

THE FOREST SERVICE'S BAIT AND SWITCH:
A CASE STUDY ON BEAR BAITING AND THE
SERVICE'S STRUGGLE TO ADOPT A REASONED
POLICY ON A CONTROVERSIAL HUNTING PRACTICE
WITHIN THE NATIONAL FORESTS

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After describing the practice and effects of bear baiting, the article recounts the USFS's reluctant and haphazard attempts to develop a national policy on bear baiting, and the resulting legal challenges. The authors examine the scope of USFS authority to regulate human activities in the national forests, particularly with regard to actions impacting wildlife, then analyze the USFS's recent proposed "national policy" on bear baiting. Finally, the authors will explain why the USFS should apply the same management principles and standards to controversial "hunting" practices, such as bear baiting, as it does to other uses of the nation's forests which have environmental impacts and interfere with the use and enjoyment of the forests by other users.

INTRODUCTION

Bear baiting is a highly controversial method of hunting. The bear baiter attracts bears to a specific site through the use of decaying foods. The use of bait allows a hunter to get a shot at point blank range at an unwary bear who has become accustomed to feeding at the location undisturbed. Bear baiting raises serious ethical questions, as well as environmental concerns; it adversely affects black bear populations, has the potential to affect endangered and threatened species, and detracts from the ability of more passive users to enjoy the nation's forests.

As the United States Forest Service ("USFS" or "Forest Service") has long recognized, these are the types of impacts from human activities on national forest lands which federal law charges the Forest Service with controlling. Historically, the USFS has broadly regulated the occupancy and use of the national forests. For instance, general restrictions on litter and garbage storage on national forest land are broad enough to encompass most bear baiting techniques. In terms of

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environmental impacts from bear baiting, the USFS has substantial statutory authority under the National Forest Management Act ("NFMA"),¹ the National Environmental Policy Act ("NEPA"),² and the Endangered Species Act ("ESA")³ to preserve the lands and resources of the national forests, as well as to make environmentally sound decisions after full examination and consideration of the environmental consequences. Nevertheless, because the Forest Service has categorized bear baiting as a "hunting" practice, the USFWS has resisted using its statutory and regulatory authority to ban or even tightly regulate the practice.⁴

After describing the practice and effects of bear baiting, this article will recount the USFS's reluctant and haphazard attempts to develop a national policy on bear baiting, and the resulting legal challenges. The second part will examine the scope of the Forest Service's authority to regulate human activities in the national forests, particularly with regard to actions impacting wildlife. The authors will then analyze the USFS's recent proposed "national policy" on bear baiting, which, once again, would be tantamount to no national regulation of the practice at all. Finally, the authors will explain why the USFS should apply the same management principles and standards to controversial "hunting" practices, such as bear baiting, as it does to other uses of the nation's forests which have environmental impacts and interfere with the use and enjoyment of the forests by other users.

II. THE HISTORY AND PRACTICE OF BEAR BAITING, AND THE FOREST SERVICE'S ATTEMPT TO DEVELOP A NATIONAL POLICY

A. *The Practice of Bear Baiting*

"Baiting" refers to the hunting practice of luring game to a site to allow for an easy, open shot.⁵ For bear hunting, a "bait station" consists of hundreds of pounds of decaying food items spread on the ground or enclosed in a container with holes to allow odors to escape.⁶ Often bear baiters use decaying animal carcasses.⁷ Bears are attracted to the bait station and eventually associate the site with easy and abundant food. Bears may also become habituated to human scent in the area. These conditions allow the hunter, who is typically hidden in

¹ 16 U.S.C.A. §§ 1600-1687 (West 1985 & Supp. 1995).

² 42 U.S.C.A. §§ 4321-4332 (West 1994).

³ 16 U.S.C.A. §§ 1531-1544 (West 1995 & Supp. 1995).

⁴ See 59 Fed. Reg. 11,766-67 (March 14, 1994): "The Forest Service [] is generally reluctant to override State fish and wildlife regulation . . . [therefore], the interim directive makes explicit that where state regulations permit baiting, the Forest Service will not require a special use authorization for the practice of baiting connected with hunting."

⁵ U.S. Forest Service, Environmental Assessment, Black Bear Baiting on National Forest System Lands in Wyoming 1 (1993) [*hereinafter* Environmental Assessment].

⁶ *Id.* at 1, 2.

⁷ In some instances baiters use "walk-in" baits such as old mules and horses that [are] shot and left at the baiting station." *Id.* at 1.

a hunting blind or a tree stand, to shoot the unsuspecting animal from close range.⁸

Even the Forest Service recognizes that “[t]he baiting of bear is particularly controversial.”⁹ By March 1994, the number of states allowing bear baiting had dwindled to eleven, with only Alaska, Idaho, Oregon, Maine, Michigan, Minnesota, New Hampshire, Utah, Washington, Wisconsin, and Wyoming still permitting the use of the practice.¹⁰ Polls show that strong opposition to baiting exists in at least five of those states.¹¹ In November 1994, Oregon voters approved a referendum to ban the hunting of bears using bait or hounds. This widespread public opposition to bear baiting is based on a combination of ecological, aesthetic, safety, and ethical concerns.¹²

B. Adverse Impacts of Bear Baiting

1. Impacts on Black Bear Populations

Black bears are found in approximately 32 states.¹³ In Alabama, Kentucky, Ohio, and Illinois, black bears have been extirpated from most of their range.¹⁴ In six states, the black bear is afforded protected status, with Florida considering it a protected species in some areas and a game animal in others.¹⁵ The U.S. Fish and Wildlife Service recently listed the Louisiana black bear as a “threatened” species under the ESA.¹⁶ Although black bear populations are relatively secure outside of such isolated populations in the south and southeast, the “[d]emand for the species as a game animal is high” and “increasing.”¹⁷ For all of North America, the annual slaughter increased from a 1972 estimate of between 25,000 to 30,000 bears to approximately 41,000 in

⁸ *Id.* at 1, 2.

⁹ 59 Fed. Reg. 11,766 (Mar. 14, 1994).

¹⁰ *Id.*

¹¹ In 1991, polls showed that in Colorado and Utah, 75% and 72%, respectively, were opposed to baiting. See Colorado Division of Wildlife, Black Bear Management Plan (1990) (on file with *Animal Law*); Aaron Medlock, *Use of Bait in Hunting on National Forest Lands: A Report Opposing the Proposed Policy of the Forest Service and Supporting a Ban on Bear Baiting* 50 (1994). In 1993, polls in Michigan and Oregon showed that 61% and 70%, respectively, opposed baiting. A 1994 poll showed that 68% of Wyoming residents were in favor of eliminating baiting, and 76% supported shortening the baiting season. University of Wyoming Survey Research Center, Public Attitude Survey on Black Bear Management in Wyoming 2 (Jan. 1994). Furthermore, the Wyoming study showed that while 53% believed bear hunting should continue, only 4% actively participated in bear hunting, and of those that did, only 8% used bait. *Id.* at 2,3.

¹² See Environmental Assessment, *supra* note 5, at 11.

¹³ CHRISTOPHER SERVHEEN, THE STATUS AND CONSERVATION OF THE BEARS OF THE WORLD 20-21 (1989).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 57 Fed. Reg. 588 (Jan. 7, 1992).

¹⁷ SERVHEEN, *supra* note 13, at 21.

1989.¹⁸ Over the past 12 years, black bears killed in Wyoming have increased by over 70%, including a 74% increase in the number of females killed.¹⁹ A “dramatic increase in popularity” of black bear hunting in northwest Montana led to concern among state biologists “about whether black bear populations could sustain [the] increased harvest.”²⁰ In one of two hunting districts studied, the “harvests” were at the “[m]aximum sustainable annual mortality” for 1985 and 1986, and far exceeded sustainable levels in 1987.²¹

Bear baiting results in a number of adverse impacts on black bear populations and their environment. Because it is a highly efficient method of hunting, baiting has the ability to decimate a population.²² And like the infamous garbage dumps of old in Yellowstone National Park, baiting can alter the biology and behavior of bear populations in little-understood but potentially damaging ways. For example, according to world-renowned bear biologist Charles Jonkel, “[b]aits pull bears away from their natural eco-centers, pathways or travel routes, often into less-adequate habitat, or areas where they are more vulnerable to poachers or predators.”²³ Other negative impacts pinpointed by Dr. Jonkel include:

- Baiting causes inadvertent conflicts between bears and third-party humans who may by chance approach the baits;
- Baits cause bears to congregate, which may lead to fights or death;
- Baits habituate bears to people odors, people activities, which may then lead to bear/people conflicts;
- Behavioral changes caused by the baiting may result in long-term, subtle, and “hard-to-recognize chain” responses which affect a considerable area or many species;
- Bears shot at by baits, but not killed, may fear that site and other[s] like it, causing a loss of habitat.²⁴

Some Forest Service officials have recognized the seriousness of these risks to black bear populations. For example, in 1989, acting Forest Supervisor Larry Hill of the Grand Mesa, Uncompangre, and Gunnison National Forests in Colorado recommended “the closure of fall bear baiting on all Forest lands in Colorado” because it is “important [that] bears rely on natural forage to prepare for winter hibernation

¹⁸ *Id.* at 20. Maine, Pennsylvania, California, Alaska, Montana, Idaho, Oregon, and Washington have had the highest annual kills, with harvests of between 1000 and over 2000 bears. *Id.* at 22, Table 3.

¹⁹ Environmental Assessment, *supra* note 5, at 2.

²⁰ WAYNE KASWORM & TIM MANLEY, MONTANA DEPT. OF FISH, WILDLIFE AND PARKS, GRIZZLY BEAR AND BLACK BEAR ECOLOGY IN THE CABINET MOUNTAINS OF NORTHWEST MONTANA 28 (1988).

