

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

STATE OF IDAHO
State Capitol
Boise, Idaho 83720

DIRK KEMPTHORNE
Governor of the State of Idaho
State Capitol
Boise, Idaho 83720

IDAHO DEPARTMENT OF FISH AND GAME
600 S. Walnut
P.O. Box 25
Boise, Idaho 83707

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Rm. 7229
Washington, D.C. 20240

BRUCE BABBITT,
Secretary of Interior
1849 C Street, NW
Washington, D.C. 20240

U.S. FISH AND WILDLIFE SERVICE
Main Interior
1849 C Street, NW, Rm. 3256
Washington, D.C. 20240

JAMIE R. CLARK
Director of U.S. Fish and Wildlife Service
Main Interior
1849 C Street, NW, Rm. 3256
Washington, D.C. 20240

Defendants.

COMPLAINT SEEKING DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, the State of Idaho, Dirk Kempthorne, in his official capacity as the Governor of Idaho, and the Idaho Department of Fish and Game (collectively, "Plaintiffs") bring this action for declaratory and injunctive relief against Defendants, the United States Department of the Interior, Bruce Babbitt, in his official capacity as Secretary of Interior, the United States Fish and Wildlife Service, and Jamie R. Clark, in her official capacity as Director of the United States Fish and Wildlife Service (collectively, "Defendants").

INTRODUCTION

1. Plaintiffs have filed this litigation to defend the State of Idaho's constitutional rights, as a sovereign state, and to protect the physical safety and welfare of its citizens. This case challenges both the federal government's authority to import grizzly bears (*Ursus arctos horribilis*) into central Idaho in the Bitterroot ecosystem and the arbitrary and capricious manner in which the federal government made the decision to do so. This litigation is necessary because the federal government's grizzly bear program under the Endangered Species Act ("Program") unconstitutionally imposes obligations on the state's executive branch of government, usurps the State of Idaho's sovereign and traditional right to regulate land use and fish and wildlife within its borders, interferes with the State of Idaho's duty to protect its citizens from physical harm, and compromises the Endangered Species Act ("ESA") protection currently afforded existing grizzly bears.

2. On November 17, 2000, in disregard for the rights of the State of Idaho and its citizens, Defendants issued the Record of Decision and Final Rule allowing Defendants to begin importing grizzly bears into central Idaho. Plaintiffs seek a declaration that the Program is unconstitutional as a violation of the Tenth Amendment of the United States Constitution and that the final environmental impact statement prepared by Defendants was in violation of the National Environmental Policy Act. Plaintiffs also seek an injunction to prohibit the Defendants from implementing the Program.

JURISDICTION

3. This action arises under the Tenth Amendment of the United States Constitution and the National Environmental Policy Act of 1969, as amended ("NEPA"), 42 U.S.C. § 4321 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. This Court may issue a declaratory judgment and further relief under 28 U.S.C. §§ 2201 and 2202.

VENUE

4. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(1), (2).

PARTIES

Plaintiffs

5. Plaintiff the State of Idaho is a sovereign state. The State of Idaho brings this litigation on its own behalf.

6. Plaintiff Dirk Kempthorne is the Governor of the State of Idaho and brings this litigation in his official capacity as the chief executive officer of the State. Under article IV, § 6 of the Idaho Constitution, he is charged with ensuring that the laws of the State of Idaho are faithfully executed.

7. Plaintiff Idaho Department of Fish and Game ("IDFG") is a department of the Executive Branch of the State of Idaho. Idaho Code § 36-101. The Idaho Fish and Game Commission supervises and manages IDFG. Idaho Code § 36-102. Collectively, IDFG and the Commission administer and carry out the policy of the State of Idaho "in accordance with the provisions of the Idaho fish and game code." Idaho Code § 36-103.

Defendants

8. Defendant United States Department of the Interior is a duly established agency of the United States, which is responsible for the administration of the ESA.

9. Defendant Bruce Babbitt has been the Secretary of Interior at all relevant times to the allegations set forth herein and is being sued in his official capacity.

10. Defendant United States Fish and Wildlife Service ("USFWS") is a bureau within the Department of the Interior. USFWS, among others, administers the ESA. USFWS issued the Record of Decision and Final Rule on the Program.

11. Defendant Jamie R. Clark is the Director of USFWS and is being sued in her official capacity.

STATEMENT OF FACTS

12. The grizzly bear is a large aggressive predator that is known to kill or seriously injure humans. In 1975, the grizzly bear was listed under the ESA as a threatened species in the lower 48 states. 40 Fed. Reg. 3173.

