

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

 TIMOTHY MAYO,)
 140 North Cache)
 Jackson Hole, Wyoming 83001,)
)
 KENT NELSON,)
 1650 Prosperity Lane)
 Wilson, Wyoming 83014,)
)
 Plaintiffs,)
)
 v.)
)
 JONATHAN B. JARVIS, Director,)
 National Park Service)
 U.S. Department of the Interior)
 1849 C Street, N.W.)
 Washington, DC 20240,)
)
 DANIEL M. ASHE, Director,)
 U.S. Fish and Wildlife Service,)
 1849 C Street, N.W.)
 Washington, D.C. 20240,)
)
 and)
)
 SALLY JEWELL, Secretary,)
 U.S. Department of the Interior)
 1849 C Street, N.W.)
 Washington, DC 20240,)
)
 Defendants.)
 _____)

Civ. No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action challenges the annual decisions made by the National Park Service (“NPS”) authorizing the hunting of elk in Grand Teton National Park (“Grand Teton” or “the Park”) as part of the Park’s Elk Reduction Program (“ERP” or “elk hunt”). NPS’s authorization

of these hunts is made each year without any express determination by NPS that such hunts are “necessary for the purpose of proper management and protection of the elk,” as required by legislation that established the Park – the Grand Teton National Park Act, 16 U.S.C. § 673c(a) — although killing elk within the Park is in fact not needed for their “proper management and protection.” In approving the annual hunts NPS also violates the statute establishing the agency and the overall national park system because the NPS neglects to consider, among other relevant factors, that approving the hunts each year fails to “conserve the scenery . . . and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them *unimpaired for the enjoyment of future generations.*” 16 U.S.C. § 1 (emphasis added).

2. These annual agency decisions are also made without compliance with *any* of the requirements of the National Environmental Policy Act , 42 U.S.C. § 4321 et seq., or that statute’s implementing regulations, even though the annual hunts have severe adverse impacts on the values, uses, resources, and wildlife of the Park, including adverse impacts on grizzly bears — a “threatened” species under the Endangered Species Act, 16 U.S.C. § 1531 et seq. NPS’s decision authorizing the hunt, and the role of the Fish and Wildlife Service (“FWS”) in that decision, also violates Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), which requires each federal agency, in consultation with the FWS, to address the impacts of its actions on threatened species, because both NPS’s decision, and the FWS’s review of that decision, failed to take into account many of the facets of the hunt that adversely affect grizzly bears.

3. For all of these reasons, Defendants have acted “not in accordance with law,” in a manner that is “arbitrary and capricious, and an abuse of discretion,” and “without observance of

procedure required by law,” within the meaning of the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 706(2).

JURISDICTION

4. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331.

PARTIES

5. Plaintiff Timothy Mayo has been a Jackson, Wyoming resident since moving there with his family 49 years ago. In addition to working as a local realtor, Mr. Mayo is an avid nature photographer with over 25 years of experience. His current residence near the southern edge of Grand Teton allows him to visit the Park daily to watch, enjoy, and photograph its flora and fauna, including the Park’s elk and grizzly bears. Mr. Mayo particularly values viewing and photographing these animals under natural, undisturbed conditions, when their innate characteristics and behaviors are more readily observed and, thus, more effectively captured in his photographs.

6. Mr. Mayo has a lifelong interest in the preservation and protection of wildlife in Grant Teton, including the resident elk and grizzly bears, which was instilled in him by his father, who had a career working for NPS. Even as a child, Mr. Mayo recalls that he, his family, and others in the Jackson community regarded the elk hunt as contrary to NPS’s purpose and policy. As an adult, Mr. Mayo finds that the ERP continues to diminish his ability to enjoy his visits to the Park. The noise of gunshots and the commotion caused by the hunt participants scares the elk and much of the other wildlife Mr. Mayo wishes to photograph, making it much more difficult to photograph these animals in their natural state. In addition, when they enter areas open to hunters, the elk, which are wary of hunters, cease much of their instinctual

behavior and rush their movements, which under normal circumstances would include much slower travel, majestic bugling, and other rutting behaviors, which enthusiasts like Mr. Mayo enjoy witnessing and photographing. Rather than observing the Jackson elk in their natural splendor and engaging in natural behavior, Mr. Mayo has, instead, all too often witnessed these animals cruelly and senselessly wounded by ERP participants shooting wildly into the herds. The annual hunts also result in unsightly “gut piles” of the slaughtered elk, which further impairs Mr. Mayo’s enjoyment of and experiences in the Park.