²¹ *Id.* at 38 (emphasis added).

²² See Environmental Assessment, *supra* note 5, at 2 (in Wyoming, approximately 90% of bears killed in spring and 58% of total kill occurs at bait sites).

²³ Charles Jonkel, The Ursid Research Center, *White Paper: The Colorado Black Bear Amendment 2* (1992).

²⁴ *Id.*

rather than a variety of baits ranging from donuts to spoiled dairy products."²⁵

2. *Impact on Endangered and Threatened Species*

Black bear baiting may adversely affect a number of endangered or threatened species, such as the northern bald eagle, grizzly bear, Rocky Mountain gray wolf, and North American wolverine.²⁶ For example, in March 1994, the first wolf known to have roamed wild in the forests of northern New England was attracted to a bear bait station and killed by the hunter.²⁷ Mountain lions and various other species that feed on carrion could also be affected.²⁸ As summarized by the Regional Forester of the Intermountain Region, "[b]ear baits have the potential to attract other wildlife species which would result in undesirable conflicts and jeopardy to these animals."²⁹

Impacts on the grizzly bear, which is listed as a threatened species under the ESA, are of particular concern. Aside from habitat destruction, which imperils the long-term viability of the species in the lower 48 states, direct human-caused mortality is the primary reason grizzlies are threatened with extinction.³⁰ Federal officials have made considerable effort to eliminate or minimize grizzly/human encounters and conflicts³¹ which almost inevitably lead to the death of the grizzly. For example, many national forests are eliminating sheep grazing al-

²⁵ Letter from Larry Hill, Acting Forest Supervisor, Grand Mesa, Uncompaghere, and Gunnison National Forests, USFS, to Regional Forester (Mar. 29, 1989) [*hereinafter* Hill Letter] (on file with *Animal Law*).

²⁶ Mark Hirschberger, U.S. Fish and Wildlife Service, Biological Evaluation for Regulating Black Bear Baiting on National Forest System Lands in Wyoming through State Game and Fish Regulations and a Memorandum of Understanding with Wyoming Game and Fish Commission 3-4 (1993) [*hereinafter* Biological Assessment].

²⁷ Allan Dowd, Reuters News Service, *Hunter Kills Maine's First Wild Wolf in 40 Years* (Mar. 29, 1994).

²⁸ Letter from J.S. Tixier, Regional Forester, Intermountain Region to Louis Racine, Chairman, Idaho Fish and Game Comm'n 1 (Nov. 29, 1990) [*hereinafter* Tixier letter] (on file with *Animal Law*).

²⁹ *Id.*

³⁰ In listing the species, the FWS relied on four of the five statutory criteria for listing a species as endangered or threatened, including "[o]verutilization for commercial, sporting, scientific, or educational purposes." 40 Fed. Reg. 31,734 (Jul. 25, 1975). See also 16 U.S.C. § 1533(a) (1) (1973).

³¹ As explained in a study of the management of grizzlies in Glacier National Park: Mutual avoidance appears to be a key element in current relationships between grizzly bears and park visitors. Management design and characteristic shyness of bears are the principal factors contributing to an essentially compatible coexistence. Effects of the relationship on visitors are measurable in terms of imposed changes in activity patterns and travel distributions. . . . Projections of management needs characteristically identify additional control of human activities as a primary goal.

C.J. Martinka, *Ecological Role and Management of Grizzly Bears in Glacier National Park, Montana*, Third International Conference on Bears—Their Biology and Management 154 (1974) (unpublished paper, on file with *Animal Law*).

lotments in grizzly habitat.³² The Forest Service also has strict rules concerning the carrying of food by recreationists in grizzly habitat, often requiring the use of bear-proof containers.³³ The federal and state agencies on the Interagency Grizzly Bear Committee ("IGBC"),³⁴ as well as conservation organizations, are expending resources in efforts to educate private landowners in grizzly country as to how to make their property less attractive to bears. A primary focus of grizzly management efforts is the "control of attractive unnatural foods."³⁵

Baiting in grizzly habitat directly subverts the consensus policy of grizzly bear experts and managers on how human/grizzly conflicts should be avoided. Such experts agree that, "[e]ven with strong education and enforcement programs . . . , [black bear hunting with hounds or bait] represent[s] a major threat to grizzly bear recovery."³⁶ Indeed, the USFS recognized in its 1993 biological assessment on bear baiting that, even when a grizzly "is not directly killed . . . , it can become food conditioned and/or habituation may occur."³⁷ Once a grizzly becomes habituated to human food sources, in almost all likelihood it will be killed or removed from the population.³⁸ As the FWS explained in a recent biological opinion on baiting in Wyoming national forests,³⁹ "in-

³² A major cause of "direct human/bear conflicts" is "careless livestock husbandry, including the failure to dispose of dead live stock in a manner that minimizes grizzly interactions." Christopher Servheen, U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan 23 (1993) [*hereinafter* Grizzly Recovery Plan].

³³ Forest Service Manual ("FSM") § 2676.16b.

³⁴ The Interagency Grizzly Bear Committee is composed of Fish and Wildlife Service, federal land management agency and state wildlife agency personnel. The purpose of the IGBC is to coordinate grizzly bear research and management activities.

³⁵ Martinka *supra* note 31, at 152.

³⁶ Dan Davis and Bart Butterfield, The Bitterroot Grizzly Bear Evaluation Area, A Report to the Bitterroot Technical Review Team 28 (1991) (unpublished report, on file with *Animal Law*).

³⁷ Biological Assessment, *supra* note 26, at 18. See also 16 U.S.C.A. § 1536(c) (1) (1973) (to facilitate consultations with the FWS an agency must "conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action").

³⁸ *Id.* Drs. Servheen and Jonkel's recounting of the story of the Gieter Creek grizzly illustrates how habituating a grizzly to human foods not only results in the death of that bear, but sets back the entire recovery effort for the species:

The Gieter Creek grizzly was a man-shy adult male who learned from messy cabins to break into buildings for food. His first relocation was successful for one year, but when he was relocated a second time he became extremely difficult to recapture and went on a rampage of breaking into cabins (as might be expected, his activities stirred a wave of anti-grizzly sentiment among local residents and landowners). For a long time he eluded all attempts at recapture, extermination, or even observation, but was eventually shot by a hunter.

Charles Jonkel and Christopher Servheen, *Bears and People: A Wilderness Management Challenge* WESTERN WILDLANDS 24 n. 1 (1977). See also Grizzly Recovery Plan, *supra* note 32, at 22 ("Those who still adhere to the axiom of the early west, ' . . . [that] the only good grizzly is a dead one,' are often steeped in tradition that all predators are a threat to their livelihood, or they have had recent negative grizzly bear encounters.")

³⁹ In April 1993 the FWS issued a biological opinion on the potential impacts to endangered and threatened species from the USFS's proposed termination of special use

dividual grizzly bears may become conditioned to these foods and seek them elsewhere (e.g., in camps and other human developments), thereby exposing the bears to further risks and creating 'problem' bears requiring management actions."⁴⁰

The behavior of grizzly bears may be disrupted by baiting, even when bait stations are located outside a grizzly's home range.⁴¹ Grizzly expert Frank Craighead identified eight types of typical grizzly travel, including movement to new food sources and "wandering."⁴² According to the FWS's Biological Opinion, "[g]rizzly bears are known to travel widely, and may visit black bear baits well outside the currently known range of the species."⁴³

Moreover, aside from impacts on grizzly biology and behavior, grizzly bears have been, and will continue to be, shot by hunters at bear baits. Once attracted to the bait, grizzly bears are likely either to be shot intentionally⁴⁴ or misidentified as a black bear. A grizzly bear can easily be confused with a black bear, even by experienced bear bi-

authorization requirements for black bear baiting in Wyoming national forests only. Letter from Charles P. Davis, State Supervisor, Wyoming State Office, Fish and Wildlife Service to Elizabeth Estill, Regional Forester, Rocky Mountain Region, U.S. Forest Service (Apr. 14, 1993) [*hereinafter* Biological Opinion] (on file with *Animal Law*). See also 16 U.S.C.A. § 1536(b) (3) (A) (1973) ("the Secretary shall provide to the Federal agency . . . a written statement setting forth the Secretary's opinion . . . detailing how the agency action affects the species or its critical habitat").

⁴⁰ Biological Opinion, *supra* note 39, at 4.

⁴¹ "The grizzly is readily attracted to bait such as gut piles from elk, a strategically placed elk or deer quarter, or a pack animal deliberately shot and positioned. When putrefaction [*sic*] occurs, a grizzly can detect the scent from great distances." John J. Craighead, *A Proposed Delineation of Critical Grizzly Bear Habitat in the Yellowstone Region*, Monograph presented at the Fourth International Conference on Bear Research and Management 18 (1977).

⁴² Frank C. Craighead, Jr., *Grizzly Bear Ranges and Movement as Determined by Radiotracking*, Third International Conference on Bears—Their Biology and Management 104-5 (1976) (on file with *Animal Law*). Craighead describes these behaviors as follows:

Movement to new food sources: when bears detected food, usually animal carcasses, by their keen sense of smell, they moved directly to it. One grizzly travelled rapidly 29 km. to feed on a carcass. It was not determined just when and how the carcass was detected. In 36 hours, no. 37 travelled an airline distance of 30 km. from one food source to another

Wandering: this seemed to consist of the wandering of young, insecure bears that were seeking food and establishing home ranges. Number 37 was shot by a hunter in spring south of Yellowstone Park, having travelled a minimum of 80 airline km. since late the preceding fall. Yearling no. 52 travelled an airline distance of 88 km. in 20 days and was shot in Grand Teton National Park.

Id.

