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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA WILDLIFE ALLIANCE, *et al.*, Plaintiffs, v. DEB HAALAND, Secretary of the Interior, *et al.*, Federal Defendants, and SAFARI CLUB INTERNATIONAL, *et al.*, Defendant-Intervenors.	Case No. 3:20-cv-00209-SLG

ALASKA WILDLIFE ALLIANCE'S OPENING BRIEF (LOCAL RULE 16.3)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other

LIST OF SHORT NAMES AND ACRONYMS

ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
Board	Alaska Board of Game
GMU	Game Management Unit
Organic Act	National Park Service Organic Act
Preserves	National Preserves
Service	National Park Service
State	State of Alaska
2015 Rule	Alaska; Hunting and Trapping in National Preserves, 80 Fed. Reg. 64,325 (Oct. 23, 2015)
2020 Rule	Alaska; Hunting and Trapping in National Preserves, 85 Fed. Reg. 35,181 (June 9, 2020)

INTRODUCTION

For decades, the National Park Service (Service) consistently declared that it must manage the National Park System in Alaska primarily for conservation, and that Congress' allowance of sport hunting on National Preserves (Preserves) did not alter that conservation mandate. The Service codified that position in 2015, adopting regulations that barred predator reduction efforts as well as specific practices allowed under State of Alaska (State) sport hunting regulations that the Service found in conflict with federal law and policy.[1] Five years later, the Service did an about-face, reversing these regulations and abandoning its long-held interpretations of the Alaska National Interest Lands Conservation Act (ANILCA) and the National Park Service Organic Act (Organic Act).[2] The Service's reversal conflicts with a plain reading of those statutes. The Service's novel statutory interpretation is impermissible, and the reasons the Service offered for reversing course are arbitrary. The Alaska Wildlife Alliance, *et al.* brought this action to protect their members' interests in the National Park System and the natural diversity of wildlife therein, and seek vacatur of the 2020 Rule, and declaratory and injunctive relief.

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[1] Alaska; Hunting and Trapping in National Preserves, 80 Fed. Reg. 64,325 (Oct. 23, 2015) (2015 Rule) (2015_NPS0000001–20); *see also* 36 C.F.R. §§ 13.42(f), (g) (2019).
[2] Alaska; Hunting and Trapping in National Preserves, 85 Fed. Reg. 35,181 (June 9, 2020) (2020 Rule) (2020_NPS0000622–32).

LEGAL FRAMEWORK

The Service manages the National Park System in Alaska under the Organic Act and ANILCA.[3] The Organic Act requires the Service "to conserve the scenery, natural and historic objects, and wild life" and provide for visitor enjoyment of the same for this and future generations.[4] The Service's Management Policies implementing the Organic Act require it to protect natural systems, processes, and wildlife populations, including the natural abundances, diversities, distributions, densities, age-class distributions, populations, habitats, genetics, and behaviors of wildlife.[5] The Management Policies also prohibit the manipulation of wildlife populations to increase hunter take.[6]

Congress passed ANILCA in 1980 to preserve nationally significant areas "for the benefit, use, education, and inspiration of present and future generations" and to preserve wildlife, wilderness values, and natural, undisturbed, unaltered ecosystems while allowing for recreational opportunities.[7] For example, Congress identified Gates of the Arctic, Denali, Katmai, and Glacier Bay National Parks as "large sanctuaries where fish and wildlife may roam freely, developing their social structures and evolving over long

[3] 16 U.S.C. § 410hh.
[4] 54 U.S.C. § 100101(a).
[5] 2020_NPS0328606–16 (§§ 4.1, 4.4.1, 4.4.1.2, & 4.4.2).
[6] 2020_NPS0328616–17 (§ 4.4.3).
[7] 16 U.S.C. § 3101(a)–(b).

periods of time as nearly as possible without the changes that extensive human activities would cause."[8] ANILCA requires the Service to manage nearly all of the National Park System units in Alaska specifically to protect wildlife populations and habitat, particularly for wolves and bears.[9] ANILCA also directs the Service to protect natural processes and maintain environmental integrity.[10]

Congress allowed sport hunting on Preserves, unlike areas designated as National Parks.[11] But Congress preserved the Organic Act's approach to wildlife management, providing that the take of wildlife "shall be carried out in accordance with [ANILCA] and other applicable State and Federal law."[12] Congress also expressly granted the Service authority to prohibit hunting in Preserves for a variety of objectives, including public safety, administration, protection of wildlife and vegetation, and public use and enjoyment.[13] Prior to the passage of ANILCA, Representative Udall emphasized:

> The standard to be met in regulating the taking of fish and wildlife and trapping is that the preeminent natural values of the Park System shall be

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[8] S. REP. NO. 96-413, at 137 (1979).
[9] 16 U.S.C. §§ 410hh; 401hh(1), (2), (4)(a), (6), 7(a), 8(a), (9), (10) & hh-1(2), hh-1(3)(a).
[10] *Id.* §§ 401hh, (1), (8)(a), (10).
[11] *Id.* § 3201. Throughout, "hunting" refers to both sport hunting and trapping.
[12] *Id.* § 3202(c); *see also* S. REP. NO. 96-413, at 233 ("[T]he policies and legal authorities of the managing agencies will determine the nature and degree of management programs affecting ecological relationships, population's dynamics, and manipulations of the components of the ecosystem.").
[13] 16 U.S.C. § 3201.

> protected in perpetuity, and shall not be jeopardized by human uses . . . this standard must be set very high: The objective for Park System lands must always be to maintain the health of the ecosystem, and the yield of fish and wildlife for hunting and trapping must be consistent with this requirement.[14]

Through ANILCA, Congress maintained "historic Federal-State relations concerning fish and wildlife management,"[15] directing that both "State and Federal law and regulation" apply to sport hunting in the Preserves.[16] However, State law sets a lower bar for wildlife protection, requiring management pursuant to "sustained yield," defined as "the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game."[17] While "game" includes bears and wolves,[18] the State may select "between predator and prey populations" and manage to reduce predators "to the lowest level possible."[19] On federal lands, like Preserves, where State law fails to meet federal standards, federal law controls.[20]

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[14] 126 CONG. REC. H10549 (daily ed. Nov. 12, 1980).
[15] 126 CONG. REC. 31109 (statement of Sen. Stevens); *see also* 16 U.S.C. § 3202(a), (b).
[16] 16 U.S.C. §§ 3201, 3202(c).
[17] AK CONST. ART. VIII, § 4; ALASKA STAT. § 16.05.255(k)(5).
[18] ALASKA STAT. § 16.05.940(19).
[19] *West v. Alaska State Bd. of Game*, 248 P.3d 689, 697, 700 (Alaska 2010).
[20] *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

FACTUAL BACKGROUND

For almost forty years, the Service interpreted its statutory mandates as setting a high bar for protecting wildlife within the National Park System in Alaska, which sport hunting regulations needed to meet.[21] The Service viewed State sustained yield management as "dramatically inappropriate for implementation within units of the National Park System."[22] The Service also interpreted its statutory mandates as precluding State management actions and decisions intended to reduce predator populations.[23] The Service recognized that it may need to preempt State sport hunting regulations from applying on Preserves where incompatible with "Preserve goals, objectives or management plans."[24] For years, the Service rarely did so.[25] But then, the State increased its efforts to reach and maintain high levels of human harvest of game, as required by State law.[26] The State designated most of Alaska as "important for human

[21] *See*, *e.g.*, 2020_NPS0328851–53; 2020_NPS0328860; 2020_NPS0328805–08.
[22] 2020_NPS0328874–76; *see also* 2020_NPS0328853; 2020_NPS0328775–76; 2020_NPS0328397–401; 2020_NPS0327829–8002; 2020_NPS0327004–06; 2020_NPS0328744–63; 2020_NPS0011684.
[23] *See*, *e.g.*, 2020_NPS0328863; 2020_NPS0328560; 2020_NPS0330122; 2020_NPS0328741.
[24] 2020_NPS0328399.
[25] 2015_NPS0000005; 2015_NPS0000009.
[26] 2020_NPS0328817.

consumption of ungulates," managed for low levels of predators to reduce predation.[27] To do so, the State expanded predator control areas and liberalized sport hunting regulations for predators.