7. The ERP also poses a risk to Mr. Mayo’s personal safety. On one occasion, while taking photographs, Mr. Mayo’s life was endangered when a hunt participant carelessly shot towards US Highway 26 where Mr. Mayo was standing, and several stray bullets hit the ground within several feet of Mr. Mayo. It is also hazardous for Mr. Mayo to drive through the Park during hunting season because, although there are technically setback limits in place prohibiting shooting within a certain distance of roads, these limits are regularly disregarded by ERP hunters and, therefore, there is a risk of being shot while traveling in this area while elk hunting is occurring. The safety risk is magnified by the fact that, although there is a statutory mandate that “qualified and experienced hunters” engage in any elk hunts within Grant Teton, virtually no proof that applicants possess either of these characteristics is required prior to someone being approved for hunt participation and subsequently deputized as a Park ranger, which is a requirement to hunt within this National Park.

8. Mr. Mayo’s interests in observing and photographing grizzly bears in Grand Teton are also injured by Defendants’ actions, including because the hunts increase the risk of human-bear conflicts, which in turn result in grizzly bears being shot, thus decreasing the number of bears that can be observed and photographed by Mr. Mayo.

9. For all of these reasons Mr. Mayo has been active in opposing and ending the ERP for many years. Among other activities undertaken in furtherance of that goal, he has written numerous letters to Jackson Hole News & Guide to express his views. He has also communicated by letter and email with former Grand Teton Superintendent Mary Gibson Scott, as well as members of her staff, regarding his concerns about the ERP, and he has met personally with Ms. Scott and her staff to discuss these matters.

10. Mr. Mayo's aesthetic, photographic, and recreational interests in visiting and enjoying the Park, as well as in observing and photographing the resident wildlife under natural conditions, without fear of injury to himself, the elk, or other wildlife, are injured by Defendants' annual decisions to authorize the elk hunts without compliance with or observance of the laws and procedures that apply to those decisions. These agency actions directly contribute to the unnecessary disturbance and slaughter of wildlife in the Park, and interfere with Mr. Mayo's ability to enjoy the otherwise serene ambiance of this very special place.

11. Mr. Mayo's injuries would be redressed by a favorable ruling in this case that required Defendants to make the necessary findings required by law, to consider all of the adverse environmental impacts of and alternatives to their actions under NEPA, and to comply with their obligations under the ESA, because any such relief could lead to a reduction or even possible termination of elk hunting in Grand Teton, and would at the very least require NPS to more carefully and thoroughly analyze the impacts and appropriate ways of mitigating them.

12. Plaintiff Kent Nelson has lived in the area adjacent to Grand Teton since 2000, and has been visiting the Park since 1990. For the past four years, Mr. Nelson's main vocation has been professional photography, with a specialty in photographing wildlife — especially grizzly bear and elk. On average, Mr. Nelson spends approximately 150 days per year in the

Park, and, over the past several years, he has taken tens of thousands of photographs of resident wildlife. He actively maintains a website documenting his work and experiences in the Park.

13. Mr. Nelson takes particular pleasure in observing and photographing wildlife under natural and undisturbed circumstances, and he finds that the elk hunt negatively affects the wildlife's behavior in significant ways. For example, he is fascinated by elk rutting behavior, and wishes he were able to capture more images of male elk bugling to their "harems" of female elk. Although the sound itself cannot be photographed, the silhouette of a large dominant male whose breath has condensed in a cloud upon colliding with the crisp, autumn air, is a prize Mr. Nelson and other photography enthusiasts cherish. Unfortunately, because the elk are so frightened by the hunt, and because they are racing to reach a safe zone where they cannot be killed, much of their distinctive mating behavior is severely curtailed and, as such, Mr. Nelson's ability to successfully capture in his photographs the true natural essence of these beautiful creatures is hampered by the hunts. In addition, as a result of the annual hunts, the elk in Grand Teton retain their skittishness year-round, particularly when compared with those in Yellowstone National Park where no hunting is permitted, and this increased skittishness of the animals in Grant Teton impairs Mr. Nelson's ability to photograph the elk even outside of hunting season.

14. Mr. Nelson fears for his personal safety while in the Park as a result of the annual hunts. In his experience, poor marksmanship is common, as is unruly behavior from ERP participants. Mr. Nelson finds it especially anxiety-provoking to travel via either of the two Park roads during the time period of the annual hunts when, like the elk, he must run a gauntlet through hunters who are lined up pickup-to-pickup, waiting for elk to pass through. Like Mr. Mayo, he has witnessed elk cruelly wounded by shots taken wildly into large packs of animals,

and such experiences greatly impair his enjoyment of the elk herd as well as Grand Teton as a whole.

15. Mr. Nelson's aesthetic, professional, recreational, and other interests in visiting the Park to observe, enjoy, and photograph its natural beauty and wildlife — free from fear that he will himself be injured, or that he will witness unnecessary harm and injury inflicted upon the Park's resident wildlife — are impaired by Defendants' annual decisions authorizing the elk hunt without compliance with the laws or observance of the procedures that apply to those decisions.

16. Mr. Nelson's interests in observing and photographing grizzly bears in Grand Teton are also injured by Defendants' actions, including because the hunts increase the risk of human-bear conflicts which in turn result in grizzly bears being shot, and a diminution of the number of bears he can observe and photograph.

