August 30, 2023

U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Via: https://www.regulations.gov/

Re: Updated Bison and Elk Management Plan for the National Elk Refuge (FWS–R6–NWRS–2023–0062)

Dear U.S Fish and Wildlife Service,

Thank you for the opportunity to provide comments during the scoping period for the updated Bison and Elk Management Plan (BEMP or Plan) and Environmental Impact Statement (EIS) for the National Elk Refuge (NER or Refuge). Our organizations have a longstanding interest in the proper management of the NER, consistent with the National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. § 668dd–668ee) (Improvement Act), the mission of the National Wildlife Refuge System, and the purposes of the NER. We have regularly engaged in the development of plans for managing the Refuge's elk and bison herds, most recently by providing comments on the 2019 Draft Bison and Elk Management Step-down Plan (SDP). We have consistently expressed our opinion that the Refuge should expeditiously phase out the supplemental winter feeding of elk and bison. The primary reason to do so is to counter the existential threat of chronic wasting disease (CWD). Ending supplemental feeding, in conjunction with the restoration of native habitat, would also improve the biological integrity of the NER and better align Refuge management with relevant statutes and policies. With respect to ending winter feeding, previous plans have mostly proposed half measures and been undercut by delays. The new BEMP/EIS is an opportunity to take decisive action.

The Urgent Threat of Chronic Wasting Disease

The 2007 BEMP acknowledged the danger of CWD. However, because the disease had not yet been detected in the Jackson elk herd, it was framed as a "future risk" (BEMP, page 8) that could be addressed in a step-down plan "as the need arises" (BEMP, page 13). In the 16 years since the original BEMP, CWD has moved inexorably toward the NER and is now an urgent threat that should be the central focus of the new Plan. While no CWD-positive animal has yet been confirmed inside the Refuge, the disease has recently been detected in the adjacent Grand Teton National Park. CWD was confirmed in a buck mule deer inside the Park in 2018, in an elk in 2020, and in a doe mule deer in 2022. Based on these detections, the U.S. Fish and Wildlife Service (FWS) has determined that "CWD is now in the

Jackson elk herd" (National Elk Refuge Response Strategy for the Presence of Chronic Wasting Disease in the Jackson Elk Herd [CWD Response Strategy], page 2). Because infected animals may show no signs of illness for more than a year, it is possible, and maybe likely, that CWD is already present in the Refuge. Unlike brucellosis, a disease that has received far more attention in previous planning efforts, CWD is fatal and there is no known vaccine or treatment. CWD is also uniquely insidious because the prions that cause the disease persist in the environment for years and may even be incorporated in plant tissues (CWD Response Strategy, page 2). For these reasons it is essential to focus on preventing the spread of the disease. The most effective way to prevent transmission is to significantly reduce the density of elk on the Refuge by ending winter feeding.

In this regard, the management approach reflected in the 2019 SDP has been demonstrated to be ineffective in addressing the CWD threat. As FWS documented in August 2022, after three winter seasons during which FWS implemented the SDP, the agency made no progress toward reducing the number of elk using winter feedgrounds on the NER:

> Despite a 22% reduction in feed season length and elk fed days during the first 3 years of [SDP] implementation, the number of elk using [NER] feedgrounds is unchanged, and the mean proportion of the Jackson Elk Herd that winters on NER remains 5 percentage points above the pre-treatment baseline.

National Elk Refuge Feeding Reduction Step-Down Plan Progress Report, August 2022. The SDP proved no more effective during the 2023 feeding season, as FWS began feeding approximately two weeks earlier than the long-term average start date and continued to feed approximately 7,500 elk on Refuge feedgrounds, which is well above the SDP's objective of reducing the number of over-wintering elk on the Refuge to 5,000. Accordingly, it is time for FWS to break with the SDP's ineffective approach with a new vision for addressing the urgent disease threat on the Refuge.

Statutory Requirements and Policy Guidance for Refuge Management

Management of the NER must be guided by the purposes of the Refuge. The Refuge's Comprehensive Conservation Plan (CCP) explains that the NER was first established to provide "for the grazing of, and . . . [be] a refuge for, American elk and other big game animals." 44 Stat. 1246, 16 U.S.C. § 673a. Later executive orders added a second purpose, stating that the Refuge and any areas that may be added to it in the future are "reserved . . . as refuges and breeding grounds for birds." Executive Order 3596, affirmed by Executive Order 3741. These purposes are reflected in the habitat and wildlife management goals outlined in the CCP: "Adaptively manage bison, elk, and other wildlife populations . . . [and] contribute to the conservation of healthy native wildlife populations and their habitats" (CCP, page 95).

