE FORWARD WITH THE LONG-DELAYED STEP-DOWN PLAN**

50. With CWD on the Refuge doorstep and the Service continuing to delay any responsive action to reform the Refuge's supplemental feeding program, Plaintiffs initiated this lawsuit by filing a complaint on March 18, 2019 that challenged the Service's failure to issue the promised Step-Down Plan and its unmitigated continuation of supplemental feeding at the National Elk Refuge.

51. In response to Plaintiffs' complaint, the Service initiated discussions about potential settlement of Plaintiffs' claims and the Court stayed this action to allow time for the parties' discussions. Although no settlement agreement was reached, Plaintiffs and the Service on August 12, 2019 filed a joint stipulation in which the Service stated that it "will issue to the public for public review and comment a draft Step-Down Elk Feeding Plan for the National Elk Refuge and Environmental Assessment on the draft plan pursuant to the National Environmental Policy Act (NEPA) by no later than September 30, 2019." ECF No. 15, at 1. The stipulation further stated that the Service would then accept public comment on the draft Environmental Assessment for 30 days, after which the Service would either finalize its NEPA analysis and issue a final Step-Down Plan on or before December 31, 2019 or develop a schedule for completing any further environmental analysis that the Service might deem necessary. *Id.* at 1-2.

#### **V. THE SERVICE'S STEP-DOWN PLANNING PROCESS**

52. The Service finally issued a draft of its long-delayed Step-Down Plan along with an associated draft Environmental Assessment document on September 30, 2019. In the draft plan, the Service acknowledged that "most evidence suggests that the distribution of CWD is increasing and that its introduction to the Jackson elk herd is inevitable." U.S. Fish & Wildlife Serv., Draft Step-Down Plan, Bison & Elk Mgmt. 29 (Sep. 2019). The draft plan further addressed the likely consequences of CWD infection in the Jackson elk herd. The draft stated that "[c]onsiderable evidence suggests that [CWD] transmission and prevalence are density dependent," and noted a study from Rocky Mountain National Park in Colorado reporting that elk densities of 15-110 per square kilometer were associated with 13 percent CWD prevalence, which was the threshold at which the study predicted elk population decline due to disease mortality. *Id.* at 11. Because elk densities on the National Elk Refuge's artificial feedlines are

much higher—ranging from 77 to 16,850 elk per square kilometer—the Service found this evidence to “suggest[] that the introduction of CWD to [the Refuge] elk would have significant negative population effects over time.” Id.

53. The Service in the draft Step-Down Plan also described a modeling exercise the agency conducted to estimate the predicted prevalence of CWD and impacts of the disease on the Jackson elk population growth rate. The model predicted that, in the absence of hunting, the population will decline when CWD prevalence reaches 7 percent in adult and yearling cow elk, but, when current cow elk hunting levels are included in the model as a source of mortality, the population will decline at any level of CWD prevalence.

54. To address this threat, the draft Step-Down Plan identified three management practices “that can be altered to achieve reduced reliance of bison and elk on supplemental feed”: “(1) timing and intensity of winter feeding, (2) timing and intensity of hunting, and (3) overall and herd segment specific harvest [i.e., hunting] levels.” Id. at 9. However, the draft plan asserted that flexibility to manipulate hunting practices was limited because “[c]urrently the Jackson elk herd is at the Wyoming Game and Fish Commission established objective of 11,000 animals,” and the Service stated that it was committed to maintain the “state elk herd objective of 11,000.” Id. at 7, 18. In this regard, the Service stated that the agency’s 2007 Bison and Elk Management Plan “supported the State herd objectives of 500 bison and 11,000 elk.” Id. at 31. The Service further asserted that, “due to NEPA requirements, any further consideration of reduced herd sizes” for the Refuge is “beyond the scope of this plan.” Id.