17. Mr. Nelson's injuries would be redressed by a favorable ruling in this case that required Defendants to make the necessary findings required by law and to consider all of the adverse environmental impacts of and alternatives to these actions, and that required NPS and the FWS to comply with their obligations under the ESA, because any such relief could lead to a reduction or even possible termination of elk hunting in Grand Teton and at the very least would require Defendants to more thoroughly and comprehensively consider the impacts of their actions and appropriate ways of mitigating those impacts.

18. Defendant Jarvis is the Director of NPS and is directly responsible for the supervision, management, and control of the units of the National Park System, including Grand Teton. Accordingly, he is ultimately responsible for the NPS's decisions challenged in this action.

19. Defendant Ashe is the Director of the U.S. FWS and is ultimately responsible for the FWS's compliance with the ESA.

20. Defendant Jewell is the Secretary of the Interior and is ultimately responsible for overseeing the work of both the NPS and the FWS, which are agencies within the Department of the Interior.

STATUTORY AND REGULATORY FRAMEWORK

A. The Grand Teton National Park Act

21. In 1950, Congress enacted legislation designating Grand Teton National Park in its present form as a unit of the National Park System. 16 U.S.C. § 406d-1 et seq. (“Grand Teton Act”). The statute provides that “[t]he Wyoming Game and Fish Commission [“WGFC”] and the National Park Service shall devise, from technical information and other pertinent data assembled or produced by necessary field studies or investigations . . . and recommend to the Secretary of the Interior and the Governor of Wyoming for their joint approval, a program to insure the permanent conservation of the elk within the Grand Teton National Park.” *Id.* § 673c(a). The statute further provides that “[s]uch program shall include the controlled reduction of elk in such park, by hunters licensed by the State of Wyoming and deputized as rangers by the Secretary of the Interior, when it is found *necessary for the purpose of proper management and protection of the elk.*” *Id.* at § 673c(b) (emphasis added).

22. The joint recommendation made to the Secretary of the Interior is to be made “[a]t least once a year between February 1 and April 1.” *Id.* The “yearly plan recommended by the” NPS and WGFC “shall become effective when approved by the Secretary of the Interior and the Governor of Wyoming,” and thereafter NPS must issue “such appropriate orders and regulations as are necessary to carry out those portions of the approved plan” that falls within NPS’s

jurisdiction. *Id.* “[I]f and when a reduction in the number of elk” is incorporated into a plan in any particular year, then “orders” enumerating the list of “qualified and experienced hunters” for that year must be issued “on or before July 1 of that year” *Id.*

B. The National Park Service Organic Act.

23. Congress created the NPS in 1916 to “promote and regulate” the public use of our national parks “by such means and measures” as are necessary to conform to the “fundamental purpose” of the parks, which is to “conserve the scenery and the natural and historic objects and the wild life therein and *to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.*” 16 U.S.C. § 1 (the “Organic Act”) (emphasis added). Pursuant to this provision, when NPS authorizes activities in a national park it must make what is referred to as a “non-impairment” determination – i.e., it must ensure that such activities will not impair the public’s ability to enjoy the park or its wildlife.

24. NPS’s Management Policies provide that where certain activities are “authorized uses” in a particular national park, “park managers have the discretionary authority to allow and manage” such uses, “*provided that the use will not cause impairment or unacceptable impacts.*” NPS Management Policies (2006), § 1.4.3.1 (emphasis added).

25. NPS has acknowledged that § 1.4 of its Management Policies serves as NPS’s official interpretation of the Organic Act and is therefore enforceable against the agency.

26. NPS has also acknowledged that the reduction of elk through hunting is not mandatory under the Grand Teton Act but, rather, is a discretionary determination that NPS makes on a yearly basis. *See* NPS Response to Comments, 2007 Final Bison and Elk Management Plan and Environmental Impact Statement.

27. Before authorizing a hunt of elk in Grand Teton, NPS must make a non-impairment finding pursuant to Section 3 of the Organic Act.

C. The National Environmental Policy Act

28. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. 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).

29. 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.

30. 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) any “adverse or environmental effects which cannot be avoided should the proposal be implemented,” (3) “alternatives to the proposed action,” (4) “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and (5) any “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332. 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(2)(E).

31. When it is not clear whether a proposed action will significantly affect the environment, and thus require the preparation of an EIS, CEQ regulations direct the agency to prepare an Environmental Assessment (“EA”), 40 C.F.R. § 1501.4, which must “provide sufficient evidence and analysis” to support the agency’s decision whether or not to prepare an EIS. *Id.* § 1508.9(a). In preparing EISs and EAs, and in otherwise implementing NEPA, federal agencies shall “[m]ake diligent efforts to involve the public.” *Id.* § 1506.6(a).

32. NEPA imposes a continuing obligation on federal agencies to prepare supplemental EAs or EISs when the agency makes “substantial changes in the proposed action that are relevant to environmental concerns” or if “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* § 1502.9(c).