Following ANILCA's passage, the State had maintained "a buffer zone" between National Park System units and predator control areas.[28] Into the early 2000s, only a few predator control areas abutted National Park System lands.[29] But by the mid-2010s, they virtually surrounded many National Park System units.[30] This has impacted wildlife within the National Park System.[31] For example, in Yukon-Charley Rivers National Preserve, the Service discontinued long-standing wolf studies because the State's predator control program adjacent to the Preserve killed so many wolves.[32] In Lake Clark National Park and Preserve, the Service observed: "[p]redator control on two sides of [the unit] impacts the natural predator/prey systems that are a hallmark of the area."[33]

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[27] 2020_NPS0010158; *see also* 2020_NPS0010159.
[28] 2020_NPS0328863.
[29] 2020_NPS0327713.
[30] 2020_NPS0327717; 2020_NPS0328948; 2020_NPS0328949.
[31] 2020_NPS0327319–48.
[32] 2020_NPS0330257–58; 2020_NPS0327011; 2020_NPS0330261–63; 2020_NPS0010160; 2020_NPS0327011–12.
[33] 2020_NPS0327194; 2020_NPS0327197.

In addition to predator control programs, the State has also adopted—in the words of the Service itself—"increasingly liberal, often previously illegal measures to decrease predator abundance."[34] In fact, the State primarily relies on liberalized sport hunting regulations to encourage hunter harvest of predators to reduce predator populations.[35] For

[34] 2020_NPS0328810; *see also* 2020_NPS0328125–26 (examples of Alaska Board of Game (Board) liberalizations, citing 2020_NPS0327581, 2020_NPS0327595, 2020_NPS0327616, 2020_NPS0327673, 2020_NPS0327645); 2020_NPS0005705 ("Efforts designed to reduce predation by liberalizing hunting regulations for predators is the default mechanism utilized to accomplish the [State] law's desired outcome of increasing hunter harvests of moose and caribou"); 2020_NPS0005706, 2020_NPS0005711 (Board has liberalized methods and means for harvest of brown bears across approximately 76% of Alaska, and the remaining areas are places with low moose and caribou populations, or either where wolves are the primary predators (and targeted by the State for reduction), or bears are large and valued as a trophy species).

[35] 2020_NPS0010511; *see also* 2020_NPS0329851 (State publication noting increased hunter harvest of ungulates is achieved, in part, by "liberalizing harvest of predators"); 2020_NPS0329815 (State publication explaining that elevating human harvest of prey depends, in part, on "sufficient" hunting and trapping harvests "to limit the growth of those predator populations" that have been reduced by predator control programs); 2020_NPS0329816 (same, noting: "Take of predators by conventional hunting and trapping may be increased through liberalized seasons and bag limits to reduce the effects of predation on prey populations."); 2020_NPS0329829 (same, noting: "[H]arvest of wolves and bears—through traditional hunting and trapping or other means—must limit the natural growth of predator populations [following predator control programs] . . . Efforts by the public . . . will sometimes be a necessary part of overall, intensive management programs designed to increase harvests of moose and caribou."); 2020_NPS0327797–98 (State publication noting: "[d]uring the last 10 years, the [Board] has made a deliberate effort to reduce numbers of grizzly bears . . . by increasing the bag limit and extending hunting seasons."); 2020_NPS0329363–64 (State regulatory proposal book, noting: "[t]he Board . . . liberalized brown bear hunting regulations . . . to increase the harvest"); 2020_NPS0328140, 2020_NPS0328150 (State policies, calling for the

example, in 2012, the State first authorized brown bear baiting under its sport hunting regulations in an attempt to decrease brown bear populations, noting that not enough hunters obtained predator control permits.[36] The State has committed to continue "develop[ing] innovative ways of increasing bear harvests if conventional hunting seasons and bag limits are not effective at reducing bear numbers to mitigate predation on ungulates."[37] The State has also acknowledged that lengthening wolf seasons is partially because "the most effective time to kill wolves is during caribou calving season," *i.e.*, during denning season.[38] The State has not limited its liberalization of sport hunting

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"reduc[tion of] bear numbers through general hunting provisions such as liberalized seasons, bag limits, hunting methods and means and tag waivers"); 2020_NPS0328156, 2020_NPS0328162, 2020_NPS0328168 (State policies, calling for general hunting provisions to reduce bear numbers, stating a preference for using "conventional hunting seasons and bag limits to manage bear numbers"); 2020_NPS0328133 (State finding: "Population and harvest objectives for species important for human use, particularly for food, may be attainable without drastic bear control measures if a considerable number of bears are taken by bear baiters."); 2020_NPS0329716 (State report, explaining the State liberalized brown bear sport hunting regulations to "attempt to reduce the brown bear population to decrease predation pressure on moose calves"); 2020_NPS0328171–72 (State policy, aiming "to greatly reduce wolf numbers to aid recovery of low prey populations or to arrest undesirable reductions in prey populations" with "season and bag limits [set] to . . . allow for participants to directly aid in . . . improving ungulate levels").

[36] 2020_NPS0328131.

[37] 2020_NPS0328156; *see also* 2020_NPS0328162; 2020_NPS0328168; 2020_NPS0329721.

[38] 2020_NPS0327708; *see also* 2020_NPS0010505 (The State uses "[s]eason timing and length, rather than a bag limit . . . to manage the level of harvest" of wolves).

methods to areas with predator control programs,[39] and has explicitly relied on "incrementally liberalized brown bear and wolf hunting regulations . . . [to] reduc[e] predation on moose and sheep" in areas where predator control is prohibited.[40]

These liberalizations have been correlated with an increase in hunter harvest of predators.[41] For example, in the early 1980s, the four-year running average of brown bear harvest was approximately 400 bears in the 76% of Alaska where brown bear harvest regulations have since been significantly liberalized.[42] In that same area, since the 2007–2008 regulatory year, that figure more than doubled, consistently exceeding 800 bears, peaking at 910 bears in the 2011–2012 regulatory year.[43] The State made little effort to monitor bear populations following adoption of these regulations or "to estimate sustainable harvest rates."[44]

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[39] 2020_NPS0329694.
[40] 2020_NPS0327448; *see also* 2020_NPS01313713; 2020_NPS0329228; 2020_NPS0327827.
[41] 2020_NPS0009079; 2020_NPS0009078; 2020_NPS0329641.
[42] 2020_NPS0005709; *see also* 2020_NPS0005707 (over 22 years, the Board liberalized hunting regulations for resident brown bear hunters 222 times).
[43] 2020_NPS0005709.
[44] 2020_NPS0005711.

The Service repeatedly asked the State to exempt Preserves from such regulations, without success.[45] In making these requests, the Service explained that State law requirements to provide for high levels of human harvest of game "are incompatible with NPS laws and implementing policies, which require maintaining natural processes, systems, and wildlife populations."[46] The Service also identified specific measures as "inconsistent with the management of national parks," including using artificial lights to harvest black bears, taking brown bears over bait, and taking wolves or coyotes with young pups.[47] The State refused to exempt the Preserves, asserting that the Service is responsible for compliance with federal law and that it should use its own authority to do so.[48] The Service began adopting temporary restrictions in 2010 to prevent the liberalized sport hunting regulations from applying to Preserves.[49] By 2013, the Service estimated

[45] 2015_NPS0000002; 2020_NPS0328560; 2020_NPS0328812–13; 2020_NPS0327829–8001. The types of State hunting regulations relevant here are typically specific to particular Game Management Units (GMUs). GMUs do not match land ownership, such that Preserves are not separated out as their own units. 2020_NPS0010622.
[46] 2020_NPS0327962–63; *see also* 2020_NPS0328003–05; 2020_NPS0328981; 2020_NPS0328986.
[47] 2020_NPS0327964; *see also* 2020_NPS0327009; 2020_NPS0328992; 2020_NPS0330050.
[48] 2020_NPS0328810 (State "encouraged the NPS to use its own authorities," then "object[ed] strongly and accus[ed] NPS of Federal 'overreach'" when it did); *see also* 2020_NPS0328023–24; 2020_NPS0330050; 2020_NPS0330093.
[49] 2020_NPS0328946; 2020_NPS0327788–96; 2015_NPS0143044–46.