⁴³ Biological Opinion, *supra* note 39, at 5.

⁴⁴ A principal reason for listing of the grizzly was that "[m]any persons consider these bears as dangerous vermin, and this attitude results in a continual loss of animals through indiscriminate illegal killing." 40 Fed. Reg. 31,734 (Jul. 28, 1975). In 1986, the Montana Department of Fish, Wildlife and Parks had recorded twenty-seven cases of poaching or vandal killing, noting that "[a]nimals killed for profit or from malicious intent are difficult to document" and "[n]ot all illegal grizzly bear deaths are reported." Dood et al., Montana Department of Fish, Wildlife, & Parks, Final Programmatic EIS,

ologists.⁴⁵ From 1975 to 1985, black bear hunters were responsible for eleven "known" accidental grizzly bear mortalities.⁴⁶ In 1982, four grizzly bears were shot over baits in the Shoshone National Forest.⁴⁷ In response, Wyoming in 1982 and Idaho in 1983 banned black bear baiting in some grizzly habitat.⁴⁸ Nevertheless, in 1985, a black colored, female grizzly was shot over bait in the Bridger-Teton National Forest.⁴⁹

Because of the serious threat that the practice poses to grizzly bears, the National Park Service called for a "specific prohibition of bear baiting" to be included in the 1993 grizzly bear recovery plan revision.⁵⁰ Currently, the USFS purports to rely on the IGBC's Grizzly Bear Guidelines, which recommend that bear baiting not be allowed in the most essential grizzly bear habitat, designated as Management Situation 1 (MS-1) habitat.⁵¹ However, as documented in a report by the Congressional Research Service, habitat which is designated as Management Situation 2 (MS-2)—areas in which the IGBC does not

the Grizzly Bear in Northwestern Montana 99 (1986) [*hereinafter* Montana EIS] (on file with *Animal Law*).

Poaching is still the single largest cause of grizzly bear mortality in the Selkirk Ecosystem, resulting in the deaths of 7 of 11 radio-collared bears which were being studied by the Idaho Department of Fish and Game. Davis and Butterfield, *supra* note 36, at 28. See also Craighead, *supra* note 42, at 18: "[A grizzly] attracted to such a lure is easily poached. Illegal kills are difficult to confirm and may mean a death rate that is much higher than actually recorded".

⁴⁵ Lawrence Kasworm, *Black or Grizzly?* MONTANA OUTDOORS 8-10 (May/Jun. 1987): Kasworm notes that color and size are not reliable characteristics for distinguishing black bears from grizzly bears and that only ear shape, face profile, and claws can be relied upon in deciding whether to shoot.

⁴⁶ Montana EIS, *supra* note 44, at 99.

⁴⁷ Biological Assessment, *supra* note 26, at 18.

⁴⁸ Montana EIS, *supra* note 44, at 99.

⁴⁹ Biological Assessment, *supra* note 26, at 18. In 1992 it was reported that grizzlies were "visiting 4 different black bear baits on the north half of the Wind River Ranger District of the Shoshone National Forest . . . until the baits were removed." *Id.*

⁵⁰ Letter from Robert D. Barbee, Superintendent, Yellowstone National Park to Christopher Servheen, Grizzly Bear Recovery Coordinator, U.S. Fish and Wildlife Service 2 (Feb. 4, 1991) (on file with *Animal Law*).

⁵¹ Rather than formally designate "critical habitat" for the grizzly, see 16 U.S.C.A. § 1533(a) (3) (1973), the FWS instead relies on an informal "management situation" system. Lands within the grizzly bear recovery zones are separated into classifications, ostensibly based upon the number of bears, habitat components, and human resource uses found in the area. The Forest Service Manual states that "the potential for preventable mortality [of grizzly bears] on National Forest lands [is to be reduced] by enforcing the Inter-agency Guidelines which specify no baiting for black bear hunting in areas designated as Management Situation 1." FSM 2676.16c. In January of 1991 Jasper Carlton, the Director of the Biodiversity Legal Foundation, petitioned the FWS to designate critical habitat for four populations of grizzlies. The FWS's denial of that petition, and the adequacy of the 1993 recovery plan revision, are currently being challenged in *The Fund for Animals et al. v. Babbitt*, No. 94 Civ. 1021 (D.D.C. May 10, 1994).

emphasize grizzly protection—often has very high densities of grizzlies and many grizzlies die as a result of human activities in such areas.⁵²

Another problem is that, under the current management situation system, islands of “essential” habitat which might contain important feeding or denning sites are surrounded by MS-2 areas. These MS-2 areas between the main grizzly population areas and isolated pockets of prime grizzly resources are, of necessity, highly-traveled by grizzlies. The FWS has stated that it is imperative that black bear baiting not be allowed in any such areas occupied by grizzlies.⁵³ Furthermore, grizzlies already occur entirely outside of the recovery zones covered by the management situations.⁵⁴ Accordingly, it is clear that black bear baiting does, and will continue to, adversely affect the survival and recovery prospects for the threatened grizzly bear.

3. *Adverse Impacts of Bear Baiting on Other Forest System Users*

Bear baits also pose a safety hazard to people, and, as a result of the offensive appearance and smell, baiting conflicts with other users of national forests, including hikers, campers and birdwatchers. As noted above, baiting can habituate bears to human odors and activities and lead to bear/people conflicts, including encounters with third parties who chance upon a bear at a bait station.⁵⁵ Encounters with bears at baits are particularly dangerous because bears defend food sources.⁵⁶

Bait stations can also be gruesome sights. The conflict these stations pose with other users of national forests is illustrated by a memo from the District Ranger for the Bridger-Teton National Forest detailing recent complaints concerning bait stations.⁵⁷ At one site, a dead horse remained tied to a tree, along with a fifty gallon drum, garbage, and scattered carcasses. The ranger described another site as follows:

⁵² CONGRESSIONAL RESEARCH SERVICE, GREATER YELLOWSTONE ECOSYSTEM: AN ANALYSIS OF DATA SUBMITTED BY FEDERAL AND STATE AGENCIES FOR THE HOUSE SUBCOMMITTEE ON NATIONAL PARKS AND RECREATION, H.R. DOC. NO. 442, 99th Cong., 2d Sess. 31 (1986).

⁵³ In its Biological Opinion, the FWS determined that black bear baiting should not occur anywhere within grizzly bear recovery zones or in areas under special order prohibiting improper food storage in grizzly habitat, in order to mitigate the potential for “incidental takings” of grizzlies. Biological Opinion, *supra* note 39, at 1, 3. See 16 U.S.C.A. § 1539(a) (2) (b) (ii) (FWS may issue incidental take permits so long as “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking”). It is current USFS policy to “[w]ork with State wildlife agencies toward the elimination of baiting for black bear hunting in Management Situation 2 areas where grizzlies are known or are likely to occur.” FSM 2676.16c.

⁵⁴ “The [Biological Assessment] indicates that grizzly bears [in Wyoming] use an estimated 519,600 acres (210,438 hectares) outside the area covered by the currently defined Recovery Zone and food storage orders (nine percent of grizzly bear distribution in the Greater Yellowstone Ecosystem).” Biological Opinion, *supra* note 39, at 5.

⁵⁵ Jonkel, *supra* note 23, at 2.

⁵⁶ *Id.*; Biological Opinion, *supra* note 39, at 4.

⁵⁷ Letter from Robert L. Reese, USFS District Ranger, Pinedale Ranger District to Bill Noblitt (Aug. 17, 1993) (on file with *Animal Law*).

Forest personnel visited the site and found 1/3 of a horse stuffed in a barrel with the horses [sic] head tied to a nearby tree It was located near White Pine Resort. The owners were worried about bears being attracted to the resort and clients seeing the horse body stuffed into a barrel. This wasn't an experience the owners wished clients to have Site also included many horse skulls and bone from previous years baiting that had never been cleaned up.⁵⁸

These are not isolated incidents. As the Regional Forester for the Intermountain Region explained: "On National Forests in Idaho, dead animals, and animal parts have been utilized as bear bait. Permanent structures such as elevated platforms, perches in trees, and barrels for holding bait have been established near baiting activities. These activities affect visual quality, public safety, and water quality" ⁵⁹ It was primarily due to such concerns that some Forest Service officials began to at least regulate bear baiting practices in the 1970's because "baits were being found in or near streams, near trails, campgrounds, and other areas where people concentrate."⁶⁰

4. *Ethical Consideration*

Bear baiting does not comport with notions of fair chase that are subscribed to by the overwhelming majority of the public at large, even those who are not generally opposed to sport hunting. For instance, Fish and Wildlife Service policies concerning hunting on National Wildlife Refuges purportedly "promote positive hunting values and hunter ethics such as fair chase."⁶¹ A similar view has been expressed by some Forest Service officials. For example, in his memorandum to the Chairman of the Idaho Fish and Game Commission, the Regional Forester of the Intermountain Region stressed that, since the "use of salt as an attractant to draw elk and other game animals is illegal for ethical reasons[,] [t]he Forest Service believes these same standards should apply to all game species, including the black bear."⁶² Even more revealing is a study by the Colorado Division of Wildlife, which found that a substantial majority of bear hunters themselves believed that baiting "gives the hunter an unfair advantage."⁶³ In the opinion of noted bear biologist Charles Jonkel, "such hunting is unfair to the bear, un-sportsmanlike, and too easily exploited by unethical hunters and outfitters."⁶⁴

⁵⁸ *Id.*

⁵⁹ Tixier letter, *supra* note 28.

⁶⁰ 57 Fed. Reg. 57,417 (Dec. 4, 1992).

⁶¹ 8 USFWS WILDLIFE REFUGE MANUAL Sec. 5.5.

⁶² Tixier letter, *supra* note 28.