33. The CEQ regulations further provide that federal agencies “shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2. Further, the discovery of significant new circumstances or information must be made “available to public officials and citizens before decisions are made and before actions are taken,” because “public scrutiny [is] essential to implementing NEPA.” *Id.* § 1500.1(b).

D. The Endangered Species Act

34. Congress enacted the ESA to ensure that “the ecosystems upon which endangered species and threatened species depend [are] conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531.

35. An endangered species is one that is presently “in danger of extinction throughout all or a significant portion of its range,” and a threatened species is one that “is likely to become an endangered species within the foreseeable future.” 16 U.S.C. §§ 1532(6), (20).

36. Section 9 of the ESA prohibits any person from “taking” any member of an endangered species, 16 U.S.C. § 1538(a), and that prohibition has been extended by regulation to the taking of any “threatened” species as well. 50 C.F.R. § 17.32. The term “take” is defined broadly, and means “to harass, harm, pursue, hunt, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). The FWS has further defined the term “harass” to include “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

37. Section 7 requires all federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” *Id.* § 1536(a)(2). To carry out this obligation, the “action agency” must formally “consult” with the FWS before the action agency undertakes an action that may affect listed species. 50 C.F.R. § 402.14. Such consultation, which must be based on the “best scientific and commercial data available,” 16 U.S.C. § 1536(a)(2), culminates in a Biological Opinion by the FWS assessing whether the action is likely to jeopardize the continued existence of the species – in which case the action may not go forward. If the FWS concludes that the proposed action is not likely to jeopardize the continued existence of the species, FWS issues a “written statement” — known as an “incidental take statement” (“ITS”) — specifying the amount of “incidental take” of an endangered or threatened species that is permitted. 16 U.S.C. § 1536(b)(4). The ITS also provides those “reasonable and prudent

measures” — along with implementing “terms and conditions” — that the FWS “considers necessary or appropriate to minimize” the impact on the species, *id.* — e.g. to insure that the action does not exceed the amount of take that has been authorized.

38. Reinitiation of formal consultation “is required and shall be requested by the Federal agency or by the [FWS], where discretionary Federal involvement or control over the action has been retained or is authorized by law,” and “the amount or extent of taking specified in the [ITS]” is exceeded, or “new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16.

FACTS GIVING RISE TO PLAINTIFFS’ CLAIMS

A. Background Relevant To The Actions And Omissions Under Review

39. Grand Teton National Park was established “to protect the scenic and geological values of the Teton Range and Jackson Hole, and to perpetuate the park’s indigenous plant and animal life.” 1976 Master Plan for Grand Teton, at 3. The Park’s “impressive array of wildlife” includes moose, sheep, pronghorns, black bears, grizzly bears, coyotes, bison, birds, and fish, as well as “[s]izeable bands of elk [that] appear routinely throughout the visitor season in certain easily accessible areas[.]” *Id.* at 9. While all of the Park’s wildlife is of considerable “scientific interest, and is worthy of protection on its own merit,” to many “park visitors its real significance lies in the excitement they feel when spotting a band of elk . . . [or] hearing the indescribable sound of elk bugling on a crisp fall day.” *Id.* at 10. Together with Yellowstone National Park, Grand Teton comprises “the strategic core of a vast upland wilderness, which is held almost exclusively within Federal ownership . . . [and which] rivals Alaska in its wilderness qualities and its variety and number of large mammals.” *Id.* at 12.

40. In its 1976 Master Plan for Grand Teton, NPS stressed the importance of implementing “management practices that take the lead in reducing degradation of resources,” *id.* at 24, including the development of “elk management programs . . . aimed at ultimately *eliminating the necessity for a public elk-reduction program on lands within Grand Teton National Park,*” *id.* at 32 (emphasis added). Through such actions NPS sought to “perpetuat[e] the indigenous plant and animal” life “in a condition of *as nearly natural dynamic equilibrium as is feasible*” and to “*display wildlife under conditions that are natural and unrestrained.*” *Id.* (emphasis added).

41. Around the turn of the last century, a series of severe winters in Wyoming strained the elk populations and spurred the people living in Jackson to save the elk by feeding them. When Congress created the National Elk Refuge (“Refuge”) in 1912, the federal government — now the FWS, which is responsible for administering the Refuge — continued this practice, which became known as the “supplemental feeding program.”

42. For roughly seventy days each winter, approximately 7,000 - 8,000 elk and 1000 bison are drawn daily to this supplemental feeding provided on the Refuge.

43. For years, both NPS and the FWS have known that the practice of supplemental feeding causes significant problems for the wildlife on both the Refuge and adjacent Grand Teton. According to the Department of the Interior — the parent agency for both NPS and the FWS — supplemental 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 brucellosis, and “damage to and loss of habitat.” Final Bison and Elk Management Plan and Environmental Impact Statement for the National Elk Refuge/Grand Teton National Park (2007) (“2007 Management Plan”), at vi. As the Department of the Interior

has also recognized, this risk poses an existential threat to the elk and bison and puts the very purpose of the Refuge at jeopardy. *Id.* at 9; *see also Defenders of Wildlife v. Salazar*, 651 F.3d 112, 114 (D.C. Cir. 2011).