that—absent its intervention—State sport hunting regulations aimed at reducing predator populations would have applied to ninety-percent of the Preserves.[50]

The Service then promulgated the 2015 Rule, formalizing its position, consistently held for almost forty years: ANILCA, the Organic Act, and the Service's Management Policies preclude "predator reduction efforts" in the National Park System in Alaska.[51] The Service defined predator reduction efforts as State management actions, laws, and regulations "with the intent or potential to alter or manipulate natural predator-prey dynamics and associated natural ecological processes, in order to increase harvest of ungulates by humans."[52] The Service emphasized that predator reduction efforts "conflict with ANILCA's authorization for sport hunting" and "the statutory purposes for which national preserves were established."[53] This is because the "National park areas are managed for natural ecosystems and processes, including wildlife populations," and the "NPS legal and policy framework prohibits reducing native predators for the purpose of increasing numbers of harvested species."[54] The 2015 Rule also prohibited specific practices authorized under State sport hunting regulations that the Service found in

[50] 2020_NPS0328773.
[51] 2015_NPS0000001–20.
[52] 2015_NPS0000019.
[53] 2015_NPS0000004.
[54] 2015_NPS0000004.

conflict with its mandates: taking wolves and coyotes during the denning season, black and brown bear baiting, hunting black bears with dogs, and taking any black bear, including cubs or sows with cubs, with artificial light at den sites.[55] The Service prohibited these practices primarily because the State's intent in authorizing them was to reduce predator populations.[56] The Service also prohibited bear baiting to maintain natural bear behavior, ecosystems, and processes, and to minimize safety concerns.[57]

In 2017, the federal administration changed. The newly-appointed Secretary of the Interior issued two Secretarial Orders, calling for expanded hunting opportunities and closer collaboration with the states.[58] He also issued a memorandum directing agencies within the Department of the Interior to review their wildlife management regulations, specifically those more restrictive than state provisions.[59]

Partially based on these directives, the Service adopted the 2020 Rule, deleting the 2015 Rule's prohibition on predator reduction efforts within the National Park System

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[55] 2015_NPS0000001; 2015_NPS0000008.
[56] 2015_NPS0000008.
[57] 2015_NPS0000005, 2015_NPS0000011, 2015_NPS0000012. Before the 2015 Rule, the Service allowed black bear baiting. But when adopting the 2015 Rule, the Service concluded that the same brown bear baiting concerns applied to black bear baiting, and prohibited both. 2015_NPS0000005, 2015_NPS0000012.
[58] 2020_NPS0008709–17.
[59] 2020_NPS0010205–06.

and the bar on specific practices within the Preserves.[60] The Service also removed many of its other regulations prohibiting specific sport hunting methods and means, including some that mirrored State regulation.[61] The Service explained that "[t]hese changes are consistent with Federal law providing for State management of hunting and trapping in Alaska preserves"[62] and "will better implement . . . policy direction . . . by increasing hunting opportunities in national preserves and promoting consistency between Federal regulations and State wildlife harvest regulations."[63]

STANDARDS OF REVIEW

As an Administrative Procedure Act (APA) case, resolution on summary judgment is appropriate.[64] Under the APA, courts "hold unlawful and set aside agency action, findings, and conclusions" when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[65] An agency's action is arbitrary when it "relie[s] on factors which Congress has not intended it to consider, entirely fail[s] to consider an

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[60] 2020_NPS0000623. The Service also used a differently-worded definition of predator reduction efforts, though it does not acknowledge or explain the change. *Compare* 2020_NPS0000623, *with* 2015_NPS0000019.
[61] 2020_NPS0000630.
[62] 2020_NPS0000622.
[63] 2020_NPS0000630.
[64] FED. R. CIV. P. 56(a); LOCAL CIV. R. 16.3(a)(1).
[65] 5 U.S.C. § 706(2).

important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[66]

Statutory interpretation presents questions of law,[67] reviewed under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[68] First, courts consider "whether Congress has directly spoken to the precise question at issue,"[69] employing "traditional tools of statutory construction" to determine congressional intent.[70] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[71] If Congress has not spoken to the issue, or if Congress' intent is unclear, courts then consider the agency's interpretation, and give it effect if it is permissible.[72] Inconsistent statutory interpretations

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[66] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*).
[67] *Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Vill. of Copper Ctr.*, 101 F.3d 610, 612 (9th Cir. 1996).
[68] 467 U.S. 837 (1984) (*Chevron*).
[69] *Id.* at 842.
[70] *Defs. of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999) (cleaned up).
[71] *Chevron*, 467 U.S. at 842–43.
[72] *Id.* at 843.

are "entitled to considerably less deference than . . . consistently held agency view[s]"[73] and, left unexplained, may be found arbitrary.[74]

Where an agency changes its position, it must: (1) display "awareness that it *is* changing position;" (2) show that "the new policy is permissible under the statute;" (3) believe the new policy is better; and (4) provide "good reasons" for the new policy.[75] Moreover, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[76] This requires "a more detailed justification than what would suffice for a new policy created on a blank slate."[77]

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[73] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (cleaned up).
[74] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005).
[75] *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009) (*Fox*) (emphasis in original).
[76] *Id.* at 515–16.
[77] *Id.* at 515.

PLAINTIFFS' INTERESTS[78]

Plaintiffs have standing to challenge the Service's decision on behalf of their members: each seeks to protect public lands and wildlife, the claims raised do not require individual members' participation, and the individual members have standing.[79] The Service's decision injures Plaintiffs' members and vacating the 2020 Rule would redress these substantial harms.[80]

Plaintiffs' members visit—and plan to continue visiting—National Park System lands in Alaska, including Preserves.[81] When visiting they enjoy viewing wildlife, observing natural predator-prey dynamics, exploring unmanipulated ecosystems, photographing wildlife, hiking, biking, camping, and rafting.[82]

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[78] In accordance with Local Rule 7.4(b)(2), Plaintiffs incorporate by reference their standing argument found at ECF 20 at 4–28.
[79] *Alaska Wildlife All. v. Jensen*, 108 F.3d 1065, 1068 (9th Cir. 1997); Exs. 1–20 (Declarations of Plaintiffs' and members).
[80] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).
[81] Ex. 1, ¶¶14–18; Ex. 2, ¶¶6–7, 10; Ex. 3, ¶¶11–13; Ex. 4, ¶¶5–8; Ex. 5, ¶¶23–24, 33; Ex. 6, ¶¶2, 10–11; Ex. 7, ¶¶6–11; Ex. 8, ¶¶9–12; Ex. 9, ¶9; Ex. 10, ¶¶6–9; Ex. 11, ¶12; Ex. 12, ¶22; Ex. 13, ¶¶11–14; Ex. 14, ¶¶3, 5–6; Ex. 15, ¶6; Ex. 16, ¶¶10–12; Ex. 17, ¶¶5–10; Ex. 18, ¶¶8–10; Ex. 19, ¶¶2, 8; Ex. 20, ¶¶8–13.
[82] Ex. 1, ¶¶2, 14–19; Ex. 2, ¶¶4–8; Ex. 3, ¶13; Ex. 4, ¶¶2, 5–10; Ex. 5, ¶¶23–25; Ex. 6, ¶¶10–11; Ex. 7, ¶¶5–12; Ex. 8, ¶¶2, 9–10, 12–13, 20, 23; Ex. 9, ¶9; Ex. 10, ¶¶5–10; Ex. 11, ¶12; Ex. 12, ¶22; Ex. 13, ¶¶11–14; Ex. 14, ¶¶3, 5–6; Ex. 15, ¶6; Ex. 16, ¶¶10–13; Ex. 17, ¶¶4–14; Ex. 18, ¶¶8–10; Ex. 19, ¶8; Ex. 20, ¶¶8–14.