55. Accordingly, the Service’s draft Step-Down Plan set forth a “principal strategy” to reduce the Refuge feeding program that focused on delaying initiation of winter feeding, initially by only “short durations of time (days)” pending evaluation of elk and bison movements

and mortality levels, which could prompt re-evaluation of proposed feeding delays. Id. at 16-17; see id. at 30 (Service admitting “vague” provision for feeding reductions). The Service asserted that such delayed feeding would “gradually condition[] animals to ‘expect’ feed to be available later in the winter; this could build cohorts of animals that rely primarily on native winter range.” Id. at 16. The draft plan proposed to also terminate feeding about a week earlier in the spring than current practices, a reform that would not condition elk to seek winter forage elsewhere but would “decrease the amount of feed provided per animal per year.” Id. at 16-17. The plan proposed these measures in service of achieving “Phase I objectives of 5,000 elk and 500 bison on [the Refuge]” as a “first step towards reducing reliance on supplementing feeding.” Id. at 15.

56. The draft plan stated that the Service would consider its objective of achieving greater elk reliance on natural winter forage to be achieved “when the 3-year running average of elk and bison fed days is <50% of baseline for 5 years in a row.” Id. at 14. The Service defined an “elk fed day” as “the total number of elk fed per day per season.” Id. So, for example, “if 5,000 elk were fed for 100 days during the winter, feeding intensity for that winter would equal 5,000 elk X 100 days = 500,000 [elk fed days].” Id. In sum, the draft Step-Down Plan proposed to define success as anything less than half of current elk-feeding levels, as measured by an assessment of aggregate feeding.

57. Plaintiffs submitted comments on the draft Step-Down Plan and associated Environmental Assessment during the Service’s public-comment process. In their comments, Plaintiffs disputed the Service’s assertion in the draft plan that “NEPA requirements” prevented the agency from considering any significant management changes beyond minor adjustments to the winter feeding schedule. In particular, Plaintiffs disputed the Service’s foreclosure of any options to reduce the overall Jackson elk herd size, thereby deviating from Wyoming’s elk-herd

objective. Noting the Service's assertion in the draft Step-Down Plan that the 2007 Bison and Elk Management Plan supported Wyoming's herd objective of 11,000 elk, Plaintiffs pointed out that the Service's NEPA environmental analysis for that Bison and Elk Management Plan actually considered two management alternatives that contemplated departing from Wyoming's population objective for the Jackson elk herd, thereby providing the Service with latitude under NEPA to entertain such options. Plaintiffs therefore called on the Service to consider a broader range of management alternatives to reduce the winter feeding program beyond the modest changes to feeding start and end dates that the Service proposed.

58. Plaintiffs also submitted to the Service an expert review of the draft Step-Down Plan by Dr. Thomas Roffe. Dr. Roffe is an eminent wildlife veterinarian who served as the Service's own Chief of Wildlife Health for the Mountain-Prairie Region—the administrative region that encompasses the National Elk Refuge—from 2003 to 2013, which includes the period during which the Service prepared the 2007 Bison and Elk Management Plan. Dr. Roffe's review offered a comprehensive expert critique of the draft Step-Down Plan. Among other things, Dr. Roffe faulted the draft Step-Down Plan for foreclosing numerous management changes due to the Service's fealty to Wyoming's elk-herd population objective and for introducing numerous subjective and vague considerations into the Service's determination whether proposed feeding delays would actually be implemented. As Dr. Roffe summarized, the Step-Down Plan “comes up with one idea that might help decrease reliance on supplemental feed (delay feeding onset), and hopes, maybe, it might be implemented ... but maybe not. And if not, management options are not articulated.” Roffe Review at 8.

59. Dr. Roffe also criticized the draft Step-Down Plan for basing its proposals on a “simplistic assumption” that “all disease is density dependent and any reduction in feeding

reduces density thereby reducing disease prevalence and transmission risk.” Id. at 10. As Dr. Roffe explained, and contrary to the Service’s assumption, “[v]irtually every density-dependent infectious contagious disease has a threshold response, a range of host densities where transmission is not significantly affected. Put another way, host density must reach a certain lower threshold before transmission is significantly interrupted.” Id. In particular, “CWD, which is transmitted both directly and through environmental contamination with a decades-long persistent infectious agent,” is effectively transmitted at a density threshold that is “considerably lower” than other wildlife diseases documented in the Refuge area. Id. As Dr. Roffe observed, despite the fact that the “stated primary goal of reducing reliance on supplemental feed is to mitigate the risk of catastrophic disease outbreaks,” the draft Step-Down Plan “does not include a single disease prevalence or transmission risk criterion for assessing success.” Id. at 2. The omission of any such criterion was critical, Dr. Roffe explained, because “[i]f the [Step-Down Plan] reaches the Phase 1 objective of 5000 elk wintering on [the Refuge], and reaches its success criterion for reducing [elk-fed days] by 50% after a decade or more of effort, that still leaves nearly half of the Jackson herd (5000 elk) on feed for over 50 days . . . . The level and duration of dense crowding on feed under successful [Step-Down Plan] implementation still leaves a substantial risk of catastrophic disease propagation.” Id. at 10-11. Dr. Roffe concluded that “delaying the onset of feeding alone is unlikely to reduce density enough to interfere with CWD transmission. Fewer elk, distributed over a much greater landscape is required.” Id. at 11.