44. The supplemental feeding program also artificially increases the number of elk that would otherwise be in the area, which in turn has become the justification NPS employs to allow the killing of elk each year via the ERP.

45. In 2005, in response to a judicial decision in this court that NPS and the FWS had violated NEPA by failing to consider the impact of the supplemental feeding program in *increasing* the number of bison present in the area before allowing bison to be killed because of the purported threat they posed in exposing cattle to brucellosis, *see Fund for Animals v. Clark*, 27 F. Supp. 2d 8 (D.D.C. 1998), the agencies issued a Draft EIS (“DEIS”) addressing management of the bison and elk via supplemental feeding.

46. The 2005 DEIS evaluated six alternative approaches, two of which provided for elimination of supplemental elk feeding on the Elk Refuge (via different time-lines), and the concomitant eventual cessation of the ERP in Grand Teton because “eliminating winter feeding on the refuge *would negate the need for hunting elk* [in the Park].” 2005 DEIS at 83 n. 4 (emphasis added). All of the alternatives under consideration were “based on the assumption that the Jackson elk herd objective, as determined by the Wyoming Game and Fish Department [“WGFD”], *remains 11,029*,” Bison and Elk Management Planning Update #7 (Summer 2005) at 3 (emphasis added), although no biological basis was provided to support that “objective,” which was first set in the 1980s or earlier, beyond the fact that it had been “determined” by WGFD.

47. The subsequent 2007 Final Bison and Elk Management Plan adopted by NPS and the FWS was challenged in this court on the grounds that it failed to specify a particular date by

which the admittedly harmful practice of supplemental feeding would be phased out entirely. *See Defenders of Wildlife v. Salazar*, 651 F.3d 112 (D.C. Cir. 2011). In the course of the litigation, the Department of the Interior and the FWS clarified and represented to the courts that although the FWS could not commit to a firm date for ending the supplemental feeding program, it was committed to “phasing out the winter feeding program over a course of the fifteen-year time horizon” beginning with adoption of the 2007 Management Plan. *Defenders of Wildlife v. Salazar*, 698 F. Supp. 2d 141, 147 (D.D.C. 2010). Relying expressly on that clarification and commitment by the Interior Department and the FWS, both this court and D.C. Circuit declined to find that the agency’s decision to continue supplemental feeding over the short term was arbitrary and capricious or an abuse of discretion. *See id*; *see also* 651 F.3d at 115, 117 (explaining that the NPS “committed to *abandoning* the practice[,] . . . [and] selected an approach that is geared toward *ending the practice over time*”) (emphasis added).

48. In connection with developing the Bison and Elk Management Plan, NPS and the FWS engaged in formal consultation under Section 7 of the ESA because of the adverse impacts the supplemental feeding program and elk hunt have on the grizzly bear, which is listed as a “threatened” species under the ESA. The subsequent 2007 Biological Opinion (“2007 BiOp”) recognized that “[i]solation from human activities is extremely important for bear survival, due to the tendency of grizzly bears to rapidly habituate to human foods,” but that “[h]uman-bear interactions [had] been increasing” in the area and that the “greatest increase in [grizzly mortalities in] recent years is self-defense in fall by big game hunters.” 2007 BiOp at 11; *see also id.* at 17 (explaining that “[h]unting-related deaths resulting from human-grizzly conflict remain *the most-significant source of known grizzly bear mortality*” in the Greater Yellowstone Ecosystem) (emphasis added). The FWS also recognized that elk “are an important food

supply” for grizzly bears, particularly during the winter, and that other traditional food sources, such as whitebark pine, army cutthroat worms, and cutthroat trout, are themselves threatened for various reasons. *Id.* at 11-12.

49. The 2007 BiOp recognized that Grand Teton represents a significant part of the recovery area for the grizzly bear — i.e., the species needs this habitat in order to recover from its threatened status, and that “[a]voiding human-caused bear mortality is a goal of the Grizzly Bear Recovery Plan and is essential to maintaining a viable grizzly bear population.” *Id.* at 6 (emphasis added) (citation omitted).

50. Based on the 2007 Management Plan’s commitment, as explained by the FWS to this court and the D.C. Circuit, to phase out supplemental feeding and thereby reduce the number of elk that would purportedly need to be killed by hunters, the FWS also stated that over “the long term” of the 15-year Plan, “it is estimated that the number of deputized hunters would decline from an average of 1,600 hunters per year to 773-957” for Grand Teton, *id.* at 4, and that the number of elk that would be killed by hunters would decrease from 480 to 232-287, *id.* at 20.