The Service's decision to strip protections for wildlife directly harms Plaintiffs' members.[83] Members are concerned that the 2020 Rule will lower their chances of seeing predators, including bears and wolves;[84] alter the natural behavior of wildlife they do see;[85] and jeopardize their safety while visiting the Preserves.[86] Overall, their environmental, scientific, recreational, aesthetic, spiritual and other interests in Preserves are harmed by the Service's decision.[87] A favorable decision from this Court would redress these harms, as vacating the Service's decision to adopt the 2020 Rule would reinstate the 2015 Rule, which protects Plaintiffs' members' interests.[88]

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[83] Ex. 1, ¶¶23–25; Ex. 2, ¶¶10–15; Ex. 3, ¶¶15–16; Ex. 4, ¶¶11–13; Ex. 5, ¶¶35–37; Ex. 6, ¶¶9–10, 12; Ex. 7, ¶¶13–15; Ex. 8, ¶¶16–17, 23–24, 27, 29; Ex. 9, ¶11; Ex. 10, ¶¶7–11; Ex. 11, ¶17; Ex. 12, ¶¶22–24; Ex. 13, ¶¶15–18; Ex. 14, ¶¶7–9; Ex. 15, ¶¶13–15; Ex. 16, ¶¶14–16; Ex. 17, ¶¶16–20; Ex. 18, ¶¶12–15, 19; Ex. 19, ¶¶11–13; Ex. 20, ¶¶17–22.
[84] Ex. 1, ¶20; Ex. 2, ¶¶13–15; Ex. 3, ¶16; Ex. 4, ¶¶12–13; Ex. 5, ¶25; Ex. 6, ¶9; Ex. 7, ¶¶12, 15; Ex. 8, ¶¶13–17, 20, 23, 29; Ex. 9, ¶11; Ex. 10, ¶¶6–10; Ex. 11, ¶17; Ex. 12, ¶¶22–24; Ex. 13, ¶¶16–17, 20; Ex. 14, ¶9; Ex. 15, ¶14; Ex. 16, ¶¶13–15; Ex. 17, ¶18; Ex. 18, ¶12; Ex. 19, ¶12; Ex. 20, ¶¶19–22.
[85] Ex. 1, ¶21; Ex. 2, ¶9; Ex. 5, ¶¶24–25, 28; Ex. 6, ¶10; Ex. 7, ¶15; Ex. 8, ¶18, 20; Ex. 11, ¶17; Ex. 12, ¶19; Ex. 13, ¶17; Ex. 15, ¶¶12–13; Ex. 17, ¶17; Ex. 20, ¶¶16–17.
[86] Ex. 7, ¶¶13–14; *see also* Ex. 2, ¶11; Ex. 3, ¶14; Ex. 4, ¶11; Ex. 5, ¶¶28–29; Ex. 6, ¶10; Ex. 8, ¶¶18–19; Ex. 13, ¶¶15, 19–20; Ex. 14, ¶7; Ex. 15, ¶13; Ex. 16, ¶14; Ex. 18, ¶13; Ex. 20, ¶¶18, 20–21.
[87] Exs. 1–20.
[88] *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (*Kake*) ("[I]nvalidating an agency rule . . . reinstate[s] the rule previously in force.") (cleaned up).

ARGUMENT

Predator reduction efforts—whether undertaken as part of a predator control program or via liberalized sport hunting regulations—conflict with federal law and policy governing the National Park System. Since ANILCA's passage, the Service consistently acknowledged this and managed the National Park System in Alaska accordingly. Then, in an abrupt shift, the Service concluded in the 2020 Rule that predator reduction efforts, including liberalized sport hunting regulations such as bear baiting and taking wolves during the denning season, are consistent with federal law and policy. In reversing course, the Service failed to show that its new policy is permissible under the relevant statutes, to offer "good reasons" for its reversal, and to provide a detailed justification for disregarding facts and circumstances underlying its previous position.[89] The Service's decision is arbitrary and should be vacated.

I. The 2020 Rule is impermissible under applicable statutes.

Federal law and policy tasks the Service with managing the National Park System in Alaska to protect wildlife, including wolves and bears, and to maintain natural wildlife behaviors. Predator reduction efforts—intended or with the potential to manipulate populations and alter natural behavior—are plainly inconsistent with these mandates. The

[89] *Fox*, 556 U.S. at 515–16.

Service failed to demonstrate that the 2020 Rule is permissible under applicable law, adopting a reading of ANILCA that does not withstand scrutiny. As a result, the decision to adopt the 2020 Rule violates the Organic Act and ANILCA, is arbitrary, and fails to comply with *Fox*.

A. Federal law prohibits predator reduction efforts within the National Park System in Alaska, including Preserves.

A plain reading of applicable Federal law leaves no room for predator reduction efforts within the National Park System in Alaska, including Preserves.[90] The Organic Act requires the Service to regulate uses of the National Park System—such as sport hunting in Preserves—to conserve and provide wildlife "for the enjoyment of future generations."[91] The statute has "but a single purpose, namely, conservation."[92] Accordingly, the Service's Management Policies require protection of natural systems, processes, and wildlife populations, including natural abundances, diversities, distributions, densities, age-class distributions, habitats, genetics, and behaviors of wildlife, and prohibit "activities to reduce . . . native species for the purpose of increasing

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[90] *Chevron*, 467 U.S. at 842–43; *Defs. of Wildlife*, 191 F.3d at 1162.
[91] 54 U.S.C. § 100101(a).
[92] *Nat'l Rifle Ass'n of Am. v. Potter*, 628 F. Supp. 903, 909 (D.D.C. 1986); *see also Bicycle Trails of Marin v. Babbitt*, 82 F.3d 1445, 1453 (9th Cir. 1996) ("overarching concern" of the Organic Act is "resource protection.").

numbers of harvested species" within the National Park System.[93] Similarly, ANILCA requires the Service to protect sound populations of wildlife,[94] manage nearly all of the National Park System units in Alaska specifically to protect wildlife populations and habitat, particularly of wolves and bears,[95] and to protect natural processes and maintain environmental integrity.[96]

Congress allowed sport hunting in Preserves, subject to State and federal regulation.[97] Congress also gave the Service broad authority to close areas to sport hunting for a variety of reasons, including wildlife protection.[98] While Congress envisioned that some hunting could occur in conformance with Preserve and overall National Park System purposes, predator reduction efforts—including sport hunting regulations that rise to that level—fall outside what Congress allowed. ANILCA's legislative history confirms this. When crafting ANILCA, Congress explained: "[i]t is contrary to the National Park System concept to manipulate habitat or populations to

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[93] 2020_NPS0328606–17 (§§ 4.1, 4.4.1, 4.4.1.2, 4.4.2 & 4.4.3). The Management Policies are not directly enforceable. *River Runners v. Martin*, 593 F.3d 1064, 1074–75 (9th Cir. 2010). However, the Service's determination that its decision complies with the Management Policies is subject to judicial review. *Id.* at 1074.
[94] 16 U.S.C. § 3101(b).
[95] *See supra* note 9.
[96] 16 U.S.C. §§ 401hh(1), (8)(a), (10).
[97] *Id*. § 3201.
[98] *Id*.

achieve maximum utilization of natural resources."[99] Rather, the Service must "maintain the natural abundance, behavior, diversity, and ecological integrity of native animals as part of their ecosystem" and "insure that consumptive uses of fish and wildlife populations within national park service units not be allowed to adversely disrupt the natural balance."[100] Accordingly, Congress directed the Service not to "engage in habitat manipulation or control of other species" to support such consumptive uses.[101] In the face of uncertainty, Congress intended the Service to err on the side of wildlife protection.[102]

These statutory directives, management policies, and congressional intent starkly contrast with predator reduction efforts—management actions, laws, or regulations "with the intent or potential to alter or manipulate natural predator-prey dynamics and

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[99] S. REP. NO. 96-413, at 171. Much of ANILCA's legislative history specific to the take of wildlife is focused on subsistence. But ANILCA prioritizes subsistence over sport hunting, such that sport hunting must be restricted before subsistence when necessary to protect wildlife. 16 U.S.C. § 3114. Accordingly, Congress' direction that subsistence must not be propped up via manipulating wildlife populations applies equally—if not more forcefully—to sport hunting. The Service failed to mention this legislative history, which it previously relied on for decades. *See supra* note 21.