## **VI. THE SERVICE’S FINAL STEP-DOWN PLAN**

60. The Service issued its final Step-Down Plan, along with a final Environmental Assessment, Finding of No Significant Impact, and Record of Decision under NEPA, on December 31, 2019. The final plan included a new addendum that modified—and weakened—

the draft Step-Down Plan's proposals for action by precluding any delay in the Service's initiation of winter elk feeding for at least the first two years of plan implementation. As the Service explained, "[d]uring the initial two years of the Step-Down Plan implementation, emphasis will be placed on terminating feeding early to achieve the goal of reduced elk-fed-days and bison-fed days. This strategy supersedes any references in the Step-down plan to beginning delayed feeding in 2020." U.S. Fish & Wildlife Serv., Step-Down Plan, Bison & Elk Mgmt. ("Final Step-Down Plan"), Addendum at 2 (Dec. 2019).

61. The Service stated in the final Step-Down Plan addendum that "[d]elayed initiation of feeding will begin in year three of Step-down Plan implementation," but only if management actions to be developed by a new stakeholder group "are in place to address elk/bison conflict with adjacent landowners." *Id.* Accordingly, the final Step-Down Plan deferred any action on what the Service termed its "principal strategy" for reducing elk reliance on artificial winter feeding for an additional two years, with only a speculative possibility of implementation in year three. Further, even then, the addendum made clear that disagreement with Wyoming officials regarding "a determination when the supplemental feeding program should begin and end" could preclude any action by the Service, depending on the outcome of a decision-making process involving Service and Wyoming officials, and that "[m]easures will be in place for immediate feeding if determined necessary." *Id.* at 1-2.

62. As the Service disclosed in its final Environmental Assessment, the agency made these changes to respond to further objections received from Wyoming officials regarding the draft Step-Down Plan. In this regard, Wyoming's governor, Mark Gordon, submitted a comment letter on the draft Step-Down Plan asserting that the Service's NEPA analysis of the Step-Down Plan "falls short" and urging the Service to initiate a new NEPA analysis of the entire Bison and

Elk Management Plan rather than moving forward with the Step-Down Plan. Letter from Wyo. Gov. Mark Gordon to Robert Wallace, Asst. Sec’y for Fish, Wildlife and Parks, U.S. Dept. of Interior (Nov. 12, 2019). For its part, the Wyoming Game and Fish Department submitted a comment letter in which it raised further concerns about elk conflicts with private landowners and stated that it does not support a cessation of supplemental feeding as a goal of the Step-Down Plan.

63. In sum, while a Refuge manager stated in 2018 that the version of the Step-Down Plan then under consideration was considered by some to be “virtually toothless” and he was “not sure there are any teeth left to pull,” Email from Glaspell to Meeks, the Service found yet more “teeth left to pull” to placate Wyoming in crafting the final Step-Down Plan.

64. While bending to Wyoming’s demands to weaken the Step-Down Plan, the Service made no changes in the final Step-Down Plan in response to plaintiffs’ comment letter or Dr. Roffe’s expert review.

65. In this regard, the Service’s final Environmental Assessment for the Step-Down Plan included an Appendix C presenting the Service’s responses to public comments received on the draft Step-Down Plan. In response to plaintiffs’ comment letter requesting that the Service consider management changes that would involve divergence from Wyoming’s population objective for the Jackson elk herd, the Service confirmed that “one of the needs” underlying the final Step-Down Plan was “supporting [the Wyoming Game and Fish Department’s] current elk herd objective.” U.S. Fish & Wildlife Serv., Environmental Assessment for Bison and Elk Management Step-down Plan, App. C at 65 (Dec. 2019). Neither in Appendix C nor anywhere else in the Environmental Assessment did the Service acknowledge, much less consider or respond to, Dr. Roffe’s expert review of the draft Step-Down Plan.