⁶³ Black Bear Management Plan, *supra* note 11, at 25.

⁶⁴ Jonkel *supra* note 23, at 2.

C. *The Forest Service's Positions: Past and Present*

The Forest Service has not and will not arrive easily at a sound policy regarding bear baiting. In fact, the agency is only now grappling with developing a national policy because a grassroots Wyoming environmental group challenged it to justify—both legally and environmentally—its practice of allowing bear baiting in Wyoming national forests.

1. *The Forest Service's Elimination of Special Use Permits for Bear Baiting in Wyoming National Forests*

Up until the 1970s, there were no federal or state regulations covering the placement and removal of bait on National Forest lands in Wyoming, even though baiting had been occurring there for decades.⁶⁵ At that time, because of the pollution, odors, litter, and user conflicts associated with bait stations, individual national forests in Wyoming⁶⁶ began to require that baiters at least obtain special use permits. The stated "reason for requiring the permits was to gain control over the previous indiscriminate placing and leaving of baits on the National [sic] Forests."⁶⁷ Of particular concern to the Forest Service were baits being left by streams, trails, and campgrounds.⁶⁸ The special use permit requirements remained in effect until March 23, 1992,⁶⁹ when they were eliminated as a result of environmental and legal concerns raised by a Wyoming environmental group, Friends of the Bow (FOB), which was founded to foster ecologically sensitive management of the Medicine Bow National Forest (MBNF).⁷⁰

Prior to 1991, there was little opposition to bear baiting in Wyoming, largely because there was no public notification of permit issuance and "[w]ithout public notification, the general public was largely unaware of the practice."⁷¹ In the Spring of 1991, the Bush Creek District Ranger began to publish permit decisions.⁷² In response, FOB "began looking into [USFS] policies and procedures related to bear baiting."⁷³ That spring, FOB sent letters to the MBNF communicating its concerns that bear baiting permits were being issued without public

⁶⁵ 57 Fed. Reg. 57,417 (Dec. 4, 1992).

⁶⁶ Until recently, it was left up to individual National Forests to decide whether to require special use permits.

⁶⁷ USFS, BEAR BAITING ISSUE PAPER 2 (1992) [*hereinafter* ISSUE PAPER] (unpublished paper, on file with *Animal Law*).

⁶⁸ 57 Fed. Reg. 57,417 (Dec. 4, 1992).

⁶⁹ *Id.*

⁷⁰ Other grassroots organizations, such as the Utah Wilderness Association, were actively opposing bear baiting elsewhere. *See, e.g.*, Tucker, Forest Supervisor, Ashland National Forest, Letter of Decision (May 30, 1991) (reversing decision of district ranger and granting Utah Wilderness Association's appeal of special use permit).

⁷¹ ISSUE PAPER, *supra* note 67.

⁷² *Id.* At that time no other district in the MBNF provided public notification of bear baiting permits and no other National Forest in Wyoming did either. *Id.*

⁷³ *Id.*

review of impacts on black bear populations. In May 1991, MBNF Supervisor Gerald G. Heath, acknowledged to FOB that the USFS was issuing special use permits for baiting, even though it did not have any statistical data pertaining to black bear populations in the forest.⁷⁴ FOB then reiterated its concerns that the Forest Service was ignoring NEPA requirements and not permitting the public to participate in the process.

In February 1992, the BLM Wyoming State Office hosted a meeting with Forest Service, BLM, and Wyoming Game and Fish Department personnel on bear baiting on public lands.⁷⁵ At the meeting, these agencies decided that rather than allow administrative appeals and follow NEPA procedures, it was preferable to devise a policy that would exclude the public entirely. Thus, the agencies decided to hand all regulatory responsibility for bear baiting over to the Wyoming Game and Fish Department, apparently believing that this would allow the federal government to circumvent NEPA and other legal obligations. In March 1992, the USFS issued "Order Number 2-2" which entirely eliminated the Forest Service Manual requirement that hunters obtain special use permits before engaging in bear baiting on all Forest Service lands in Wyoming.⁷⁶ In issuing this order, the USFS prepared neither an Environmental Assessment (EA) nor an Environmental Impact Statement (EIS), nor did it solicit public comment.

After the USFS summarily rejected the FOB's administrative appeal, the FOB, along with The Fund for Animals, Inc.—a national wildlife protection organization—filed a lawsuit challenging the USFS's failure to adhere to the requirements of federal law in adopting Order Number 2-2.⁷⁷ Shortly after the plaintiffs filed a motion for summary judgment in that case, the USFS terminated the Order.

In November 1992, the Deputy Chief of the Forest Service executed an affidavit in the case in which he committed the Service to preparation of an EA regarding the USFS's bear baiting policy in Wyoming. The affidavit stated that the USFS would comply with NEPA and implementing regulations issued by the USFS and the Council of Environmental Quality (CEQ), and that the public would have an opportunity to comment, before the USFS made any final decision to eliminate the special use authorization requirement.⁷⁸ On that basis, the parties stipulated to dismissal of the lawsuit.

⁷⁴ Letter from Gerald Heath, Medicine Bow National Forest Supervisor to Donald Duerr, Friends of the Bow (May 1991) (on file with *Animal Law*).

⁷⁵ *Id.*

⁷⁶ Gary Cargill, Regional Forester, Rocky Mountain Region and Gray Reynolds, Regional Forester, Intermountain Region, *Order No. 2-2* (March 23, 1992). See 36 C.F.R. Sec. 261.50 (authorizing Regional Forester to "issue orders which close or restrict the use" of National Forests within their jurisdiction.)

⁷⁷ *The Fund for Animals, Inc. v. Robertson*, No. 92 Civ. 1694 (D.D.C. July 21, 1992).

⁷⁸ Declaration of James C. Overbay, *The Fund for Animals, Inc. v. Robertson*, Civ. No. 92-1694 (D.D.C. Nov. 30, 1992).

2. *The Forest Service's Environmental Assessment and Formal Consultation With the FWS Regarding Bear Baiting in Wyoming*

The USFS issued an EA for public comment in February 1993, in which it stated that its "preferred alternative" was to eliminate the requirement for the issuance of special use permits for bear baiting and to enter into a "Memorandum of Understanding" with the WGFD which would authorize state officials to regulate, or refrain from regulating, the practice.⁷⁹ In its EA, the USFS recognized that this alternative could have a number of adverse environmental impacts, including "potential conflicts between [other] recreation users and bear baiters,"⁸⁰ potential adverse impacts on grizzly bears and other species protected by the ESA,⁸¹ and potential adverse impacts on designated Wilderness areas.⁸² The EA also recognized that the USFS had the authority to terminate bear baiting on national forests in Wyoming and that, if it did so, none of these adverse impacts would result. Moreover, if the USFS chose to terminate bear baiting, the number of black bears killed on Wyoming national forests might be reduced by as much as one-half.⁸³ Nevertheless, the EA never coherently explained why this alternative was not the "preferred" one.

In its EA, the USFS also stated that it had prepared a "Biological Assessment" analyzing the impact of bear baiting on endangered and threatened species, which concluded that a number of protected species, including the northern bald eagle, Rocky Mountain gray wolf, grizzly bear, North American wolverine, and fisher may be "adversely affected" by the practice of bear baiting on Forest Service lands, and that "[t]here is the potential for direct or indirect taking of a grizzly bear."⁸⁴ According to the Biological Assessment, which was released to the public in March 1993, the "proposal to regulate black bear baiting through Wyoming State Game and Fish Commission Regulations on National Forest lands in the analysis area for the purpose of hunting black bears 'may affect' the grizzly bear" because "black bear baiting will still occur in areas that have grizzly bear use outside of both the proposed recovery zone [for the grizzly bear] and areas with a special order prohibiting improper food storage."⁸⁵ Because of the potential adverse effects of its "preferred alternative" on grizzly bears and other endangered and threatened species, the USFS determined that it was

⁷⁹ See Environmental Assessment, *supra* note 5.

⁸⁰ *Id.* at 19.

⁸¹ *Id.* at 20.

⁸² *Id.* at 21.

⁸³ *Id.* at 25.

⁸⁴ *Id.* at 20.

⁸⁵ *Id.* See also Biological Assessment, *supra* note 26, at 3. As noted above, the biological assessment further found that, under the "preferred alternative," 9 percent or more of the current grizzly bear use area in the GYE [Greater Yellowstone Ecosystem] has the potential to be affected by black bear baiting." *Id.* at 17. The assessment further detailed the data supporting the proposition that bear baiting may harm grizzly bears, as well as the various ways in which this harm may occur:

necessary to enter into "formal consultation" with the Fish and Wildlife Service, as mandated by the ESA and implementing regulations.⁸⁶

In response to its EA and biological assessment, the USFS received a large number of comments from groups and individuals strongly opposed to bear baiting on environmental and ethical grounds, and urging the USFS to at least prepare an EIS before making a final decision. For example, FOB explained that the USFS's proposed deregulation of bear baiting could have a detrimental impact on black bear populations in national forests in Wyoming, and it presented a detailed statistical analysis indicating that such populations have been exposed to excessive hunting in the past.⁸⁷ FOB further explained that continued baiting—as a particularly efficient means of killing bears—could have a grave impact on black bear populations in Wyoming and that, by eliminating the federal regulation and fees associated with the issuance of special use permits, the Service would be aggravating, rather than mitigating, that impact.⁸⁸ FOB and many other commenters also pointed out that the USFS's proposed elimination of the special use permit requirement would essentially eliminate opportunities for ongoing public input into Forest Service decisionmaking regarding this matter.⁸⁹

3. *The Forest Service's Determination To Prohibit Bear Baiting in Wyoming Pending Development of a National Policy*

In April 1993, the Forest Service issued a Decision Notice and Finding of No Significant Impact ("FONSI"). In its Decision Notice, the

Baiting for black bears has the potential of 'taking' a grizzly bear regardless of what management situation area the bear is in or if the bear is in the recovery zone or not.