[100] S. REP. NO. 96-413, at 171.

[101] *Id*.

[102] *Id*. at 233 ("The greater the ignorance of the resource parameters, particularly of the ability and capacity of a population or species to respond to change in its ecosystem, the greater the safety factor must be."); *see also* 2020_NPS0011684 ("The NPS has the responsibility and obligation to take a precautionary approach to authorizations for which outcomes are uncertain.").

associated natural ecological processes, in order to increase harvest of ungulates by humans."[103] On its face, the Service's decision to allow such actions within the National Park System in Alaska, including the Preserves, violates the entire federal statutory framework.[104]

B. The Service's novel interpretation of its statutory mandates is arbitrary.

For almost forty years, the Service interpreted its mandates as barring predator control and requiring wildlife management within the National Park System in Alaska—including the Preserves—to be far more protective than State law.[105] When adopting the 2020 Rule, the Service reversed course, advancing a novel interpretation of ANILCA that allows for predator reduction efforts. This interpretation conflicts with plain language and congressional intent.[106] To the extent ANILCA and the Organic Act leave room for the Service to exercise discretion, the Service must do so "in a manner that is calculated to protect park resources and genuinely seeks to minimize adverse impacts on park

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[103] 2015_NPS0000019.
[104] *Chevron*, 467 U.S. at 842–43.
[105] *See supra* notes 21–25.
[106] Instead of looking to Congress' intent when adopting ANILCA, the Service improperly looks to Congress' joint resolution of disapproval of a different agency's regulation under the Congressional Review Act (CRA). 2020_NPS0000623. The CRA itself bars federal agencies from inferring congressional intent from actions under the CRA except regarding the specific, invalidated rule. 5 U.S.C. § 801(g), (b)(2).

resources and values."[107] The Service erred by advancing an unreasonable interpretation of its statutory mandates, without acknowledging the long-held interpretation it now abandons.[108]

The Service also failed to offer any explanation as to why predator reduction efforts would be permissible in areas of the National Park System not open to sport hunting, focusing solely on the Preserves. This is arbitrary. The 2015 Rule's prohibition of predator reduction efforts applied more broadly to "park areas."[109] While sport hunting is only allowed in the Preserves, the ban on predator reduction efforts encompassed more than just liberalized sport hunting regulations, barring *any* State management action, law, or regulation "authoriz[ing] tak[e] of wildlife . . . if . . . related to predator reduction efforts," i.e., "those with the intent or potential to alter or manipulate natural predator-prey dynamics and associated natural ecological processes, in order to increase harvest of ungulates by humans."[110] The Service's failure to consider the permissibility of predator

[107] *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 193 (D.D.C. 2008) (cleaned up); *see id.* ("To hold otherwise now would depart from years of well-reasoned precedent and undermine over 100 years of park management.").
[108] *I.N.S.*, 480 U.S. at 447 n.30.
[109] 2015_NPS0000019.
[110] 2015_NPS0000019.

reduction efforts in the National Park System beyond the Preserves—as well as potential related impacts—is arbitrary.[111]

Instead the Service pinned its statutory interpretation on ANILCA's allowance of sport hunting in the Preserves, reading ANILCA as mandating deference to State management of sport hunting, subject only to the Service's "limited" closure authority.[112] The Service also erred in equating ANILCA's requirement to maintain "sound populations" with the State law requirement to manage for "sustained yield."[113] Further, the Service regarded the State's commitment to comply with State law as ensuring that the Service is meeting federal mandates.[114] This interpretation of ANILCA is arbitrary and the delegation of authority unlawful.

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[111] *State Farm*, 463 U.S. at 43.
[112] 2020_NPS0000623. The Service errs in viewing its closure authority under 16 U.S.C. § 3201 as limited. That grant of authority is expansive, allowing the Service to restrict sport hunting for reasons of public safety, administration, protection of wildlife and vegetation, and public use and enjoyment. 16 U.S.C. § 3201. In contrast, the Service may close areas to subsistence "only if necessary for . . . public safety, administration, or to assure the continued viability of such population." *Id.* § 3126(b).
[113] 2020_NPS0000625–26.
[114] 2020_NPS0000624–25.

1. *The Service arbitrarily interpreted ANILCA as granting the State sole authority to regulate sport hunting on the Preserves, with the Service only retaining limited closure authority.*

ANILCA requires sport hunting in the Preserves to be regulated in accordance with "State and Federal law and regulation."[115] When adopting the 2020 Rule, the Service interpreted "Federal law and regulation" to refer only to the Service's closure authority.[116] This is arbitrary. The closure authority is in addition to Congress' direction that sport hunting be regulated under Federal law.[117] "Federal law" includes the Organic Act's mandate that the Service regulate uses to conserve wildlife and "provide for the enjoyment" of wildlife "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations,"[118] as well as ANILCA's requirement that the Service protect populations of bears and wolves on almost all the Preserves.[119]

Ignoring these directives under the Organic Act and ANILCA, the Service read ANILCA as mandating deference to "State laws, regulations, and management of hunting

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[115] 16 U.S.C. § 3201.
[116] 2020_NPS0000624; 2020_NPS0000625; 2020_NPS0000628.
[117] 16 U.S.C. § 3201; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").
[118] 54 U.S.C. § 100101(a).
[119] *See supra* note 9.

and trapping" in the Preserves.[120] This deference is all but complete: the Service asserted that even where the State adopts liberalized hunting regulations specifically to reduce predators, "these are management considerations reserved to the State under ANILCA."[121] The Service went so far as to find that it must allow any methods authorized by State sport hunting regulations.[122] But, as the Service previously acknowledged, Congress specified that:

> when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation [is] predominant. ANILCA['s] mandates for sport hunting do not insulate the NPS from that overarching obligation. Manipulating wildlife populations to meet greater hunter demands is not an appropriate use of any park area.[123]

In other words, hunting can only take place when in conformance with the purposes of the National Park System and the individual Preserves.[124] The Service errs in reading those mandates out of ANILCA.

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[120] 2020_NPS0000623.
[121] 2020_NPS0000627.
[122] *See, e.g.,* 2020_NPS0000625 (finding that ANILCA requires the Service to "defer[] to State fish and game management to establish methods and means," subject only to the Service's closure authority).
[123] 2020_NPS0328808; *see also* 2020_NPS0329084 (Service recognizing that it must "assur[e] that the take of fish and wildlife is consistent with the fundamental purposes of the park system and individual park units"); 2020_NPS0328851–53 (Service recognizing that sport hunting regulations must be consistent with purposes of individual Preserves).
[124] 54 U.S.C. § 100101(a); *see also* 16 U.S.C. §§ 3101(c), 3112(1), 3118(b) (providing for subsistence where consistent with purposes for which units were designated). Sport

This unreasonable interpretation led the Service to conclude that the 2020 Rule complies with its Management Policies. For example, the Service found that the 2020 Rule complied with its prohibition on "activities to reduce . . . native species for the purpose of increasing numbers of harvested species"[125] reasoning that ANILCA mandates sport hunting in the Preserves.[126] But, the Service failed to acknowledge that sport hunting is *allowed*, not required, and is also limited: the take of wildlife for "sport purposes" is subject to federal regulation, as discussed above. Similarly, the Service concluded that it must "allow the State to determine whether bear baiting is allowed within national preserves."[127] The Service found that baiting complied with its Management Policies requiring maintenance of natural behavior in spite of its own findings that baiting—by design—alters bear behavior.[128] The Service instead relies on the State's conclusion that baiting would not "alter natural predator-prey dynamics."[129] The Service's conclusion that the 2020 Rule complied with its Management Policies is

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hunting must be managed just as conservatively—if not more—than subsistence. *See supra* note 99.

[125] 2020_NPS0328616–17 (§ 4.4.3).