The purposes and goals of the Refuge must be achieved in a way that is consistent with the mission of the National Wildlife Refuge System and the statutes that govern it. First among these is the Improvement Act, which makes clear that "the mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats." 16 U.S.C. § 668dd(a)(2). Supporting federal regulations define *conservation* and *management* in this context to include "sustain[ing] . . . healthy populations of fish, wildlife, and plants utilizing . . . methods and procedures associated with modern scientific resource programs." 50 CFR § 25.12(a). The Improvement Act mandates that FWS administer refuge lands 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)(B). The

concepts of biological integrity and environmental health are expanded upon by FWS policy, which states that FWS must not "allow [wildlife population] densities to reach excessive levels that result in adverse effects on wildlife and habitat" and adds that "the effects of producing densities that are too high may include disease." 601 FW 3.14(E).

The policy that provides guidance for Habitat Management Plans directs refuge managers to pursue natural conditions in their refuges and to prioritize the use of natural management techniques. It encourages managers to "restore ecosystem function," or, if that is not feasible, to employ "refuge management strategies . . . [that] mimic natural processes to the extent practicable." 620 FW 1.7(E). The policy clarifies that managers should "use the least intrusive and intensive management strategies to achieve desired habitat management objectives, as appropriate." Id.

Courts have also spoken to the management obligations of the National Elk Refuge. In its ruling in response to litigation challenging the legality of winter feeding of elk and bison, the D.C. Circuit Court stated that "[t]here is no doubt that unmitigated continuation of supplemental feeding would undermine the conservation purpose of the National Wildlife Refuge System." *Defenders of Wildlife v. Salazar*, 651 F.3d 112, 117 (D.C. Cir. 2011). As the court further explained,

> [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 miasmic zone of life-threatening diseases. Id. at 116.

For this reason, the court determined that FWS must adopt a management plan that phases out the winter feeding program, and the agency "must proceed in a manner that is consistent with the science and accounts for the risks posed by supplemental feeding." Id. at 117.

Purpose and Need of the New Bison and Elk Management Plan

The purpose and need of the updated BEMP, like that of the earlier version, should be to establish goals, objectives, and strategies for managing bison and elk on the NER. The new Plan's purpose and need should emphasize that the Plan is intended to bring management of the Refuge into alignment with relevant statutes and policies, including those referenced above. It should acknowledge that intensive winter feeding of elk and bison on the Refuge is inconsistent with FWS wildlife management guidance and the Refuge's legal obligations. Given that fact, and the potentially catastrophic consequences of CWD becoming established in the Refuge, a commitment to phase out winter feeding as expeditiously as practicable should be included in the purpose and need of the plan. Because the Refuge is under no statutory obligation to support the Wyoming Game and Fish Department (WGFD) objective for the size of the Jackson elk herd, and because reducing the density of elk on the Refuge by phasing out winter feeding is the most effective way of preventing the spread of CWD, the purpose and need of the Plan should make no mention of the WGFD objective.

Recommendations for the Scope of Management Alternatives

1. *The process of updating the BEMP should start with the presumption that winter feeding will be phased out*

Under the National Environmental Policy Act (NEPA), the EIS must include "a reasonable range of alternatives to the proposed agency action . . . that are technically and economically feasible, and *meet the purpose and need of the proposal*." 42 U.S.C. 4332 (emphasis added). The proper scope of alternatives for the new EIS is suggested by conclusions drawn in the 2007 BEMP. The original BEMP determined that "high animal concentrations have created an unnatural situation" on the Refuge that has contributed to problems including "an increased risk of potentially major outbreaks of exotic diseases" and "damage to and loss of habitat" (BEMP, page vi). It correctly identified that all problems related to the unnatural density of elk and bison "stem from the winter feeding program" (BEMP, page 9). In addition, the BEMP acknowledged that these outcomes are contrary to FWS policies directing that "wildlife population levels on national wildlife refuges [should] be maintained at levels consistent with sound wildlife management principles, that populations be managed for natural densities and levels of variation," and that "wildlife densities . . . [should] not reach excessive levels that would result in adverse effects on habitat and other wildlife species, including increased disease risks" (BEMP, page vii). All these determinations made in 2007 remain true today. The most relevant change since then has been the introduction of CWD to the Jackson elk herd.