...

Grizzly bears can be attracted to black bear baits. Grizzlies were reported visiting 4 different black bear baits on the north half of the Wind River Ranger District of the Shoshone National Forest in 1992, until the baits were removed. *Once a grizzly bear is attracted to a bait it could be shot by mistake because it is mis-identified [sic] as a black bear or shot intentionally.*

...

In 1982, 4 grizzly bears (one was radio-collared) were killed over black bear baits on Shoshone National Forest . . . In 1985, a radio-collared, black colored, female grizzly was killed over a black bear bait in the Granite Creek area on the Bridger-Teton National Forest.

...

Even if a grizzly that comes to a black bear bait is not directly killed . . . by a hunter, it can become food conditioned and/or habituation may occur (both of which constitute disruption of normal behavioral patterns, thus harassment).

Id. (emphasis added).

⁸⁶ *Id.* at 3-4.

⁸⁷ See Considerations of Wyoming Black Bear Population Viability, Comments of Donald Duerr, Friends of the Bow (March 24, 1993) (on file with *Animal Law*).

⁸⁸ *Id.*

⁸⁹ *Id.*; see also Comments of The Fund for Animals (March 24, 1993) (on file with *Animal Law*).

USFS acknowledged that there are "indications" that the black bear population is "currently being overharvested" on at least "some segments" of the national forests in Wyoming.⁹⁰ Nevertheless, without first preparing an EIS or obtaining the FWS's biological opinion, the USFS made a final decision to allow hunters to engage in bear baiting without obtaining any permit or authorization from USFS officials.⁹¹

Soon thereafter, the FWS issued its Biological Opinion—the end result of the "formal consultation" process under the ESA—which concluded that there was in fact a "potential for [the] incidental take of grizzly bears" as a result of the USFS's action.⁹² To mitigate the effects of the action on grizzly bears, the FWS "prescribed conditions" that were deemed to be "critical to the fulfillment of the [Forest Service's] responsibilities under the [ESA]," including the "[e]limination [of] the use of processed human, livestock, or pet foods."⁹³

In view of the potential environmental impacts associated with the continuation of bear baiting on national forests in Wyoming, FOB requested the opinion of the CEQ—which provides oversight on implementation of NEPA—as to whether the USFS had complied with NEPA by failing to prepare an EIS before making its decision. CEQ's opinions regarding NEPA compliance are entitled to "substantial deference."⁹⁴

In a May 1993 letter to the Friends of Bow, CEQ "conclude[d] that USFS did not comply with the National Environmental Policy Act (NEPA) or the CEQ implementing regulations in the preparation of the [Environmental Assessment], and the issuance of the decision notice and finding of no significant impact."⁹⁵ CEQ further advised that the "EA/FONSI is seriously inadequate and reflects an inappropriate bias towards the needs of one particular user group: hunters and outfitters seeking to engage in bear baiting on Wyoming national forests."⁹⁶

In view of CEQ's opinion, as well as the potential for adverse impacts on grizzly bears and other protected species, counsel for FOB and The Fund for Animals wrote to the USFS, indicating that they would pursue litigation over the matter again unless the USFS agreed to prepare an EIS and halt the practice of bear baiting on national forests in Wyoming while that EIS was being prepared.⁹⁷ Soon thereafter, The

⁹⁰ Elizabeth Estill and Gray F. Reynolds, USFS, Decision Notice on Black Bear Baiting in Wyoming (April 1, 1993).

⁹¹ *Id.*

⁹² Biological Opinion *supra* note 39, at 7.

⁹³ *Id.* at 6.

⁹⁴ Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 536 (D.C. Cir. 1993), quoting *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

⁹⁵ Letter from Elizabeth Blaug, Attorney, CEQ to Donald Duerr, Friends of the Bow (May 7, 1993) (on file with *Animal Law*).

⁹⁶ *Id.*

⁹⁷ Letter from Eric Glitzenstein and Aaron Medlock, Attorneys, The Fund for Animals to Michael Espy, Secretary of the Dept. of the Interior and F. Dale Robertston, USFS Chief (May 19, 1993) (on file with *Animal Law*).

Fund and FOB were informed that the USFS had decided, for the first time, to develop a "national policy regarding the placement of bear bait on national forests" and that "[t]herefore, the Forest Service will shortly propose a policy and solicit public review and comment."⁹⁸ The Forest Service's Deputy Chief further represented that the Service would "prohibit the use of bear baits on the national forests in Wyoming following the close of the spring season pending the establishment of a national policy by the Forest Service."⁹⁹

4. *The Forest Service's Issuance of Its March 14, 1994 "Interim Policy" Allowing Baiting To Take Place On All Forest Service Lands Without Special Use Permits*

Unfortunately, the USFS failed to abide by its pledge to prohibit bear baiting in Wyoming national forests pending development of a national policy following public notice and comment. Instead, as the 1994 hunting season drew near, without any prior public notice and comment, the USFS published an "interim policy" which sweepingly eliminated the special use permit requirement for bear baiting on all national forests nationwide and which, contrary to the Forest Service's prior announcement, rescinded the ban on baiting in Wyoming.¹⁰⁰ Under the "interim policy," bear baiting could occur anywhere in the country on national forest lands so long as the state in question permitted the baiting of game.¹⁰¹

To exclude bear baiting from a national forest or segment of a national forest, an authorized USFS officer would have to affirmatively "determine[] on a site-specific basis that there is a need to prohibit or restrict the practice of baiting because one or more . . . circumstances" apply, i.e., that "[b]aiting is inconsistent with the applicable forest plan or that the "[s]tate law and regulations conflict with Federal law."¹⁰² Most significantly, according to the USFS "[t]his policy, in and of itself, does not compel an authorized officer to undertake a specific decision or to make a determination of whether baiting is allowed in those States where the practice is permitted."¹⁰³ By removing affirmative decisionmaking responsibilities from USFS personnel, the USFS was plainly seeking to circumvent any legal duty to engage in NEPA analysis regarding bear baiting on national forests.¹⁰⁴

⁹⁸ Letter from James C. Overbay, Deputy Chief, USFS to Eric Glitzenstein and Aaron Medlock, Attorneys, The Fund for Animals (May 28, 1993) (on file with *Animal Law*).

⁹⁹ *Id.*

¹⁰⁰ 59 Fed. Reg. 11,765, 11,767 (Mar. 14, 1994).

¹⁰¹ *Id.*

¹⁰² 59 Fed. Reg. 11,767-68 (Mar. 14, 1994).

¹⁰³ *Id.* at 11,768.

¹⁰⁴ See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1250 (D.C. Cir. 1980) (Secretary of Interior not obligated "to prepare an environmental impact statement when he declines to exercise [] power . . . to preempt state wildlife-management programs").

A coalition of wildlife protection and conservation organizations promptly challenged the "interim policy" as violative of NEPA, the ESA, and the Administrative Procedure Act's requirement for public notice and comment prior to rulemaking, 5 U.S.C. § 553.¹⁰⁵ In response, the Forest Service agreed to (1) rescind the interim policy, (2) continue the prohibition on baiting in Wyoming in effect pending development of a national policy, (3) require the use of special use permits as a condition for bear baiting on national forests where such permits were used prior to the interim policy, and (4) solicit public comment on a proposed national policy, including comment on NEPA compliance.¹⁰⁶

A Wyoming outfitters organization intervened in the lawsuit and sought to block implementation of the stipulation and thereby ensure bear baiting in Wyoming during 1994. The outfitters argued, among other things, that the USFS violated the APA by agreeing to rescind the interim policy and that the Service had exceeded its statutory and constitutional authority by prohibiting the use of bait on national forest lands in Wyoming. The Forest Service—having completely reversed course in the litigation—sided with the conservation groups in opposing the outfitters' efforts to sidetrack implementation of the stipulation. Of particular relevance to this article, the Forest Service emphasized that it has clear constitutional and statutory authority "to override state fish and wildlife regulation when federal interests such as protection of federal resources or compliance with federal environmental statutes are at issue."¹⁰⁷

Judge Stanley Sporkin rejected the outfitters' effort to derail the stipulation. Observing that the Forest Service "for some time has struggled with the issue of whether to permit 'bear baiting' on national forest lands," Judge Sporkin concluded that the outfitters had not "demonstrated a substantial likelihood of prevailing on the merits" of their claims and that, "if any public interest is being served, it is through the protection of grizzly bears and other threatened species that the Fund for Animals persuasively argues are attracted and sometimes mistakenly killed by black bear hunters using the bear bait technique."¹⁰⁸

In April 1994, the USFS proposed for public comment a national policy on bear baiting, which mirrored its ill-fated "interim policy."¹⁰⁹

¹⁰⁵ *The Fund for Animals, Inc. v. Thomas*, No. 94 Civ. 672-NHJ (D.D.C. March 28, 1994) (SS).

¹⁰⁶ *Stipulation, The Fund for Animals, Inc. v. Thomas*, No. 94 Civ. 672-NHJ (D.D.C. Apr. 1, 1994) (SS). Subsequently, the USFS also agreed to pursue ESA consultation with the FWS prior to formulation of any national policy.

¹⁰⁷ *Defendants' Memorandum in Opposition to Intervenor-Defendant Applicants' Motion to Set Aside Stipulation at 20, The Fund for Animals, Inc. v. Thomas*, No. 94 Civ. 672 (D.D.C. Mar. 28, 1994).

¹⁰⁸ *Order, The Fund for Animals, Inc. v. Thomas*, Civ. No. 94-672 (D.D.C. April 14, 1994).