51. Reasoning that the “proposed action will exacerbate the short-term risk for hunting-related grizzly bear mortality within the Park,” *id.* at 25, because it allowed the hunting of elk to continue at the same level as in previous years, the FWS stressed that the “increased risk would be minimal in the long term,” *id.* at 24, because of the vast reduction in the number of hunters that will be present in the Park. Accordingly, the FWS set a limit of only one grizzly bear as the permissible incidental “take” in the Park for the 15-year life of the Plan. *Id.* at 25. The only “reasonable and prudent measure” required to insure that this limit was not exceeded was the “education of hunters.” *Id.* at 26. However the FWS also made clear that “[i]f, during the course of the action, this level of incidental take is reached, such incidental take represents

new information requiring re-initiation of consultation and review of the reasonable and prudent measures provided.” *Id.*

B. Recent Events Giving Rise To Plaintiffs’ Claims

52. On Thanksgiving day in November, 2012, a group of three hunters, deputized under the ERP, shot and killed an adult male grizzly bear in Grand Teton. Prompted by this incident, NPS sent a request to the FWS to reinitiate formal consultation under Section 7 of the ESA.

53. In response, on September 13, 2013, the FWS issued an “Addendum” to the 2007 BiOp, along with an updated incidental take statement (“ITS”), which authorized the take of “*up to 4 additional grizzly bears in the Park and 2 grizzly bears on the Refuge . . . during the remaining 9 years this biological opinion is valid.*” Memo from FWS Field Supervisor to Park Superintendent (Sept. 13, 2013) at 4 (emphasis added). The FWS provided no explanation as to how it derived these “take” figures, which dramatically increased the permitted take of threatened grizzly bears. The FWS did not impose any new binding measures on the NPS to ensure that these new take figures would not be exceeded, and the FWS also did not impose any new reasonable and prudent measures or terms and conditions with which NPS must comply.

54. Although the Addendum stated that there will be a “relatively high risk of hunter-grizzly bear contacts as long as the ERP is necessary,” *id.* at 2, the Addendum failed to reconcile that statement with the FWS’s previous conclusion in the 2007 BiOp that the long-term risk for grizzly bears in the Park would be “minimal” because the number of hunters would be substantially reduced over time with the phase-out of the supplemental feeding program.

55. The Addendum acknowledged that “[s]ince 2007, several grizzly bears have been observed seeking out gut piles left on the landscape,” *id.* at 2, during the annual elk hunt in the

Park, but the FWS did not analyze or include in the newly authorized incidental take of the bears this additional form of “take” by harassment — i.e., an act or omission that “creates a likelihood of injury to wildlife” by “significantly disrupt[ing] normal behavioral patterns, including . . . feeding.” 50 C.F.R. § 17.3.

56. The Addendum did not include in the analysis of the appropriate amount of “take” the fact that the reduction of elk by hunting “harasses” grizzly bears by reducing the *natural* food that is available to them, and the FWS failed to take into account that this also impedes the ability of this threatened species to recover.

57. The number of elk being fed with supplemental feeding in the Elk Refuge has increased from 7,279 elk in 2007, when the Management Plan was adopted, to 8,300 elk in 2014. In addition, the numbers and percentages of elk being fed on the refuge since adoption of the Management Plan are not appreciably different from what they were prior to the adoption of the Plan. Accordingly, contrary to the representations made to both this court and Court of Appeals in *Defenders of Wildlife v. Salazar, supra*, and on which the courts relied, the FWS is not in fact in the process of phasing out the supplemental feeding of elk in the Refuge in accordance with the agencies’ prior characterizations of the 2007 Management Plan, despite the fact that the FWS is now already in year 7 of the 15-year Plan during which the phase-out is supposed to be accomplished.

58. On or about May 5, 2014, in violation of the statutory deadline, NPS again made its annual decision to authorize the extensive hunting of elk in Grand Teton. This decision, which was approved by the Secretary of the Interior, appears to be based on an estimate that the number of elk have *increased* since the 2012-13 season, and allows the killing of 300 elk in the Park — the same number authorized in 2011 and 2013.

59. In making its decision to approve the hunt this year, as in years past, NPS did not issue any finding that allowing the hunt — at the same level approved in prior years — was in fact “necessary” for the “proper management and protection of the elk,” as required by the Grand Teton Act, 16 U.S.C. § 673c(a). Nor did NPS explain how it could possibly make such a determination in light of the fact that its sister agency within the Interior Department — the FWS — has failed to reduce the supplemental feeding of elk in Grand Teton in accordance with the 2007 Management Plan, in direct conflict with the representations made to this court and the D.C. Circuit.

60. In deciding to approve the hunt this year, as in past years, NPS did not even publicly discuss, let alone analyze in any manner, the basis for or validity of the 11,000 elk population objective upon which the hunt is based and has been based since at least 1987, *see* WGFD, “Elk Feedgrounds in Wyoming” (2004), at 3, without any consideration of whether there is recent scientific data or other developments bearing on the validity of that objective or the biological assumptions underlying it.