**FIRST CLAIM FOR RELIEF**  
(Violation of the Improvement Act)

66. All preceding paragraphs are hereby incorporated as if fully set forth herein.

67. The Improvement Act requires the Service to manage the National Wildlife Refuge System to “provide for the conservation of fish, wildlife, and plants, and their habitats within the System” and to “ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(4)(A), (B). The Act also instructs the Service to “sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing ... methods and procedures associated with modern scientific resource programs.” Id. § 668ee(4).

68. “There is no doubt that unmitigated continuation of supplemental feeding would undermine the conservation purpose of the National Wildlife Refuge System” in violation of the Improvement Act. Defs. of Wildlife, 651 F.3d at 117.

69. In its 2007 Bison and Elk Management Plan, the Service committed to issue a plan to phase out its supplemental feeding program on the National Elk Refuge “[b]y year one” of that plan’s implementation period, i.e., 2008, by developing a “structured framework” of “actions for transitioning from intensive supplemental winter feeding of bison and elk herds to greater reliance on natural forage on the refuge”; to “[e]stablish objective criteria for when supplemental feeding will begin and end in years when needed on the refuge”; and, based on such objective criteria, to “implement actions” to reduce “intensive supplemental winter feeding” that could include: delaying the onset of winter feeding, decreasing the average daily ration per elk, decreasing the number of days of supplemental feeding, decreasing the frequency of years of providing supplemental feed, increasing hunting levels, and implementing mitigation measures

to reduce conflicts resulting from the redistribution of Refuge elk. Bison and Elk Mgmt. Plan at 135-137.

70. The Bison and Elk Management Plan constitutes a portion of the comprehensive conservation plan for the National Elk Refuge required by the Improvement Act. That comprehensive conservation plan states that the Service will “[a]daptively manage bison, elk, and other wildlife populations and habitats as outlined in the Bison and Elk Management Plan.” Comprehensive Conservation Plan at 95; see also 16 U.S.C. § 668dd(e)(1)(A)(iii) (requiring the Service to “issue a final conservation plan for each planning unit” of the National Wildlife Refuge System outside of Alaska).

71. Under the Improvement Act, the Service must “manage the refuge ... in a manner consistent with” the comprehensive conservation plan. 16 U.S.C. § 668dd(e)(1)(E). The provisions of the Bison and Elk Management Plan are therefore binding on the Service.

72. The D.C. Circuit in 2011 held that the 2007 Bison and Elk Management Plan complied with the Improvement Act only because the Service “committed to end[] supplemental feeding” and held that the Service “must proceed in a manner that is consistent with the science and accounts for the risks posed by supplemental feeding.” Defs. of Wildlife, 651 F.3d at 117. The Court of Appeals forecasted the prospect of additional judicial review of the Service’s action should the agency “act unreasonably in establishing criteria for the transition [away from supplemental feeding on the Refuge] or in otherwise carrying out the plan.” Id.

73. In formulating and adopting the December 2019 Step-Down Plan, the Service has violated its duties under the Improvement Act.

74. While the National Elk Refuge faces urgent threats to “healthy populations” of elk and the “biological integrity” and “environmental health” of the Refuge itself due to diseases

including chronic wasting disease, 16 U.S.C. §§ 668dd(a)(4)(B), 668ee(4), the Service's final Step-Down Plan defers for at least two more years any action on its "principal strategy" to transition from intensive supplemental winter feeding to greater reliance on natural forage (i.e., the strategy of delaying the onset of winter feeding) and offers no assurance that this "principal strategy" will be implemented even in year three or thereafter due to numerous contingencies and vague and subjective considerations. While the Plan promises an earlier termination of winter feeding beginning in 2020, according to the Service itself this measure is not designed to modify elk behavior in returning to the Refuge feedlines each winter but only to reduce the total amount of supplemental feeding as calculated in reduced elk fed days. Accordingly, the Plan offers no assurance that the measure it relies on to achieve elk behavioral changes that are ultimately necessary for a transition away from intensive supplemental feeding under the Plan will ever be implemented. The Service therefore has not "committed to ending supplemental feeding" and, after more than 13 years of delay in taking any action even to begin a reform supplemental feeding, will allow the "continuation of supplemental feeding" in a manner that, in all material respects, is unmitigated for at least two more years and possibly longer. Defs. of Wildlife, 651 F.3d at 117.