[126] 2020_NPS0000627–28. The Service also relied on its new findings regarding State intent and the potential impacts, addressed below in Argument II.B at 33–42.

[127] 2020_NPS0000629.

[128] 2020_NPS0000629; *see also* 2020_NPS0000701.

[129] 2020_NPS0000628.

arbitrary, as agencies must provide rational connections between facts found and choices made.[130]

The Service's novel interpretation of ANILCA as sidelining its role in protecting the National Park System is contrary to the plain text of the statute and due no deference.

2. The Service arbitrarily found that State law conforms with federal mandates.

The Service arbitrarily interpreted ANILCA's requirements as equivalent to those imposed by State law.[131] Specifically, the Service equated State sustained yield management with ANILCA's direction to maintain sound populations of wildlife and the Service's Management Policy that requires management "for self-sustaining populations."[132] This is a complete—and unacknowledged—departure from its previous long-standing position that "State of Alaska regulatory processes do not substitute for NPS law, regulation, or policy, nor can they relieve us of our responsibilities."[133] The Service relied on the State's "assert[ion] that it is legally obligated to . . . maintain sustainable populations of wildlife."[134] However, State law requires State managers to

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[130] *State Farm*, 463 U.S. at 43.
[131] 2020_NPS0000625.
[132] 2020_NPS0000625.
[133] 2020_NPS0011684; *see also supra* note 22.
[134] 2020_NPS0000625. The Service itself evaluates the 2020 Rule under standards found in State—not federal—law. *See*, *e.g.*, 2020_NPS0000624 (2020 Rule would not reduce

"achieve[] and maintain[]" high levels of human harvest.[135] The State has done this by reducing predator populations through liberalizing sport hunting regulations and via predator control programs.[136] Management under the State's sustained yield framework endorses this manipulation of populations. In fact, State actions that seek to dramatically reduce predator populations "to the lowest possible level" comply with the Alaska Constitution's sustained yield mandate.[137] The Service failed to explain how this comports with its mandates under ANILCA to manage almost all the Preserves to protect populations of bears and/or wolves[138]—mandates never acknowledged in the 2020 Rule. This is arbitrary.

3. The Service improperly delegated its authority to the State.

The Service improperly delegated its responsibility to assure compliance with federal mandates to the State, despite the State only committing to ensure compliance with State, not federal, law.[139] Granting the State sole management authority over sport hunting in the Preserves, equating State and federal law, and relying on the State's

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"opportunities for take of predator species over the long-term").
[135] ALASKA STAT. § 16.05.255(k)(5).
[136] *See supra* notes 26–40.
[137] *West*, 248 P.3d at 697, 700.
[138] *See supra* note 9. Katmai Preserve must be managed to protect high concentrations of bears. 16 U.S.C. § 401hh-1(2).
[139] 2020_NPS0000624–25.

determination of compliance with its Management Policies are all unlawful abdications of the Service's statutory duties. In *Trustees for Alaska v. Watt*, this Court found that the U.S. Fish and Wildlife Service acted improperly when giving another federal agency "responsibility for approving" activities on a National Wildlife Refuge, even where the Fish and Wildlife Service still needed to concur with any approval.[140] Similarly, in *High Country Citizens Alliance v. Norton*, the District Court of Colorado found that the Service impermissibly delegated its responsibility to protect natural resources of a National Park when it delegated protection of the Park's water resources to the State of Colorado.[141] That court observed: "[w]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so."[142] This is because "[d]elegation to outside entities increases the risk that these parties will not share the agency's 'national vision and perspective,' and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme."[143] Similarly, here, any delegation of the Service's

[140] 524 F. Supp. 1303, 1307, 1309–10 (D. Alaska 1981).
[141] 448 F. Supp. 2d 1235, 1246 (D. Colo. 2006).
[142] *Id.* at 1246.
[143] *Id.* at 1247.

responsibility to manage the Preserves to protect wildlife is improper. The Service itself must ensure compliance with federal statutory mandates.

II. The Service failed to provide good reasons for its reversal.

The Service's decision to adopt the 2020 Rule contains no reasoned justification for allowing predator reduction efforts in the National Park System in Alaska or for allowing the specific practices prohibited under the 2015 Rule. The Service's failure to provide good reasons for its reversal fails under *Fox* and cannot support the decision to adopt the 2020 Rule.[144]

A. The Service's reasons for deleting its prohibition on predator reduction efforts were arbitrary.

The Service failed to offer a reasoned explanation for deleting the 2015 Rule's prohibition on predator reduction efforts. The Service claimed that removing that regulation would "expand harvest opportunities, complement regulations on lands and water within and surrounding national preserves, and defer to the State in regard to fish and wildlife management."[145] The Service also explained it "believes that removing [the restriction] will help provide regulatory certainty to park users about what hunting practices are or are not allowed in national preserves."[146] These justifications do not

[144] *Fox*, 556 U.S. at 515–16.
[145] 2020_NPS0000630.
[146] 2020_NPS0000630.

reasonably support a decision to allow predator reduction efforts within the National Park System.

The Service relied heavily on policy guidance encouraging the Service to increase hunter opportunity and consistency with State law.[147] But these directives must be implemented in a way that is compatible with federal statutes and protects the wildlife values of the National Park System. Further, this "new" policy guidance was not new at all: in 1982, the Service entered into an agreement with the State that included the same goals of consistency and collaboration.[148] Also common between the 2017 policy guidance and the 1982 agreement was the requirement that actions comply with Federal law. But in adopting the 2020 Rule, the Service overlooked this important qualifier, and elevated hunter opportunity and consistency with State regulations above its obligation to regulate the System to conserve wildlife and to protect bears and wolves within almost all the Preserves.[149] The policy goals of increased hunter opportunity and consistency with State regulations cannot override federal law or otherwise justify allowing predator reduction efforts throughout the National Park System in Alaska.

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[147] 2020_NPS0000623, 630.
[148] *Compare* 2020_NPS0008604–10, *with* 2020_NPS0008709–11; 2020_NPS0008712–17; 2020_NPS0010205–06; *see also Kake*, 795 F.3d at 969 (agency justification not plausible where reversal based on comments raising "no new issues.").
[149] 2020_NPS0000623–24.

The Service also relied on concerns about regulatory certainty to justify deleting its prohibition on predator reduction efforts.[150] But the Service failed to explain why reversing its long-held position would provide certainty. The 2015 Rule did not leave the public guessing about what practices were allowed on Preserves: rather, it required the Service to provide notice regarding any State laws and regulations not adopted on Service lands.[151]

B. The Service arbitrarily concluded that the specific practices barred by the 2015 Rule are not predator reduction efforts.

The Service arbitrarily concluded that the specific practices barred by the 2015 Rule are not predator reduction efforts, finding neither "intent" nor "potential" to "manipulate natural populations or processes" for the purpose of increasing human harvest of prey.[152] This directly conflicts with previous factual findings, requiring a reasoned explanation beyond "what would suffice for a new policy created on a blank slate."[153] The Service failed to offer such a reasoned explanation, and its determination that the specific practices barred by the 2015 Rule were neither intended nor have the

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[150] 2020_NPS0000630.
[151] 2015_NPS0000003–4; 2015_NPS0000006; 2015_NPS0000015; 2015_NPS0000019–20.
[152] 2020_NPS0000623; 2020_NPS0000627–28.
[153] *Fox*, 556 U.S. at 515.

potential "to alter or manipulate natural predator-prey dynamics and associated ecological processes, in order to increase harvest of ungulates by humans" is arbitrary.[154]

1. The Service arbitrarily reversed its findings regarding State intent.

The Service's findings regarding State intent directly conflict with its prior findings and are not supported by the record. Previously, the Service found that many of the liberalized regulations "were based wholly or in part on a desire to reduce predator populations."[155] The Service also anticipated that the State would continue to promulgate regulations that conflict with federal law and policy.[156] The Service failed to provide a reasoned explanation for reaching the opposite conclusion in the 2020 Rule. Regarding the specific practices themselves and the likelihood of future State action, the Service's decision to adopt the 2020 Rule contains "[n]ot one sentence."[157] Instead, the Service generally concluded that the practices as a whole are not predator reduction efforts because—essentially—the State said so.[158]

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[154] 2015_NPS0000019.
[155] 2015_NPS0000008; *see also* 2015_NPS0000019 (identifying brown bear baiting, taking wolves and coyotes during the denning season, and hunting bears using artificial lights as methods adopted to reduce predators).
[156] 2015_NPS000002.
[157] *State Farm*, 463 U.S. at 48. The Service offered no explanation specific to its decision to delete a number of prohibitions on sport hunting practices that were in place prior to the 2015 Rule. *See* 36 C.F.R. § 13.42(g) (2019).
[158] 2020_NPS0000627.