61. On information and belief, in connection with its annual decisions to approve the hunting of elk in Grand Teton, NPS has never made a finding that such hunting is “necessary for the proper management and protection of the elk” as required by the Grand Teton Act, 16 U.S.C. § 673c(a). Nor, on information and belief, has NPS ever analyzed the basis for, or validity of, the 11,000 elk population goal upon which the hunt is based.

62. In deciding to approve the hunt this year, NPS did not make a “non-impairment” determination as required by Section 1 of the agency’s Organic Act, 16 U.S.C. § 1.

63. On information and belief, in connection with its annual decisions to approve the hunting of elk in Grand Teton, NPS has never made a “non-impairment” finding, as required by 16 U.S.C. § 1.

64. In deciding to approve another hunt of elk in Grand Teton, NPS did not conduct any review under NEPA — i.e., it did not prepare either an Environmental Assessment or an EIS concerning the adverse impact of and alternatives to this year’s hunt. Hence, NPS did not analyze, or solicit public input on, any of the adverse impacts of the hunt authorized this year or alternatives to the hunt. NPS did not analyze this year, and has never analyzed in a NEPA document, the environmental effects of increasing the authorized killing of grizzly bears, along with other “cumulative impacts” on grizzly bears, as such impacts are defined by the NEPA implementing regulations. *See* 40 C.F.R. § 1508.7. NPS also failed to analyze in any NEPA document the effect of the hunt on the public’s ability to continue to enjoy the Park, the serious public safety issues that have been raised by the Plaintiffs, or the effects of any of the changes made by NPS with respect to where and how the hunt will be conducted this year, including, for example, NPS’s decision to no longer keep hunters out of a half-mile area of the Park near certain campgrounds that were previously closed to hunters.

65. Because NPS did not conduct any NEPA review in conjunction with its decision to authorize the hunt again this year, it also did not provide for any public involvement in its decision, i.e., it did not provide the public with any opportunity to address the serious, ongoing adverse impacts associated with the hunt. Nor has NPS solicited public input on the implications for the annual hunts of the FWS’s failure to abide by its representations to this court and the D.C. Circuit that the supplemental feeding of elk on the Refuge would be phased out, thus reducing the only purported “management” justification for the yearly elk hunt. Nor did

NPS afford Plaintiffs or other members of the affected public an opportunity to comment on, e.g., the elk population target that NPS has relied on with no analysis, the removal of protective areas, the significant safety concerns associated with the hunt, impacts on grizzly bears, or any of the hunt's other adverse environmental impacts.

66. On information and belief, NPS has never conducted NEPA review on any of NPS's annual decisions to approve the hunt of elk in Grand Teton. On information and belief, NPS has a policy, pattern, and practice of not conducting any NEPA review whatsoever on the annual elk hunts, or even considering whether such NEPA review is required. Even assuming that the agency had conducted adequate NEPA review on the hunts in the past, NPS has not conducted any supplemental NEPA review on new information and changes in the hunts, as required by the CEQ regulations, 40 C.F.R. § 1502.9(c).

67. By letter dated February 28, 2014, Plaintiffs provided Defendants notice of Defendants' violations of the ESA. By letter dated August 22, 2014, Plaintiffs provided Defendants with another letter outlining their objections to Defendants' ESA compliance, as well as delineating the ways in which Defendants are violating their other legal obligations in connection with the annual hunts. To date, Defendants have taken no action to remedy any of these legal violations.

PLAINTIFFS' CLAIMS FOR RELIEF

I. VIOLATIONS OF THE GRAND TETON ACT (Against NPS)

68. By failing to make and set forth a factual basis for a determination that the annual elk hunt is "necessary for the purpose of proper management and protection of the elk," in Grand Teton, and by engaging in a policy, practice, and pattern of approving the elk hunt each year without making or setting forth a factual basis for such a determination, NPS is in violation of

the Grand Teton Act, 16 U.S.C. § 673c(a), and its actions are therefore “not in accordance with law,” and are otherwise “arbitrary, capricious, [and] an abuse of discretion” within the meaning of the APA, 5 U.S.C. § 706(2).

69. By failing to analyze the basis for and validity of the 11,000 elk population objective for the elk herd, and by failing to take into account the FWS’s failure to phase out the supplemental feeding of elk in the manner that was represented to this court and the D.C. Circuit, both in this year and in past years when NPS has authorized the hunting of elk in Grand Teton, NPS has violated its obligation to allow the hunt only when “necessary for the purpose of proper management and protection of the elk,” 16 U.S.C. § 673c(a), and its actions are therefore “not in accordance with law,” and are otherwise “arbitrary, capricious, [and] an abuse of discretion” within the meaning of the APA, 5 U.S.C. § 706(2).