75. In developing and adopting the Step-Down Plan, the Service failed entirely to consider the fundamental question of what level of reduction in feeding and associated reduction in elk density is necessary to minimize disease prevalence and transmission risk sufficiently to maintain "healthy populations" of elk and ensure the "biological integrity" and "environmental health" of the Refuge. 16 U.S.C. §§ 668dd(a)(4)(B), 668ee(4). As Dr. Roffe discussed in his expert review, to be effective, efforts to address wildlife disease threats by reducing elk density must consider what threshold of density reduction is necessary to impact disease transmission.

This is because virtually every density-dependent disease has a density threshold that must be achieved before disease transmission is interrupted. As Dr. Roffe explained, the density-related objective established by the Step-Down Plan—which would still leave 5,000 elk on the Refuge’s artificial feedlines for more than 50 days each winter—“still leaves a substantial risk of catastrophic disease propagation.” Roffe Review at 10-11. Further, the Step-Down Plan contains no disease prevalence or transmission risk criterion for assessing the Service’s success in preventing or mitigating the risk of catastrophic disease outbreaks. The Service failed entirely to consider this important issue, including even after receiving Dr. Roffe’s expert comments on the draft Step-Down Plan. The Service therefore failed to “proceed in a manner that is consistent with the science and accounts for the risks posed by supplemental feeding.” Def. of Wildlife, 651 F.3d at 117.

76. In developing and adopting the Step-Down Plan, the Service failed to “[e]stablish objective criteria for when supplemental feeding will begin and end in years when needed on the refuge,” as required by the mandatory terms of the Service’s own Bison and Elk Management Plan. Bison & Elk Mgmt. Plan at 135. Although the Step-Down Plan contemplates potential changes in the beginning and ending dates of supplemental feeding, it conditions implementation of such changes on the Service’s subjective evaluation of numerous factors including private land conflicts, herd size, elk distribution, weather conditions, elk mortality, and other factors. The plan offers no objective criteria to govern how these factors will be considered or analyzed. The Step-Down Plan’s subjectivity is so pervasive that the Service felt compelled in the plan to acknowledge the “frequently asked question”: “Why is the Step-Down Plan vague regarding the magnitude in the reduction of feeding days and specific triggers that would lead to either more aggressive or conservative reduction in feeding days?” Final Step-Down Plan at 30. The

Service claimed that its asserted need to “maintain flexibility” justified such vagueness, *id.*, but that asserted need was well known to the agency when it crafted the 2007 Bison and Elk Management Plan that called for establishment of objective, rather than subjective, criteria for beginning and ending supplemental feeding. Accordingly, the Service failed to establish objective criteria for beginning and ending supplemental feeding on the Refuge as required by the mandatory provisions of the Bison and Elk Management Plan.

77. In developing and adopting the Step-Down Plan, the Service failed to consider a range of significant management options that were specifically identified for possible implementation in the agency’s mandatory Bison and Elk Management Plan provisions. The Service foreclosed most alternative management approaches other than modifying the beginning and ending dates for supplemental feeding based on the Service’s decision to defer to Wyoming’s population objective for the Jackson elk herd. As a result, the Service rejected options including, among others, decreasing the average daily ration per elk, decreasing the frequency of years of providing supplemental feed, and increasing hunting levels. The Service therefore failed to consider the range of options for reducing supplemental feeding that were identified for such consideration by the mandatory provisions of the Bison and Elk Management Plan.

78. The Service’s unlawful actions and failures discussed above arise from the Service’s deference to objections by the State of Wyoming, including the Wyoming Game and Fish Department. In particular, the Service deferred for two years any action on its “principal strategy” to reduce supplemental feeding due to Wyoming’s objections, and foreclosed most alternative management approaches due to fealty to Wyoming’s elk population objective for the Jackson herd. The Service has thus effectively given the State of Wyoming and its Game and

Fish Department a veto over the issuance and content of the supplemental feeding phase-out plan, contrary to the Improvement Act and the Service's representations to the D.C. Circuit in 2011. See Defs. of Wildlife, 651 F.3d at 117 (“We take the Secretary at his word that Wyoming has no veto over the Secretary’s duty to end a practice that is concededly at odds with the long-term health of the elk and bison in the Refuge.”).