The Service based its findings on the State not seeking to conduct predator control in the Preserves and the State's assertion that State sport hunting regulations can never qualify as predator reduction efforts.[159] But predator control is not the only "management action[] or law[] or regulation[]" that falls under the Service's definition of predator reduction efforts.[160] The State defines predator control as only occurring in designated areas, where the State uses such methods as shooting bears and wolves from helicopters, bear snaring, and gassing wolf pups in their dens to reduce wolf and bear populations.[161] But the State also achieves its statutory mandates to provide for high levels of human harvest of game via means other than predator control. In fact, the State has recently disfavored predator control because of cost and public outcry.[162] Instead, the State primarily relies on liberalized sport hunting regulations to encourage hunter harvest of predators to reduce those predator populations.[163] The Service failed to recognize that the State's liberalized sport hunting regulations are "part of [the State's] overall wildlife

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[159] 2020_NPS0000627.
[160] 2015_NPS0000019.
[161] 2020_NPS0010157–58.
[162] 2020_NPS0010510–11.
[163] 2020_NPS0010511. While the State may regard these reduced predator populations to be maintained at "sustainable" levels, the Service's mandates do not allow for such manipulation of populations or management of predators at bare minimum levels. *See supra* Argument I.B.2 at 28.

management strategy" focused on providing for high levels of human harvest of ungulates.[164]

The Service dismissed the rationales underlying specific proposals for liberalized regulations and the reasons given by the Alaska Board of Game (Board) for adopting the liberalized regulations as irrelevant, instead relying on comments from the State Department of Law and the Alaska Department of Fish and Game, submitted during the rulemaking processes for the 2020 and 2015 Rules.[165] This is arbitrary. The Board is the entity charged with enacting State regulations to achieve the objectives of State law.[166] Its reasons for promulgating regulations cannot be papered over by comments offered during a rulemaking process. And, as discussed above, the Board primarily relies on liberalized sport hunting regulations to advance the goals of State law of achieving and maintaining high levels of human harvest of ungulates.[167]

The Service attempted to justify its new reliance on the State's comments with the nonsensical statement that it now understood the comments from a "perspective inspired by Congressional disapproval and required by revised guidance and policy direction

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[164] 2020_NPS0010511.
[165] 2020_NPS0000627.
[166] 2020_NPS0009494.
[167] *See supra* note 35–41.

announced by the Secretary since the promulgation of the 2015 Rule."[168] But any inspiration the Service may have felt does not absolve it of its duty to provide a reasoned explanation based on the record and a substantial justification for disregarding its previous factual findings. The Service failed to do so. Relying on the State's comments, undermined by years of statements and positions to the contrary, is quintessential arbitrary decision-making.[169]

2. The Service arbitrarily found the practices allowed by the 2020 Rule did not have the potential to manipulate natural populations or processes.

The Service suggested that the practices barred by the 2015 Rule are not predator reduction efforts based on a finding that they are unlikely to cause population-level impacts.[170] This is disingenuous for three reasons.

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[168] 2020_NPS0000627.

[169] *S. Utah Wilderness All. v. Norton*, 237 F. Supp. 2d 48, 52–54 (D.D.C. 2002) (an agency cannot merely accept "self-serving" statements); *Zirkle Fruit Co. v. U.S. Dep't of Labor*, 442 F. Supp. 3d 1366, 1379–80 (E.D. Wash. 2020) ("[A]n agency's wholly unexplained acceptance of another entity's conclusions, with no apparent effort to ensure the reliability of those conclusions or the evaluative process that produced them," is arbitrary).

[170] 2020_NPS0000624; 2020_NPS0000625; 2020_NPS0000628; 2020_NPS0000630. The Service relied on similar reasoning to find that it complied with its policies requiring protection of natural systems, process, and wildlife populations. 2020_NPS0000628. This finding is arbitrary for the reasons discussed below.

First, the Service arbitrarily assumed that if populations remain static, impacts to natural processes, including behaviors, will be minimal.[171] But human harvest can cause "marked changes" to natural behavior even when populations remain stable.[172] As a result, the Service must look beyond just impacts to population numbers when assessing whether State actions qualify as predator reduction efforts.

Second, the Service's reliance on population-level impacts obfuscates its findings regarding potential impacts to wildlife on the Preserves. The Service defined population-level impacts as those discernable across GMUs, which are vastly larger than the Preserves.[173] At the same time, the Service found it likely that impacts would occur on smaller scales—such as the Preserves themselves—that would have the effect of or potential to alter or manipulate predator-prey dynamics.[174] In other words, the Service found, but failed to acknowledge, that the specific practices allowed by the 2020 Rule have the potential to alter predator-prey dynamics on the Preserves—meaning they qualify as predator reduction efforts.

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[171] 2020_NPS0000630; *see also supra* note 128.
[172] 2020_NPS0006727.
[173] 2020_NPS0000630; 2020_NPS0000695.
[174] *See*, *e.g.*, 2020_NPS0000695–96 ("[i]increased take of predator species could reduce abundance of bears and wolves or increase abundance of prey"); 2020_NPS0000700 (finding "corresponding localized effects on predator-prey systems").

Third, the Service projected that allowing the practices prohibited by the 2015 Rule would only result in "a low level of additional take" on Preserves based on levels of take on lands adjacent to Preserves.[175] But the Preserves are world-renowned destinations. It is unreasonable to assume, for example, that bear baiting in Katmai National Preserve would attract the same number of hunters as lesser-known areas. The Service also relied on the State's assertion that its liberalizations of sport hunting regulations have not resulted in increased take elsewhere.[176] But between 1980 and 2018, areas with liberalized sport hunting regulations saw an approximately 2.4-fold increase in brown bears harvested, 3.6-fold increase for black bears, and 1.5-fold increase for wolves.[177] Ignoring this in favor of the State's conclusory assertion is arbitrary.[178]

Critically, the Service failed to support its conclusion that even low levels of additional take would ensure its continued compliance with statutory mandates. As the Ninth Circuit has noted:

> the addition of a small amount of [harm] . . . may have only a limited impact . . . [b]ut the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase

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[175] 2020_NPS0000625.
[176] 2020_NPS0000625.
[177] 2020_NPS0009070.
[178] *See Pac. Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d 1194, 1199 (N.D. Cal. 2002) ("mere conclusory statements" insufficient).

will mean [harm large enough to violate statutory mandates].[179]

Here, the Service projected that, following adoption of the 2020 Rule, the level of take of predator populations in the Preserves would be "much less than 40%."[180] For context, when the State's predator control program adjacent to Yukon-Charley Rivers National Preserve killed half of the wolves residing in the Preserve and surrounding areas, the Service found it "no longer feasible to conduct research."[181] And anticipated overall take of "less than 40%" is nowhere near what wildlife biologists have found protective for brown bear populations.[182] Further, the Service failed to put these estimated hunter-harvest levels in the context of impacts to predators from the State's predator control programs on adjacent lands, dismissing impacts from those programs as irrelevant.[183] This is arbitrary.[184]

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[179] *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004).
[180] 2020_NPS0000696. It is unclear how the Service reached this estimation, given it lacks data regarding levels of take and populations for Preserves. *See infra* notes 193, 194.
[181] 2020_NPS0330257–58; *see also* 2020_NPS0330261–63; 2020_NPS0327011–12.
[182] 2020_NPS0005705 ("sustainable mortality rates for adult female[] [brown bears] typically are estimated to be in the range of 4–9%").
[183] 2020_NPS0000630.
[184] *See Rancheria v. Jewell*, 776 F.3d 706, 714 (9th Cir. 2015) (agency decisions that "ignore[] important considerations or relevant evidence" are arbitrary).