70. NPS’s unlawful actions harm the Plaintiffs in the manner described in paragraphs 3-16 above.

II. VIOLATIONS OF THE NPS ORGANIC ACT (Against NPS)

71. By failing to make a “non-impairment” finding with respect to its most recent decision to authorize hunting of elk in Grand Teton Park, and by engaging in a policy, practice, and pattern of failing to make a “non-impairment” finding in connection with its annual decisions to authorize the hunting of elk in this Park, NPS has violated, and will continue to violate its obligations under the Organic Act to “conserve the scenery and the natural and historic objects and the wildlife therein and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. Such actions are therefore “not in accordance with law,” and are otherwise “arbitrary, capricious, [and] an abuse of discretion” within the meaning of the APA, 5 U.S.C. § 706(2).

72. NPS's unlawful actions harm the Plaintiffs in the manner described in paragraphs 3-16 above.

III. VIOLATIONS OF NEPA (Against NPS)

73. In authorizing the hunt of elk in Grand Teton this year without preparing an EA or EIS, and by engaging in a policy, pattern and practice of approving the annual elk hunts without preparing an EA or EIS, or any supplemental NEPA document in accordance with the CEQ regulations, or otherwise complying with any of the other requirements of NEPA for the consideration of environmental impacts associated with the annual hunts, NPS has violated and will continue to violate the dictates of that statute 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).

74. NPS's unlawful actions harm the Plaintiffs in the manner described in paragraphs 3-16 above.

IV. VIOLATIONS OF THE ESA (Against NPS and the FWS)

75. By failing to go through the formal steps required by the Section 7 formal consultation process, and instead issuing an "Addendum" to the 2007 BiOp, the FWS violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and the FWS's own implementing regulations when it substantially increased the number of grizzly bears that may be "taken" as a result of the annual elk hunt in Grand Teton during the 15-year tenure of the 2007 Bison and Elk Management Plan. These actions were "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).

76. When the FWS substantially increased the number of grizzly bears that may be "taken" as a result of the annual elk hunt in Grand Teton during the life of the 2007 Bison and

Elk Management Plan. the FWS violated its obligations under Section 7(a)(2) of the ESA and the Act's implementing regulations, including by failing to: (1) provide any biological or other basis for the increased amount of take of grizzly bears authorized in the 2013 Addendum; (2) consider in its analysis the fact that grizzly bears are "taken" not only by being killed in self-defense during conflicts with hunters, but also through "harassment" by being attracted to gut piles left by the hunters and by having their natural food supply decreased; and (3) reconcile the statement in the 2013 Addendum that there will be a "relatively *high risk of hunter-grizzly bear contacts* as long as the ERP is necessary" with the conclusion in the 2007 BiOp that the long-term risk of hunters killing grizzly bears would be "*minimal*" because the number of hunters would *decrease* over time. The FWS's increase in the lethal take authorization without addressing these highly relevant factors violated the agency's statutory obligation to base its determinations on the best available science and to establish take limits for all potential forms of take, and constituted agency action that 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).

77. By failing to impose any binding measures or requirements on the NPS to ensure that the amount of "take" is not exceeded during the life of the 2007 Bison and Elk Management Plan, the FWS violated its obligations under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). These actions were "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).

78. When the FWS substantially increased the number of grizzly bears that may be "taken" as a result of the annual elk hunt in Grand Teton during the life of the 2007 Bison and Elk Management Plan, the FWS's Addendum failed to address how and the extent to which the elk hunt adversely impacts the grizzly bear's recovery — i.e., the point at which this species will

no longer need the protections of the ESA. As a result, the FWS's decision violated Section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), and the FWS's own implementing regulations, and constituted agency action that 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).

79. By relying on the FWS's unlawful and arbitrary "Addendum" in order to satisfy its own obligations under the ESA, NPS is also in violation of Section 7(a)(2) of the Act and implementing regulations.

80. Defendants' actions harm Plaintiffs in the manner described in paragraphs 3-16 above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Declare that NPS's authorization of the 2014 elk hunt in Grand Teton, and its policy, practice and pattern of authorizing the elk hunt annually each year as described herein, violates the Grand Teton Act, 16 U.S.C. § 673c(a), the NPS's Organic Act, 16 U.S.C. § 1, NEPA, the ESA and the APA;

(2) Declare that the FWS has violated the ESA and that statute's implementing regulations in connection with the NPS's 2013 reinitiation of consultation;

(3) Enjoin Defendants Jarvis and Jewell from approving any additional elk hunts in Grand Teton National Park unless and until they have fully complied with all of their obligations under the Grand Teton Act, the NPS Organic Act, NEPA, and the ESA;

(4) Set aside the amount of "take" of grizzly bears purportedly authorized by the FWS in the 2013 "Addendum" that was issued to the NPS in connection with the Elk Reduction Plan, and order the NPS and FWS to immediately reinitiate consultation under Section 7 of the

ESA and fully comply with all of the statutory and regulatory requirements that apply to such consultation before allowing any additional “take” of grizzly bears in Grand Teton;

(5) Order Defendants to promptly prepare, according to a schedule to be determined by the Court, an EIS or at least an EA, incorporating public comment, regarding the annual elk hunts in Grant Teton; and

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

Respectfully submitted,

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