¹⁰⁹ 59 Fed. Reg. 17,758 (April 14, 1994).

The substance and merit of the proposed national policy will be discussed in detail in Parts III and IV of this article.

III. THE SCOPE OF THE FOREST SERVICE'S AUTHORITY OVER NATIONAL FORESTS

As is evident, the Forest Service is finding it enormously difficult to adopt a coherent, well-founded national policy on bear baiting in the national forests. The source of this difficulty is not the ordinary one, i.e., a divergence of views within the agency on the utility of federal regulation. To the contrary, virtually all Forest Service officials who have publicly voiced a position on the subject have denounced the practice of bear baiting and suggested that it should not be permitted on national forests for a variety of reasons.¹¹⁰

Indeed, even in its proposed policy—under which the Service would continue to largely defer to state regulation—the USFS describes bear baiting as “particularly controversial” and directly suggests that the agency will attempt to minimize the practice on forest service lands by “work[ing] diligently through its ongoing cooperative efforts to encourage the States to evaluate their regulation of the practice of baiting bears.”¹¹¹ The national policy is, according to the Service, only being proposed “in the meantime”—i.e., until the Forest Service can convince the relatively few states which still allow the practice to terminate it.¹¹²

In other words, this is a situation in which the Forest Service has evidently already made a policy judgment that it would be in the best interests of the national forests—and the majority of users of the forests—to prohibit the practice of bear baiting. Nevertheless, rather than take that course of action, the agency has proposed, for the most part, to continue to defer to the minority of states that regard baiting as an environmentally and ethically acceptable practice. The explicit rationale for this deference is that “Federal land management statutes acknowledge the States’ traditional role in managing fish and wildlife” and that the Forest Service is, therefore, “generally reluctant to override State fish and wildlife regulation, except where federal interests, such as protection of forest land, resources, and users, require federal intervention.”¹¹³

In essence, therefore, the Forest Service has suggested two reasons for its “reluctance” to make the obvious policy choice to abolish, or at least substantially restrict, bear baiting: first, that, from a legal standpoint, the agency must meet a higher burden to justify regulating practices on national forests that impact on wildlife than it would have to meet to regulate other occupancy and use; and second, that the “fed-

¹¹⁰ See, e.g. Tixier letter, *supra* note 28; Hill letter, *supra* note 25.

¹¹¹ 59 Fed. Reg. 17,759 (April 14, 1994).

¹¹² *Id.*

¹¹³ *Id.*

eral interests" involved in restricting bear baiting are not adequate to satisfy that burden.

The authors will examine each of these interrelated rationales in turn. This section, will show that the Forest Service has broad legal authority under a host of federal laws to adopt whatever policy regarding bear baiting it believes is justified, and that it is under no constitutional or statutory obligation whatsoever to defer to state preferences. The next section will explain why a ban on bear baiting is the only national policy that is consistent with the agency's legal responsibilities to protect the national forests and their many users.

A. *The Forest Service's General "Police Powers" To Control the Occupancy and Use of National Forests*

It is well settled that the Property Clause of the United States Constitution gives the Congress of the United States plenary authority over the public lands.¹¹⁴ Thus, the federal government cannot be constrained by state law in its ability to exercise control over the public lands. As the Supreme Court has explained:

True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to *control their use* and to prescribe in what manner others may acquire rights in them And so we are of the opinion that the inclusion within a State of lands of the United States does not take from Congress *the power to control their occupancy and use, to protect them from trespass and injury* and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.¹¹⁵

These principles apply equally to federal control over wildlife on federal lands. From a constitutional standpoint, there is nothing unique about a state's traditional role in regulating hunting or fishing which somehow limits Congress's otherwise plenary authority over the federal lands. In particular, it is well-settled that Congress can protect wildlife resources regardless of whether such protection would conflict with state policy.¹¹⁶

¹¹⁴ See *United States v. San Francisco*, 310 U.S. 16, 29 (1940) ("[T]he power of the public land thus entrusted to Congress is without limitations"); *McKelvey v. United States*, 260 U.S. 353, 359 (1922) (it is "firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others.").

¹¹⁵ *Utah Power & Light v. United States*, 243 U.S. 389 (1917) (emphasis added).

¹¹⁶ See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) ("where those state laws conflict with the Wild Free-Roaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear: the state laws must recede"); *Hunt v. United States*, 278 U.S. 96 (1928) (federal government can kill deer on National Forest and National Game Preserve land without conforming to state law); *New Mexico State Game Commission v. Udall*, 410 F.2d 1197 (10th Cir. 1969) (National Park Service may kill deer on park land without complying with state law); see also *COGGINS ET*

B. Congress Has Delegated Its Broad Police Power Over Wildlife Resources to the Secretary of Agriculture and the Forest Service

In 1897, Congress delegated its authority over the general management of national forests to the Secretary of Agriculture.¹¹⁷ The scope of this authority is not limited to rules that “preserve the forests from destruction,” but extends to general administration of the land, natural resources, and people within the boundaries of the national forests.¹¹⁸ Courts have also explicitly held that the USFS is authorized to take moral and ethical considerations into account when adopting regulations regarding the use of federal forest lands.¹¹⁹

Consistent with its broad statutory mandate, the USFS has adopted regulations which broadly control conduct, occupancy or use, and sanitation in the national forests.¹²⁰ The rules regarding disorderly conduct prohibit fighting, fighting words,¹²¹ incitement, and unreasonably loud noise.¹²² It is also generally illegal to “[c]onstruct[], plac[e], or maintain[] any kind of road, trail, structure, fence, . . . or other improvement,”¹²³ “[p]ossess[] or leav[e] refuse, debris, or litter

AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 194 (3rd ed. 1993) (“If the federal government can destroy wild animals on federal land without complying with state game laws . . . is there any reason to think it cannot protect wild animals on those lands without regard for state law?”)

¹¹⁷ See 16 U.S.C. § 551 (1964); see also *Cal. Coastal Comm’n v. Granite Rock*, 480 U.S. 572, 582 (1987) (“Congress has delegated to the Secretary of Agriculture the authority to make ‘rules and regulations’ to ‘regulate [the] occupancy and use’ of National Forests.”); *Mountain States Telephone & Tel. Co. v. U.S.*, 499 F.2d 611, 614 (Ct. Cl. 1974) (“The statute reveals a clear intent of Congress to commit regulation of the national forests to the discretion of the Secretary.”).

¹¹⁸ *U.S. v. Hymans*, 463 F.2d 615, 617 (1972). In *Hymans*, the court rejected the argument “that though the Secretary of Agriculture may make rules and regulations which relate to ‘occupancy and use’ of National Forests, the underlying purpose of all such rules and regulations must still be to ‘preserve the forests from destruction . . .’” *Id.* at 617. The Court found this argument to be “at odds with the ‘consistent administrative interpretation’ of 16 U.S.C.A. § 551.” *Id.*, quoting *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965) (upholding prohibition on motorized vehicles within posted portion of national forest); see also *Northwest Motorcycle Ass’n v. USDA*, 18 F.3d 1468, 1477 (9th Cir. 1994) (upholding USFS’ restriction on off-road vehicle use because various individuals stated that they found these vehicles to “conflict” with their use and enjoyment of a national forest); *Sabin v. Butz*, 515 F.2d 1061, 1066 (10th Cir. 1975) (within authority of USFS to require permits for ski instructors on national forests); *United States v. Reeves*, 39 F. Supp. 580 (W.D. Ark. 1941) (upholding regulation requiring dogs to be leashed).

¹¹⁹ *Hyams*, 463 F.2d at 617 (upholding Forest Service regulations prohibiting nude swimming).

¹²⁰ 36 C.F.R. Part 261.

¹²¹ Specifically, the regulations make it unlawful to “[a]ddress[] any offensive, derisive or annoying communication to any other person who is lawfully present when such communication has a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” 36 C.F.R. § 261.4(b).

¹²² *Id.* § 261.4.

¹²³ *Id.* § 261.10(a).

in an exposed or unsanitary condition,"¹²⁴ "[d]ump[] any refuse, debris, trash or litter,"¹²⁵ "[b]ring . . . in or possess . . . an animal, other than a seeing eye dog, unless it is crated, caged, or upon a leash,"¹²⁶ "[o]perat[e] or park[] a motor vehicle or trailer except in places developed or designated for this purpose,"¹²⁷ and "conduct[] any kind of [unauthorized] work activity or service."¹²⁸

Even further, the Forest Service has construed its statutory mandate as authorizing it to prohibit by special order the following activities in any particular national forest: camping, swimming, discharging a firearm, air rifle or gas gun, and "possessing, storing, or transporting any bird, fish, or other animal or parts thereof, as specified in the order."¹²⁹ Whole areas of the national forests may be closed entirely to public entry "for the protection of: (a) [t]hreatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish[;] (b) [s]pecial biological communities[;] (c) [o]bjects or areas of historical, archeological, geological, or paleontological interest[;] (d) [s]cientific experiments or investigations[;] (e) [p]ublic health or safety[;] (f) [p]roperty."¹³⁰

In short, the Secretary of Agriculture and Forest Service have been delegated by Congress sweeping authority to regulate use of the national forests.¹³¹ There is no doubt that this authority extends to the regulation of all activities affecting wildlife, and particularly controversial "hunting" activities such as bear baiting.¹³² As noted above, the Forest Service itself has emphasized that it is under absolutely no legal obligation, when adopting regulations bearing on the protection of wildlife or other resources in the national forests, to defer to the desires of the state in which the national forest is located.¹³³

¹²⁴ *Id.* § 261.11(b).

¹²⁵ *Id.* § 261.11(e).

¹²⁶ 36 C.F.R. § 261.14(j).

¹²⁷ *Id.* § 261.14(m).

¹²⁸ *Id.* § 261.10(c).