The Service did nothing to assure that take will remain at levels that do not threaten the Service's compliance with its statutory directives. In *Greater Yellowstone Coalition v. Kempthorne*, the Service based its decision to allow 540 snowmobiles per day into Yellowstone on three years of use data where the average of snowmobiles was 260–290 per day.[185] The Service asserted that actual use would not likely increase, such that wildlife would be adequately protected.[186] The court rejected the Service's decision, stating that the Service's "assertion that 'actual use' will likely be lower than the limit does nothing to justify its conclusion that the 540 limit adequately protects wildlife."[187] Similarly, here, the Service did nothing to ensure that take resulting from the 2020 Rule will remain low such that the Service will meet its mandates to protect wildlife in the Preserves. This is arbitrary in the face of the State's commitment to further liberalize its regulations to achieve reductions in predator populations.[188] In these circumstances, expecting take to remain low is "like throwing away your umbrella in a rainstorm because you are not getting wet."[189]

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[185] 577 F. Supp. 2d at 203.
[186] *Id.* at 203–04.
[187] *Id.* at 204.
[188] *See supra* note 37.
[189] *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

The Service erred in relying on its ability to exercise its closure authority if impacts from the previously-prohibited practices become too great.[190] Congress intended the Service to prevent impacts in the first place,[191] and—in the face of uncertainty—to err on the side of protecting wildlife.[192] The uncertainty here is significant: the Service lacks population data for the Preserves to give harvest data context,[193] and the harvest data collected by the State is not specific to the Preserves.[194] Even if harvest data were available at the Preserve-level, relying on that alone is arbitrary. Harvest data can mask population plummets, especially where new, more effective hunting methods are allowed.[195] While the Service has relied on harvest data in the past,[196] it also previously adhered to a conservative approach and prohibited sport hunting regulations with the

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[190] 2020_NPS0000624–25.
[191] S. REP. NO. 96-413, at 278; H.R. REP. NO. 96-97, pt. 1, at 289 (1979).
[192] S. REP. NO. 96-413, at 233.
[193] Answer to Am. Compl., ¶84, ECF No. 40. Population levels and trends are not consistently collected, even at the GMU level. 2020_NPS0000629–30; 2020_NPS0009073. The Service did not rely on the State's GMU-level population estimates. 2020_NPS0009538. Instead, the Service relied on the State's assertion that "abundant populations" of predators exist on the Preserves, 2020_NPS0000627; 2020_NPS0009495, despite the State having "largely abandoned . . . research and monitoring efforts" for predators. 2020_NPS0009069; *see also* 2020_NPS0005711; 2020_NPS0005705.
[194] 2020_NPS0000630. Even if this data were sufficient, the Service lacks reliable access. 2020_NPS0010994–1003; 2020_NPS0000747–48; 2020_NPS0011585–86.
[195] 2020_NPS0005711.
[196] 2020_NPS0000630.

potential to reduce predator populations.[197] While the Service may make decisions without perfect data, in the face of such uncertainty, the Service must err on the side of conservation.[198] It failed to do so here.

C. The Service decided to allow bear baiting despite admitting it may result in human injury or death.

Apart from whether the practice qualifies as a predator reduction effort, the Service prohibited bear baiting in the 2015 Rule "to avoid public safety issues, to avoid food conditioning bears and other species, and to maintain natural bear behavior as required by NPS law and policy."[199] As discussed above, the Service disregarded its own findings that baiting, by design, alters natural bear behavior in violation of the Service's mandates.[200] With regard to public safety and food conditioning, the Service acknowledged when adopting the 2020 Rule that bear baiting poses threats including "serious injury or death"[201] but dismissed such concerns, concluding that State regulations would adequately mitigate risk and the Preserves' remoteness meant few people would be impacted. These reasons are arbitrary.

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[197] 2015_NPS0000003.
[198] *See supra* note 192.
[199] 2015_NPS0000005; 2015_NPS0000011–12.
[200] *Supra* note 128.
[201] 2020_NPS0000628.

The Service failed to provide a reasoned explanation for its finding that State regulations will alleviate risks to public safety.[202] The record demonstrates abysmal compliance with baiting regulations on the Preserve where baiting had been most common: Wrangell-St. Elias.[203] The Service monitored bear baiting there since 1996,[204] and found 73% of the bait stations along the McCarthy Road in violation of State or federal law.[205] The Service also overlooked—without explanation—its previous finding that State regulations are insufficient to protect public safety.[206]

The Service reasoned that not many people's safety would be jeopardized by allowing baiting because few people visit the Preserves and few hunters are likely to bait in the Preserves.[207] But simply that few people might be mauled is not a reasoned justification, and it is arbitrary to rely on hunters *not* engaging in the authorized activity to find that the authorized activity will not cause issues.[208] Further, not all Preserves are so remote as to obviate concerns. As the Service previously found: "[b]aiting tends to occur in accessible areas used by multiple user groups, which contributes to the public

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[202] 2020_NPS0000629.
[203] 2020_NPS0000706; 2020_ NPS0000697.
[204] 2020_NPS0328105.
[205] 2020_NPS0008934.
[206] 2015_NPS0000012.
[207] 2020_NPS0000628.
[208] *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 207.

safety concerns associated with baiting."[209] The Service failed to explain why it abandoned these factual findings and ignored the potential for safety issues in highly-trafficked areas.

THE COURT SHOULD VACATE THE 2020 RULE

The APA mandates that the reviewing court "shall . . . set aside" arbitrary agency action.[210] Vacatur is the presumptive remedy under the APA.[211] This case is not one of the "rare circumstances" where remand without vacatur may be warranted.[212] The Service violated multiple laws and failed to meet the standard for agency reversals—serious and harmful errors.[213] Far from causing disruption, vacatur would re-establish the Service's long-held position, as vacating the 2020 Rule would reinstate the 2015 Rule.[214]

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[209] 2015_NPS0000005; 2015_NPS0000012.
[210] 5 U.S.C. § 706(2)(A).
[211] *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018).
[212] *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010).
[213] *See Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1143 (D. Alaska 2019) (finding serious error and vacating unexplained agency reversal).
[214] *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

CONCLUSION

For the foregoing reasons, the Court should hold the Service's decision to adopt the 2020 Rule unlawful and arbitrary, and vacate it.

Respectfully submitted this 16th day of December, 2021.

s/ Rachel G. Briggs

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3), I certify that this brief complies with the type-volume limitation of Local Civil Rule 7.4(a)(1) because it contains 9,956 words, excluding the parts of the brief exempted by Local Civil Rule 7.4(a)(4).

s/ Rachel G. Briggs
Rachel Briggs (AK Bar No. 2103012)

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2021, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

s/ Rachel G. Briggs
Rachel Briggs (AK Bar No. 2103012)

LIST OF EXHIBITS

Exhibit 1 Declaration of Frank Keim

Exhibit 2 Declaration of Juliette Boselli

Exhibit 3 Declaration of Cliff Eames

Exhibit 4 Declaration of William Sherwonit

Exhibit 5 Declaration of Francis Mauer

Exhibit 6 Declaration of Andrea Feniger

Exhibit 7 Declaration of John Quinley

Exhibit 8 Declaration of William Watkins

Exhibit 9 Declaration of Collette Adkins

Exhibit 10 Declaration of Rebecca Noblin

Exhibit 11 Declaration of Richard Ring

Exhibit 12 Declaration of Samantha Rose Hagio

Exhibit 13 Declaration of Nicole Whittington-Evans

Exhibit 14 Declaration of Marc June

Exhibit 15 Declaration of Scott Fogarty

Exhibit 16 Declaration of James Adams

Exhibit 17 Declaration of Victoria Swinghamer

Exhibit 18 Declaration of Nicole Schmitt

Exhibit 19 Declaration of Nancy Bale

Exhibit 20 Declaration of Andrew Moderow