13. Section 10(j) of the ESA authorizes USFWS to designate as "experimental" some reintroduced populations of endangered or threatened species. 16 U.S.C. § 1539(j).

14. Under section 10(j), the Secretary of Interior may designate reintroduced populations established outside of the species' current range, but within its historical range as "experimental." The law requires reintroductions of experimental populations to further the conservation of the listed species. In addition, an experimental population must be separate geographically from nonexperimental populations of the same species.

15. Individual animals used in establishing an experimental population may be obtained from other existing populations if their removal is not likely to jeopardize the continued existence of the species.

16. Section 6 of the ESA, 16 U.S.C. § 1535(a), requires the federal government to cooperate with the States in implementing and enforcing the ESA. Section 6 mandates, in relevant part, as follows:

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultations with the States concerned before acquiring any land or water or interest therein for the purpose of conserving any endangered or threatened species.

17. In addition, the regulations require USFWS to cooperate with the States in implementing an experimental population program. The regulations require that:

The Fish and Wildlife Service shall consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

50 C.F.R. § 17.82(d).

18. The Final Rule for the Program declares that USFWS will "undertake the grizzly bear recovery project in the Bitterroot ecosystem in cooperation with the U.S. Forest Service, other Federal agencies, the States of Idaho and Montana, the Nez Perce Tribe, and entities of the Canadian Provincial government." 65 Fed. Reg. 69627.

19. Under recently enacted legislation, the State of Idaho seeks to further cooperation between the State and the federal government prior to the reintroduction of a species. Idaho Code section 67-6302 provides that "[n]o action may be taken by a federal agency including the United States fish and wildlife service, or any entity acting on behalf of a federal agency, to introduce or reintroduce any species into the state of Idaho without first securing the approval of the Idaho state legislature."

20. The State of Idaho also regulates the importation of wild animals by a permitting process. Idaho Code section 36-701(d) provides that "[n]o person shall import into this state or export out of this state or release in the wild any species of wildlife except by permit

issued by the director and in accordance with the rules promulgated by the commission.”

Despite this clear statutory directive, Defendants’ have failed to seek permits from the State of Idaho for the importation of grizzly bears into central Idaho.

21. On January 5, 1995, USFWS issued a Notice of Intent to import and establish grizzly bears in the Bitterroot ecosystem thereby commencing the Environmental Impact Statement (“EIS”) process.

22. On June 5, 1995, Defendants began the formal scoping process. Throughout the scoping process, serious concerns were raised regarding public safety, impacts of grizzly bears on existing land uses, nuisance bears and their control, and depredation by bears on domestic livestock and native ungulates.

23. In June 1997, Defendants released the draft EIS (“DEIS”) and proposed rule to the public. USFWS received more than 24,000 comments from individuals, organizations, and government agencies. Numerous members of the public again raised objections to the Program and voiced concerns about the effects of grizzlies on human health and safety, on livestock and pets, and on recreational opportunities.

24. On December 1, 1997, the State of Idaho expressed its vehement opposition to the Program through comprehensive comments on the DEIS. Specifically, the State of Idaho pointed to fatal flaws in the NEPA analysis by Defendants, including the following: (1) that the DEIS underestimated the potential risks to health and human safety presented by the importation of grizzly bears in central Idaho; (2) that USFWS had violated NEPA by inappropriately delegating most of the analysis of potential impacts posed by the Program to the yet-to-be-formed Citizen Management Committee; (3) that the Citizen Management Committee would be acting in an unlawful manner if it operated with greater “flexibility” than USFWS itself; and (4) that a number of biological flaws infected USFWS’ approach to the grizzly bear Program.

25. On March 24, 2000, USFWS released the final EIS ("FEIS") on the Program. Attached hereto as Exhibit A is a true and correct copy of a relevant excerpt from the FEIS. The FEIS considered six alternatives: (1) restoration of grizzly bears as a nonessential experimental population with citizen management (preferred alternative); (1A) restoration of grizzly bears as a nonessential experimental population with USFWS management; (2) natural recovery – the no action alternative; (3) no grizzly bear alternative; (4) restoration of grizzly bears as a threatened population with full protection of the ESA and habitat restoration; and (4A) restoration of grizzly bears as a threatened population with full protection of the ESA and under USFWS management.