¹²⁹ *Id.* § 261.58; 261.58(s).

¹³⁰ *Id.* § 261.53.

¹³¹ *See, e.g., Oregon Natural Resources Council v. Lowe*, 836 F. Supp. 727, 733 (D. Or. 1993) ("[T]he courts have held that the Forest Service 'has wide discretion to weigh and decide the proper uses within any area of the national forests.'"), *quoting* *Big Hole Ranchers Ass'n v. United States Forest Service*, 686 F. Supp. 256, 264 (D. Mont. 1988).

¹³² *See, e.g., Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1099 (10th Cir. 1985) ("[F]ederal agencies may choose to incorporate tribal or state laws for fishing, hunting, or the like, or they may preempt these laws by promulgating regulations designed to further federal land management policy."); *cf. United States v. Hells Canyon Guide Service, Inc.*, 660 F.2d 735, 737 (9th Cir. 1981) (noting that 16 U.S.C.A. § 551 "gives the Secretary the authority to regulate the use and occupancy of the national forests" and the "strong national policy regarding the conservation of this country's natural resources dictates that we must view this legislation from a broad rather than a narrow perspective.").

¹³³ *See* Defendants' Memorandum in Opposition to Intervenor-Defendant Applicants' Motion to Set Aside Stipulation, at 9 n. 2, *The Fund For Animals, Inc. v. Thomas*, No. 94 Civ. 672-NHJ (D.D.C. Apr. 11, 1994) ("[M]oreover, the Forest Service regulations make clear that no individual is entitled to use of the national forests for recreational pur-

Moreover, the Forest Service's recognition that it has authority to regulate activities affecting wildlife on national forests is not a new development. Rather, "from its inception," the agency has "regarded wildlife as one of the major forest resources to be managed and protected like timber or watershed resources."¹³⁴ The Multiple Use Sustained Yield Act of 1960 ("MUSY")¹³⁵ expressly codified the Forest Service's authority and obligation to give "due consideration" to fish and wildlife resources in the course of making decisions allowing the extraction of resources from the national forests.¹³⁶ In comments supporting that legislation, the Forest Service emphasized that it

does not believe there is any question as to its authority to so manage the national forests The authority to administer recreation and wildlife habitat resources of the national forests has been recognized in numerous appropriations acts and comes from the authority contained in the act of June 4, 1897, to regulate the 'occupancy and use' of the national forests.¹³⁷

It is true that, traditionally, federal land management agencies, including the Forest Service, have allowed states to establish hunting seasons and bag limits affecting the taking of wildlife on federal lands. Yet that traditional deference in no way undermines the Forest Service's authority and ability to impose additional or even squarely conflicting regulations when it sees fit do to so.¹³⁸ In brief, there is nothing in the agency's organic statute, the MUSY, or any other law which suggests that the Forest Service may not or should not make independent decisions regulating activities affecting wildlife, where it determines that state regulations are not fulfilling Congress's overarching objectives for the national forests.¹³⁹

poses such as: hunting, swimming, hiking, camping, boating etc. The Forest Service regulations promulgated at 36 C.F.R. 261.50 and 261.58 make clear that the Forest Supervisor has the discretion to restrict, and even *prohibit* [bear baiting].") (emphasis in original).

¹³⁴ COGGINS, *supra* note 116, at 859-60.

¹³⁵ 16 U.S.C.A. §§ 528 (West 1985).

¹³⁶ *Id.* § 529.

¹³⁷ H.R. REP.No. 1551, 86th Cong., 2nd Sess. (1960), *reprinted in* 1960 U.S.C.A.C.A.N. 2377, 2381-82.

¹³⁸ *See, e.g.,* United States v. Weiss, 642 F.2d 296, 298-99 (9th Cir. 1981) (past acquiescence to state regulation does not bind federal agencies).

¹³⁹ Congress did provide, in enacting the MUSY, that "[n]othing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests." 16 U.S.C. § 528 (emphasis added). According to its plain terms, that provision merely reinforces the preexisting division of authority between the federal and state governments, under which "the State is free to enforce its criminal and civil laws on federal lands so long as those laws do not conflict with federal law." Cal. Coastal Comm'n v. Granite Rock, 480 U.S. 572, 580 (1987); *see also* West Virginia Division of the Izaak Walton L. of Am. v. Butz, 522 F.2d 945, 953 (4th Cir. 1975) ("Multiple-Use Act specifically recognizes the continued viability of the Organic Act.").

C. Other Federal Environmental Statutes Confer Additional Authority on the Forest Service to Abolish or Regulate Hunting Practices Which Harm the National Forests

Other federal environmental laws afford the Forest Service additional authority and responsibility to ameliorate the environmental degradation and risks associated with bear baiting on national forests. The National Forest Management Act, the National Environmental Policy Act, and the Endangered Species Act are the other important statutes governing the USFS's powers and responsibilities in this area.

1. National Forest Management Act

In enacting the National Forest Management Act, "Congress declare[d] that the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system dedicated to the long-term benefit for present and future generations."¹⁴⁰ The NFMA requires the USFS to manage the national forests on an "environmentally-sound basis,"¹⁴¹ and it specifically "addresses *wild-life* management . . . on several levels."¹⁴² In particular, NFMA directs the Forest Service to "provide for diversity of plant and animal communities . . ."¹⁴³ The USFS's implementing regulations further spell out that "[f]ish and wildlife resources shall be managed to maintain viable populations of existing native . . . vertebrate species,"¹⁴⁴ an obligation which obviously extends to the various species which may be affected by bear baiting.

2. National Environmental Policy Act

NEPA is the "basic national charter for protection of the environment."¹⁴⁵ Its purpose is "to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."¹⁴⁶ In essence, the statute requires that federal agencies take a "hard look" at the environmental consequences of their actions, as well as reasonable alternatives to them.¹⁴⁷

To accomplish its purpose, NEPA requires that all agencies of the federal government must prepare a "detailed statement" regarding all

¹⁴⁰ 16 U.S.C.A. § 1609(a) (West 1985).

¹⁴¹ 43 U.S.C.A. § 1607 (West 1985).

¹⁴² *Sierra Club v. Espy*, 822 F. Supp. 356, 363 (E.D. Tex. 1993) (emphasis in original).

¹⁴³ 43 U.S.C.A. § 1604(g) (3) (B) (West Supp. 1995); see also *Espy*, 822 F. Supp. at 365 (in enacting NFMA, Congress intended the "national forests to be managed on a better balanced, ecologically sound basis").

¹⁴⁴ 36 C.F.R. § 219.19.

¹⁴⁵ 40 C.F.R. § 1500.1(a).

¹⁴⁶ *Id.* § 1500.1(c).

¹⁴⁷ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976); accord *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

“major federal actions significantly affecting the quality of the human environment.”¹⁴⁸ This statement—known as an Environmental Impact Statement (“EIS”)—must describe (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented,” (3) any “alternatives to the proposed action,” and (4) any “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.”¹⁴⁹ As the Supreme Court has emphasized, the fundamental objective of the EIS requirement is to ensure that an “agency will not act on incomplete information only to regret its decision after it is too late to correct.”¹⁵⁰

As noted above, CEQ has promulgated regulations implementing NEPA, which have been adopted by the USFS.¹⁵¹ These regulations provide for the preparation of environmental assessments (“EAs”), which agencies use to determine whether a particular action may have a significant impact on the quality of the human environment and thus require preparation of an EIS.¹⁵² The CEQ regulations also set forth general factors that agencies must consider in determining whether to prepare an EIS, including “the degree to which the effects on the quality of the human environment are likely to be highly controversial,”¹⁵³ the “degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,”¹⁵⁴ and the “degree to which the action may adversely affect an endangered or threatened species.”¹⁵⁵

Of particular pertinence to the Forest Service’s adoption of a national bear baiting policy, agencies must prepare “programmatic” EIS’s in appropriate circumstances.

A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying a programmatic EIS is that a systematic program is likely to generate disparate yet related impacts Whereas the programmatic EIS looks ahead

¹⁴⁸ 42 U.S.C.A. § 4332(C) (West 1994).

¹⁴⁹ *Id.*

¹⁵⁰ *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1858 (1990) (citation omitted).

¹⁵¹ 40 C.F.R. §§ 1500-1517; 57 Fed. Reg. 43,188 (Sep. 18, 1992).

¹⁵² 40 § 1501.4.

¹⁵³ *Id.* § 1508.27(b) (4).

¹⁵⁴ *Id.* § 1508.27(b) (5).

¹⁵⁵ *Id.* § 1508.27(b) (9). Under the CEQ regulations, either an EA or an EIS must be prepared for each proposed federal action, unless the action is subject to a “categorical exclusion,” which “means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted” by the Federal agency. *Id.* § 1508.4. However, agencies may not rely on a “categorical exclusion” as a basis for avoiding preparation of an EA or EIS if there are “extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” *Id.*

and assimilates 'broad issues' relevant [to the program], the site-specific EIS addresses more particularized considerations.¹⁵⁶

In brief, a "programmatic EIS should be prepared if it can be forward-looking and if its absence will obstruct environmental review."¹⁵⁷

3. *Endangered Species Act*

The ESA was enacted as a result of Congressional findings that "species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," and that "other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction."¹⁵⁸ The overriding purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species."¹⁵⁹

Under the ESA and its implementing regulations, it is illegal for anyone to "take" an endangered or threatened animal.¹⁶⁰ Furthermore, section 7(a)(1) of the ESA commands each federal agency to "utilize [its] authorities in furtherance of the purposes" of the ESA,¹⁶¹ and under section 7(a)(2), "[e]ach federal agency [must], in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species"¹⁶² In short, as the Supreme Court has ruled, in section 7 of the Act, Congress imposed special duties on all federal agencies, directing them to "afford[] endangered species the highest of priorities" and to adopt a policy of "institutionalized caution" with regard to the preservation of such species.¹⁶³

Also of particular pertinence to the bear baiting controversy, the ESA requires the FWS to "develop and implement plans . . . for the conservation and survival of endangered species and threatened spe-

¹⁵⁶ *National Wildlife Federation v. Appalachian Regional Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981).