79. For all these reasons, the Service’s issuance of the December 2019 Step-Down Plan constitutes final agency action that is arbitrary, capricious, and contrary to law in violation of the Improvement Act. See 5 U.S.C. § 706(2)(A).

**SECOND CLAIM FOR RELIEF**  
(Violation of the National Environmental Policy Act)

80. All preceding paragraphs are hereby incorporated as if fully set forth herein.

81. NEPA is “our basic national charter for protection of the environment,” 40 C.F.R. § 1500.1(a). “NEPA’s primary function is information-forcing, compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions.” Am. Rivers v. Fed. Energy Reg. Comm’n, 895 F.3d 32, 49 (D.C. Cir. 2018) (quotation and citation omitted).

82. NEPA requires all federal agencies to include a detailed environmental impact statement (“EIS”) “in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA further requires federal agencies to “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(2)(E).

83. In determining whether a major federal action “significantly affect[s]” the environment such that an EIS is required, id. § 4332(2)(C), an agency may prepare a more concise environmental assessment, see 40 C.F.R. § 1508.9, which may result in the agency

issuing a “finding of no significant impact” in lieu of a full EIS, see id. § 1508.13. Such an environmental assessment must address, among other things, the need for the proposed action; alternatives to the proposed action that would reduce its environmental impacts; and “the environmental impacts of the proposed action and alternatives.” Id. § 1508.9(b). In carrying out these mandates for an Environmental Assessment, a federal agency must “(1) identify accurately the relevant environmental concerns, (2) take a hard look at the problem in preparing its Environmental Assessment, [and] (3) make a convincing case for any finding of no significant impact.” Am. Rivers, 895 F.3d at 49.

84. The Service’s Environmental Assessment and Finding of No Significant Impact for the December 2019 Step-Down Plan violate these NEPA requirements.

85. Like the Step-Down Plan itself, the Service’s Environmental Assessment failed entirely to consider the fundamental question of what level of reduction in feeding and associated reduction in elk density is necessary to avoid the severe wildlife disease consequences threatened by the Refuge’s supplemental feeding program. The Environmental Assessment therefore failed to take a “hard look” at the environmental consequences of the Step-Down Plan or to make a “convincing case” for the Service’s Finding of No Significant Impact, as NEPA requires. Am. Rivers, 895 F.3d at 49.

86. Also like the Step-Down Plan, the Service’s Environmental Assessment failed to conduct a reasonable consideration of alternatives to the Service’s proposed action. As discussed, the Service foreclosed most alternative management approaches other than modifying the beginning and ending dates for supplemental feeding based on the Service’s decision to defer to Wyoming’s population objective for the Jackson elk herd. The Service therefore failed to

study, develop, and describe appropriate alternatives to its proposed action, as NEPA requires. See 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b).

87. For all of these reasons, the Service's Environmental Assessment and Finding of No Significant Impact for the December 2019 Step-Down Plan constitute final agency actions that are arbitrary, capricious, and contrary to law in violation of NEPA. See 5 U.S.C. § 706(2)(A).

### **RELIEF REQUESTED**

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that the Service violated the Improvement Act by issuing the December 2019 Step-Down Plan;
2. Declare that the Service violated NEPA by issuing the December 2019 Step-Down Plan and associated Environmental Assessment and Finding of No Significant Impact;
3. Remand the December 2019 Step-Down Plan and associated Environmental Assessment and Finding of No Significant Impact to the Service;
4. Issue temporary, preliminary, and/or permanent injunctive relief against the Service to enforce the requirements of the Improvement Act and NEPA, including, without limitation, by compelling the Service to issue, within the shortest practicable period of time after this Court's judgment, a lawful, objective, and science-based plan to phase out supplemental feeding on the National Elk Refuge, as required by the Improvement Act;
5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, associated with this litigation; and
6. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 3rd day of February, 2020.

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