26. On April 24, 2000, the State of Idaho again opposed Defendants' plan and submitted comments on the FEIS. In addition to renewing its objections to the DEIS which remained unaddressed in the FEIS, the State of Idaho pointed out numerous inadequacies and deficiencies in the FEIS including, among others, that (1) USFWS failed to fully and adequately consider the environmental impact on the source bear populations, *i.e.* the populations from which the imported bears would be captured; (2) USFWS failed to fully and adequately consider and disclose the risk that nuisance bears will be imported into the Experimental Population Area; (3) USFWS failed to fully and adequately consider the significant economic impacts and land use restrictions that could stem from the Program; and (4) USFWS failed to fully and adequately consider the risks to the human health and safety created by the grizzly bear Program. Attached hereto as Exhibit B is a true and correct copy of the State of Idaho's April 24, 2000 comments on the FEIS.

27. Without addressing the repeated substantial concerns raised above, on November 13, 2000, USFWS signed the Record of Decision on the FEIS and selected its "Preferred Alternative" – restoration of grizzly bears as a nonessential experimental population with "citizen management."

28. On November 17, 2000, USFWS issued its Record of Decision and Final Rule on the establishment of a nonessential experimental population of grizzly bears in central Idaho and Montana. 65 Fed. Reg. 26924. Attached hereto as Exhibit C and D are true and correct copies of the Record of Decision and FEIS. On December 18, 2000 the Final Rule became effective. 65 Fed. Reg. 26924.

29. Under Defendants' program, the Bitterroot Grizzly Bear Experimental Population Area ("Experimental Population Area"), which includes most of east-central Idaho and part of western Montana, would be artificially populated with grizzly bears. Portions of the Experimental Population Area, approximately 25 percent, include state and private lands.

30. The Program would import a minimum of 25 grizzly bears over a 5-year period from areas of Canada and the United States. USFWS plans to capture and import into Idaho grizzly bears purportedly from British Columbia, the Northern Continental Divide ecosystem, and the Yellowstone ecosystem to central Idaho and release them on national forest land in the Selway-Bitterroot Wilderness area. The long term objective is to establish a population of approximately 280 grizzly bears in the Bitterroot ecosystem.

31. Defendants plan to begin importing grizzly bears into central Idaho as early as 2002. The first phase of the Program is a planning and preparation phase involving the formation of the Citizen Management Committee ("Committee"), initiation of public outreach and information and education programs, and initiation of a sanitation program to ensure that bear-proof garbage storage containers are installed in campgrounds and facilities in the Selway-Bitterroot Wilderness area.

32. As part of the grizzly bear program, the Secretary of Interior would establish the Committee, having certain management responsibilities for the implementation of Defendants' program. The creation of the proposed Committee is unprecedented and without statutory basis.

33. The Committee will ostensibly be set up by the Secretary of Interior, who will request nominations of citizens to serve on the Committee from the Governors of Idaho and Montana and the Nez Perce Tribe. The Governors and the Tribe will have 60 days to comply. If the Governors and the Tribe fail to make nominations within the 60 days, the Secretary of Interior will make appointments based on the recommendations from interested parties.

34. The Committee would be composed of 15 members serving 6-year terms. Membership will consist of seven individuals appointed by the Secretary of Interior based upon the recommendations of the Governor of Idaho, five members based upon the recommendations of the Governor of Montana, one member based upon the recommendation of the Nez Perce Tribe, and one member representing the Forest Service and USFWS respectively.

35. Defendants have deferred and delegated numerous management decisions concerning the basic operation of the Program to the Committee including, but not limited to, recommending changes in land-use standards and guidelines as necessary for grizzly bear management, the preparation of management plans, implementing the grizzly bear recovery plan, developing guidelines for proper camping and sanitation within the Experimental Population Area, developing a protocol for responding to grizzly/human encounters and grizzly depredations of livestock, developing strategies to accommodate grizzly bears in various areas of the Experimental Population Area, and making recommendations to land and wildlife management agencies.

36. The Committee, however, would not have full management authority because all decisions and actions must lead toward the prescribed goal of creating a grizzly bear population in the Bitterroot ecosystem. If the Secretary of Interior or his delegates determine that the actions of the Committee may not lead to creation of a grizzly bear population as intended, the Secretary of Interior can assume full management authority for the Program and dissolve the Committee.

37. The Final Rule and regulations set forth that the IDFG, among others, will exercise day-to-day management responsibility within the Experimental Population Area. In addition, the Program imposes permitting, enforcement, monitoring, and administrative duties on IDFG. For example, IDFG has responsibilities for issuing permits to harass nuisance grizzly bears, 65 Fed. Reg. 63938; IDFG must serve on the Committee which "will include at least one representative each from the appropriate State wildlife agencies," 65 Fed. Reg. 69639; and IDFG "will exercise day-to-day management responsibility," 65 Fed. Reg. 69640.