Therefore, the EIS for the updated BEMP must evaluate management alternatives with the objective of phasing out winter feeding. The "no action" alternative should be a continuation of the management prescribed by the 2007 BEMP and the 2019 SDP, with the explicit recognition that this alternative is not viable because the SDP has been demonstrated to be ineffective at reducing elk densities on the Refuge. All other alternatives should be designed to phase out feeding within a defined timeframe that is as expeditious as practicable. They should only differ in terms of how feeding would be reduced, the target date for ending it, and supplemental management actions such as hunting or habitat restoration.

2. *The alternatives should not be constrained by the interests of stakeholders, including the Wyoming Game and Fish Department*

FWS has no statutory obligation to manage the NER to meet WGFD's objective for the Jackson elk herd. The agency does have an obligation to disregard this objective if it conflicts with sound science and FWS policy. The Tenth Circuit has already definitively ruled that Wyoming's interests cannot outweigh the mission and purpose of administering the NER, stating "The first sentence of the [State authority] saving clause [in the Improvement Act] does not deny the FWS, where at odds with the State, the authority to make binding decision bearing upon the 'the biological integrity, diversity, and environmental health of the System.' Such a construction of the saving clause would be inconsistent with the [Improvement Act's] 'mission . . . to administer a national network of lands.'" Wyoming v. U.S., 279 F.3d 1214, 1234 (10th Cir. 2002) (internal citations omitted). If the EIS evaluates any alternatives that incorporate WGFD's herd objective, it should be made clear that maintaining herd size at that level would be acceptable only if independent criteria for wildlife population health and habitat quality are also met. No alternative should condition the phasing out of winter feeding on maintaining the herd size objective. If the herd is to be maintained at that level going forward, it must be done through other means.

We recognize the importance of coordinating Refuge management with WGFD. It should be made clear that active coordination with WGFD and other local stakeholders would be a feature of all alternatives. However, no alternative should include language stating that a particular action would be taken in consultation with WGFD, and no alternative should be overall more deferential to WGFD than the others, as was the case for the preferred alternative (Alternative 4) selected in the 2007 BEMP. In this regard, despite the D.C. Circuit's decision to "take the Secretary at his word that Wyoming has no veto

over the Secretar[y]," *Defs. Of Wildlife*, 651 F.3d at 118, conduct by Wyoming and FWS since that ruling suggest that FWS has continued to defer to Wyoming regarding FWS feeding policy changes. It is now time to break with that history in the interest of maintaining the Refuge's integrity. Accordingly, FWS should afford Wyoming no approval authority.

3. *Adaptive management should not undermine an aggressive approach to phasing out winter feeding*

Adaptive management is a valuable tool for adjusting management actions in response to unforeseen circumstances or new data. Some or all of the alternatives evaluated in the EIS should include adaptive management strategies. However, clear limits should be placed on the extent to which adaptive management can result in delaying the phase-out of winter feeding. Rather than slowing the implementation of actions intended to phase out feeding, the primary purpose of adaptive management should be to overcome challenges that would cause delays. It would also be appropriate to use adaptive management to achieve phase-out timelines while minimizing undesirable outcomes (e.g., high levels of calf mortality).

Compared to the 2007 BEMP and 2019 SDP, adaptive management strategies evaluated in the new EIS should include more criteria that would trigger changes in management actions. The criteria should be objective, and the alternatives should outline monitoring programs that would produce the data (e.g., availability of forage, habitat quality, herd size and density) that form the basis of the criteria. Each alternative should also anticipate potential contingencies of its prescribed course of management and describe responses that would be consistent with the general approach of the alternative and maintain progress toward the goal of phasing out winter feeding.