38. The Final Rule and regulations also contain a "taking" regulation which restricts livestock owners from protecting their property. The Final Rule and regulations require livestock owners to endure depredation and loss of livestock without compensation. The Final Rule and regulations delay livestock owners from acting to protect their property, imposing cumbersome and possibly impossible conditions to the adequate protection of property:

(iv) Livestock owners may obtain a permit from the Service, and the Idaho Department of Fish and Game, the Montana Department of Fish, Wildlife and Parks, or appropriate Tribal authorities to harass (see definition in § 17.2) grizzly bears found in the Experimental Population Area that are actually pursuing or killing livestock (to include permitting the use of livestock guard dogs around livestock to harass such grizzly bears). Prior to issuance of such a permit, authorized State, Federal, or Tribal officials must document pursuit or killing of livestock. All such harassment must be accomplished by an opportunistic, noninjurious method (see definition of "opportunistic noninjurious harassment" in paragraph (1)(16) of this section) to the grizzly bear, and such harassment must be reported within 24 hours as to date, exact location, and circumstances to the authorities listed under paragraph (1)(5)(iii) of this section.

(v) Livestock owners may obtain a permit from the Service, and the Idaho Department of Fish and Game, the Montana Department of Fish, Wildlife and Parks or appropriate Tribal authorities to take grizzly bears on private lands found in the Experimental Population Area in a manner other than harassment as defined in this paragraph (1), in order to protect livestock actually pursued or being killed on private property. Prior to issuance of such a permit, authorized State, Federal, or Tribal officials must document pursuit or killing of livestock. Any response protocol established by the Committee must have been satisfied and efforts to capture depredating grizzly bears by Service or State or Tribal wildlife agency personnel must have proven unsuccessful. All such taking must be reported as to date, exact

location, and circumstances within 24 hours to the authorities listed under paragraph (l)(5)(iii) of this section.

50 C.F.R. § 17.84(l)(5)(iv) & (v).

39. Throughout the entire EIS process vigorous opposition to the Program was displayed by numerous citizens of Idaho, the Governor of the State of Idaho, the entire Congressional delegation for Idaho, the Idaho legislature, the Idaho State Board of Land Commissioners and the Idaho Fish and Game Commission.

40. Historically, the Experimental Population Area, which includes the Selway-Bitterroot and Frank Church River-of-No-Return wilderness areas, have been used by all types of outdoor enthusiasts including tens of thousands of river rafters who run the Salmon and Selway rivers in the summer, hikers, campers, horseback riders, anglers and hunters. The Experimental Population Area also includes private lands, residences, businesses, and ranches. These users and residents will be placed in unnecessary mortal danger by Defendants' grizzly bear Program. On information and belief, the Program represents the first time in history that the federal government has calculated that human lives will be lost through a specific application of the ESA.

41. Plaintiffs have no adequate remedy at law and will suffer irreparable harm as a result of the violation of their constitutional rights by the implementation of the Program in Idaho.

FIRST CLAIM FOR RELIEF
VIOLATION OF THE TENTH AMENDMENT OF
THE UNITED STATES CONSTITUTION

42. Plaintiffs reallege and incorporate by reference the allegations set forth in Paragraphs 1 through 41 of this Complaint.

43. Pursuant to 5 U.S.C. § 706(2), a reviewing court shall hold unlawful and set aside agency action found to be contrary to a constitutional right, power privilege, or immunity.

44. The Department of Interior and USFWS are agencies under the Administrative Procedure Act ("APA"). 5 U.S.C. § 551(a).

45. Federal agency action for which there is no other adequate remedy is subject to judicial review. 5 U.S.C. § 704.

46. The Tenth Amendment of the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

47. Under the Tenth Amendment, the federal government cannot compel or command state officers to enact, administer, or enforce a federal regulatory program.

48. By adopting the Program, Defendants unconstitutionally attempt to compel the State of Idaho and IDFG to administer and enforce the Program. Defendants' action violates state sovereignty because it unconstitutionally conscripts State officers for a federal cause.

49. The Final Rule and regulations impermissibly impose many obligations on IDFG including day-to-day management responsibilities for the Program, administration of permits for takings, and enforcement obligations. *See* 65 Fed. Reg. 69639-40. For example, IDFG has responsibilities for issuing permits to harass nuisance grizzly bears, 65 Fed. Reg. 63938; IDFG must serve on the Citizen Management Committee which "will include at least one representative each from the appropriate State wildlife agencies," 65 Fed. Reg. 69639; and IDFG "will exercise day-to-day management responsibility," 65 Fed. Reg. 69640.

50. The Final Rule and regulations also improperly assign multiple duties and obligations to the Governor of the State of Idaho by requiring him to nominate members of the Committee, nominate scientists to provide scientific expertise, and consult with the Secretary of Interior if the Secretary decides to assume lead management responsibility for the program. *See* 65 Fed. Reg. 69638, 69641.

51. The Program's commandeering of State officials is a significant impingement on the State of Idaho's traditional and primary power over wildlife conservation and land use. For example, the Final Rule purports to give Idaho officials duties and responsibilities under the Program, a federal regulatory program, without any attempt to comply with the permit requirements set forth in Idaho Code section 36-701(d).

52. Moreover, the coercive character of Defendants' program is further demonstrated by the fact that Defendants were undoubtedly aware of the State of Idaho's vigorous opposition to the Program which was articulated in the State's comments on the DEIS and the FEIS. As noted, strenuous opposition was also voiced by numerous citizens of Idaho, the entire Congressional delegation for Idaho, the Idaho legislature, the Idaho State Board of Land Commissioners and the Idaho Fish and Game Commission. In the face of this opposition and despite Defendants' mandatory obligations under federal law to cooperate with the State of Idaho, Defendants failed to cooperate with the State. Rather, Defendants made little or no effort to address and remedy the concerns of State officials and now, by final agency action adopting the Program, Defendants have imposed regulatory duties and obligations on State officials in violation of the Tenth Amendment.

53. The requirements of Defendants' Program unconstitutionally coerce the State of Idaho, the Governor, and IDFG into implementing the ESA and specifically the grizzly bear Program and, therefore, the Final Rule and regulations of the Program violate the Tenth Amendment.

SECOND CLAIM FOR RELIEF

ABUSE OF DISCRETION UNDER NEPA AND THE APA

54. Plaintiffs reallege and incorporate herein by reference the allegations set forth in Paragraphs 1 through 53 of this Complaint.

55. Pursuant to 5 U.S.C. § 706(2), a reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, or an abuse of discretion.

56. NEPA requires an adequate disclosure of the environmental impacts of a major federal action. The Program is a major federal action and the FEIS prepared by Defendants is inadequate in numerous respects.

57. Defendants acted arbitrarily and capriciously and abused their discretion under NEPA by the following actions or omissions:

- a. Defendants failed to fully and adequately consider the risks to the human health and safety created by the Program. In the Final Rule and FEIS, Defendants cavalierly dismiss the significant risks of grizzly/human encounters and the serious danger that such encounters will result in loss of human life. *See* FEIS at pp. 4-4 to 4-6 (attached hereto as Exhibit A).
- b. Defendants failed to fully and adequately consider the significant economic impacts and potential land use restrictions that could stem from the Program. Rather, Defendants arbitrarily and capriciously deferred decisions on significant grizzly bear management issues, including land use issues such as road closures and trail closures, to the yet-to-be-formed Citizen Management Committee thereby evading public scrutiny and the requirements of NEPA. A broad spectrum of Idaho citizens, including numerous small businesses, outfitters, ranchers, farmers, the timber industry, and others will likely experience negative economic impacts from the Program and yet none of these negative economic consequences were given adequate consideration. *See* FEIS 4-9 to 4-14 and 4-17 to 4-19 (attached hereto as Exhibit A).

- c. Defendants failed to fully and adequately consider the environmental impact on the source bear populations, *i.e.* the populations from which the imported bears would be captured. Defendants' analysis is overly optimistic and unreasonable. The source bears most likely will not come from British Columbia, but rather from the listed populations in the Northern Continental Divide Ecosystem and the Yellowstone Ecosystem. By being selected for the Program these grizzly bears will lose their full protection under the ESA and become part of a nonessential experimental population with lesser protections under the law. In addition, Defendants failed to fully and adequately consider and disclose the significant risk that nuisance bears will be introduced into the Experimental Population Area. See FEIS 4-6 to 4-9 (attached hereto as Exhibit A).

58. Defendants' failure to comply with NEPA is arbitrary and capricious and contrary to law and thus violates section 706 of the APA.

PRAAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment to be entered in their favor and against the Defendants as follows:

1. For permanent injunctive relief against Defendants, barring them, their agents and their employees from implementing the grizzly bear Program in the State of Idaho.
2. For the Court to issue a declaratory judgment declaring that Defendants' grizzly bear program violates the Tenth Amendment of the United States Constitution.
3. For the Court to issue a declaratory judgment declaring that Defendants violated NEPA by preparing an inadequate FEIS.
4. For the Court to remand the grizzly bear Program to the United States Fish and Wildlife Service and order the agency to comply with its obligations under ESA, NEPA and APA.

5. For attorney's fees and costs as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412;

6. For any other further relief that this Court deems just and proper.

Dated: January 19, 2001

Respectfully submitted,

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