4. *The alternatives should explicitly address prevention and control of chronic wasting disease*

As discussed above, the EIS should evaluate alternatives that would reduce the density of elk on the Refuge by ending winter feeding, primarily for the purpose of preventing the spread of CWD. The disease should be addressed more explicitly in the alternatives than was done in the 2007 BEMP or the 2019 SDP. The SDP had a single criterion for measuring the effectiveness of feeding reduction efforts (elk/bison fed days), which has no well-established relevance to disease management. The new BEMP should include multiple quantifiable and objective criteria with a more direct link to the potential for CWD to spread in the Refuge, including density-based transmission thresholds, spatial heterogeneity of elk herds, and persistence of the pathogen in the environment. The relationship between density and disease transmission is unlikely to be a simple linear one where reduced density necessarily produces a similar drop in transmission and prevalence. As such, the Plan should account for density thresholds and discuss how proposed management measures will affect disease transmission and prevalence in light of those thresholds.

The EIS should also evaluate alternatives for responding to the detection of CWD in the Refuge. The alternatives should describe how infected animals will be detected, how they will be removed from the population, and how the remaining herd will be managed to mitigate transmission of the disease. The new BEMP should incorporate a CWD response plan, rather than relying on WGFD strategies as the 2007 BEMP did.

Recommendations for the Preferred Alternative

The preferred alternative should be generally similar to Alternative 6 in the 2007 BEMP. Like that alternative, it should commit to phasing out winter feeding within five years. The first priority of the preferred alternative should be reduction of elk densities in the Refuge to counter the spread of CWD. As such, it should accept a lower overall elk population that is not tied to the WGFD herd objective and should accept higher (and more natural) rates of calf and total mortality. The second priority, which is fully compatible with the first, should be to establish overall more natural conditions in the Refuge by restoring native habitats and reducing reliance on irrigation and the cultivation of non-native plants. The Refuge should not seek to maintain populations of elk or bison that are greater than naturally available forage can support. Refuge managers should also collaborate with other agencies and stakeholders to work toward a more natural distribution of elk on the landscape, through measures that include recognizing and protecting migration routes to wintering areas outside Jackson Hole. Finally, the preferred alternative should prioritize balancing sustainable populations of elk and bison on the Refuge with the needs of other species, particularly migratory birds, which are included in the Refuge's purpose. Reduced concentrations of elk will alleviate browsing pressure on woody riparian vegetation, a key habitat for breeding birds. The preferred alternative should further enhance the quality of this habitat by constructing elk-excluding fencing around some riparian areas.

The Final EIS (FEIS) for the 2007 BEMP rated the six alternatives that were considered based on various criteria. It ranked Alternative 6 first in terms of how well it would "conserve and restore fish, wildlife, and plant resources and their habitats," "sustain healthy fish and wildlife populations over [the] long term," and "conserve and restore habitat for fish and wildlife and maintain biological diversity" (FEIS, page 83). Alternative 6 was also rated the best in terms of its ability to prevent elk and bison densities from being "so high that they cause habitat and disease problems" and to "provide a refuge and breeding ground for birds" (FEIS, page 83). Following from this analysis, the Record of Decision (ROD) for the FEIS concluded that Alternative 6 would be the "environmentally preferable alternative" and "would result in the greatest overall benefit to the biological and physical environment" (ROD, page 14). In addition, the FEIS ranked Alternative 6 first among the alternatives in terms of both its ability to fulfill FWS's legal directives (e.g., the mission of the National Wildlife Refuge System and the purposes of the NER) and its consistency with "pertinent management principles" (FEIS, page 84).

Despite its lesser environmental benefit and its divergence from Refuge System policies and management principles, Alternative 4 was chosen as the preferred alternative in 2007 because it "better balances the divergent views and interests and perspectives of other agencies, stakeholder groups and the public" (ROD, page 14), most significantly by adhering to WGFD's elk herd objective. Whereas Alternative 6 would have ended winter feeding within five years, Alternative 4 only committed to reducing feeding based on "criteria determined in cooperation with [WGFD]" (FEIS, page 82).

We believe that choosing Alternative 4 was a mistake that should not be repeated. While refuge managers should consider the views of other agencies and stakeholders, they have a higher duty to uphold statutes and policies governing wildlife populations and habitats. There should also be a strong presumption that the environmentally preferable alternative is the preferred alternative for the Refuge. In 2007, FWS identified a single alternative that was both environmentally preferable and the strongest on policy. That alternative would have aggressively phased out winter feeding and allowed elk populations to fluctuate naturally. There is every reason to think that the same analysis would lead to the same conclusion today. The most important change since 2007 is the introduction of CWD to the

Jackson elk herd. Given the urgency of the threat posed by that disease, the impetus to end winter feeding is even greater now.

Sincerely,

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