¹⁵⁷ *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 159 (D.C. Cir. 1985). Moreover, "under CEQ regulations, a programmatic EIS *should* be prepared if actions are 'connected,' 'cumulative,' or sufficiently 'similar' that a programmatic EIS is 'the best way' to identify the environmental effects." (*quoting* 40 C.F.R. § 1508.25) *Id.* (emphasis in original).

¹⁵⁸ 16 U.S.C.A. § 1531(a) (West 1985).

¹⁵⁹ *Id.* § 1531(b).

¹⁶⁰ 16 U.S.C.A. § 1538(a)(1)(B) (West 1985), 50 C.F.R. §§ 17.21, 17.31. The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, or capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C.A. § 1532(19) (1973).

¹⁶¹ *Id.* § 1536(a) (1).

¹⁶² *Id.* § 1536(a) (2).

¹⁶³ *TVA v. Hill*, 437 U.S. 153, 194 (1978) (*citing* H.R. REP. NO. 412, 93rd Cong., 1st Sess. 4-5 (1973)).

cies.”¹⁶⁴ Such “recovery plans” must incorporate “a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species.”¹⁶⁵ As noted above, the Grizzly Bear Recovery Plan identifies the curtailment of black bear baiting in grizzly habitat as one of the necessary actions to ensure the survival and recovery of grizzly bears.¹⁶⁶

IV. THE FOREST SERVICE’S PROPOSED NATIONAL POLICY REPRESENTS AN UNWARRANTED ABDICATION OF FEDERAL RESPONSIBILITY TO PROHIBIT OR REGULATE A DESTRUCTIVE HUNTING PRACTICE ON NATIONAL FOREST LANDS

A. *Since It Undoubtedly Has Legal Authority to Prohibit or Strictly Regulate Bear Baiting, the Forest Service Has Offered No Coherent Policy Reason For Not Doing So*

The USFS unquestionably has the legal authority, from several statutory sources, to prohibit or at least strictly regulate bear baiting and other such controversial or destructive hunting practices. Yet the agency continues to resist doing so, apparently on the rationale that the “federal interests” in restricting or eliminating the practice are not adequate to “overrid[e] State fish and wildlife regulation.”¹⁶⁷ As noted previously, however, Forest Service officials themselves have pinpointed a host of substantial “federal interests” that are implicated by bear baiting. In his 1990 memorandum to the Chairman of the Idaho Fish and Game Commission, the Regional Forester of the Intermountain Region summarized many of these federal interests as follows:

- (1) that the “use of salt as an attractant to draw elk and other game animals is illegal for ethical reasons” and the “Forest Service believes these same standards should apply to all game species, including the black bear;”
- (2) “[b]ear baits have the potential to attract other wildlife species which could result in undesirable conflicts and jeopardy to these animals;”
- (3) bear baiting has the potential to interfere with many other recreational activities by other users of national forests, such as backpacking, mountain biking, and photography;
- (4) the use of dead animals, animal parts, and permanent structures “affect visual quality, public safety, and water quality” and constitute “littering” within the meaning of the Forest Service’s regulations; and
- (5) “[i]t is difficult to assure compliance with land management standards and State regulations for bear baiting without the

¹⁶⁴ 16 U.S.C.A. Sec. 1533(f) (1) (West 1985).

¹⁶⁵ *Id.* § 1533(f) (1) (B) (i); *See also* Sierra Club v. Interior Department, 36 ERC 1533, 1542 (W.D. Tex. 1993) (recovery plans “are supposed to spell out what is biologically required to prevent extinction and permit recovery of endangered species”).

¹⁶⁶ *See* text accompanying notes 31-44, *supra*.

¹⁶⁷ 59 Fed. Reg. 17,759 (Apr. 14, 1994).

use of a permit system that traces individual activities to a specific location."¹⁶⁸

Since that letter was written, the Forest Service has also explicitly recognized—because it was constrained to engage in NEPA analysis and section 7 consultation under the ESA—that baiting has the potential to harm grizzly bears and other endangered and threatened species, and also, that baiting likely contributed to the “over-harvesting” of black bears in Wyoming—thus undermining the agency’s duty to “maintain viable populations of existing native . . . vertebrate species.”¹⁶⁹

In view of these significant, if not overriding, federal interests in terminating bear baiting, the unavoidable conclusion is that the Forest Service has not taken that obvious step only because the practice involves hunting. In other words, if a non-hunting use of the national forests undermined as many significant “federal interests,” there can be little doubt that the Forest Service would not be continuing to defer to those few states that, for whatever reason, prefer the practice to proceed.

Indeed, the Forest Service’s double standard is most apparent from the fact that the practice of bear baiting is flatly contrary to other regulations that the agency has issued in recognition of its statutory mandate to protect the resources and uses of the national forests. Thus, as noted above, bait stations violate several Forest Service regulations that are designed to prevent littering and the improper disposal of refuse and noxious materials.¹⁷⁰ In addition, baiters often violate

¹⁶⁸ See Tixier letter, *supra* note 28.

¹⁶⁹ 36 C.F.R. § 219.19.

¹⁷⁰ See 57 Fed. Reg. 57,417 (Dec. 4, 1992). In response to a citizen’s inquiry, one district ranger explained: “Rules and Regulations pertaining to bear bait activities are found in the Code of Federal Regulations (36 C.F.R.). The specific regulations are found under *Occupancy and Use* 36 C.F.R. 261.10(e): Abandoning any personal property; 36C.F.R. 261.10(j): Use or occupancy of National Forest System land or facilities without special-use authorization; and under *Sanitation* 36 C.F.R. 261.11(b): Possessing or leaving refuse, debris or litter in an exposed condition. . . . In summary, it is illegal to place on National Forest lands personal property or garbage, litter or debris . . . the Forest Service can authorize bear hunters to leave refuse, debris or garbage in an exposed condition subject to the terms of a signed permit . . . Bear Bait Permits were issued this year (1991) for the spring bear season. Of the permits issued, 68% were in non-compliance with the permit terms. Due to the District’s summer/fall work load and the non-compliance demonstrated during the spring bear season, I decided not to issue bear bait permits for the fall 1991 season. I will not issue permits that we can not properly administer.” Letter from Larry J. Klock, District Ranger, Lander District, Shoshone National Forest to Randy Jacobs (Sep. 17, 1991) [*hereinafter* Klock Letter] (on file with *Animal Law*); Another ranger reported on items found at a bait station, including loose camouflage netting, milk crate, hamburger package, note stating “Blubonic [sic] plague area. Get medical testing immediately. Signed Smokey,” and a cardboard box with newspaper used to haul bait. Preliminary Report, Jodi Becker, Ranger, Crater Lake National Forest (Aug. 29, 1991) (on file with *Animal Law*) [*hereinafter* Becker Report]; another ranger adds to the list of unsavory bait station items: a dead horse, 50 gallon drum, and garbage. Letter from Robert Reese, District Ranger, Pinedale District to Bill Noblitt (Aug. 17, 1993) (on file with *Animal Law*).

regulations that prohibit unsanctioned construction activities and destruction of vegetation on national forest lands by building tree stands and hunting blinds, and by clearing vegetation to improve sight lines.¹⁷¹

Obviously, enforcement of these regulations against bear baiting activities would protect other, less intrusive users of the national forests.¹⁷² In fact, USFS officers have long recognized how repulsive bait stations can be to other users of the national forests, including other hunters.¹⁷³

Hence, as Forest Service personnel have recognized, the agency must, in effect, "waive[]" its own regulations¹⁷⁴—and ignore the other national forest users they are designed to protect—in order to allow as destructive and noxious an activity as bear baiting to take place. Once again, it is difficult to imagine the agency adopting such a stance—i.e., agreeing to a wholesale departure from duly-promulgated regulations—for a practice that did not in some fashion involving a "hunting" activity.¹⁷⁵

¹⁷¹ 36 C.F.R. § 261.10j(n); see, e.g., letter from Susan M. Zike, Regional FOIA Coordinator, Pacific Northwest Region, USFS, to Aarom Medlock (Apr. 12, 1994) ("tree-stand constructed near bait and enclosed with camo netting" on Winema National Forest); Becker Report, *supra* note 170 (hunting blinds and camouflage netting near bait station); Tixier letter *supra* note 28, ("Permanent Structures such as elevated platforms, perches in trees, and barrels for holding bait have been established near bear baiting activities."); see also *City and County of Denver v. Bergland*, 695 F.2d 465, 476 (10th Cir. 1982) (upholding authority of USFS to issue stop orders when unauthorized construction occurs on NF lands on the grounds that 16 U.S.C. § 551 "confers upon the Forest Service the duty to protect the forests from injury and trespass, and the power to condition their use and prohibit unauthorized uses").

¹⁷² See, e.g., *Northwest Motorcycle Association v. USDA*, 18 F.3d 1468 (9th Cir. 1994) (generally finding that USFS decision to close area to off-road vehicle use was not arbitrary and capricious where there were finding that ORV presence created user conflict by hindering non-motorized trail users' enjoyment of the area).

¹⁷³ See, e.g., letter from Ronald Dickemore, District ranger, Palisades District, Targhee National Forest to Forest Supervisor (Aug. 12, 1991) (on file with *Animal Law*) ("It is estimated that we get approximately a dozen or more complaints [about bear baiting] each year.") Hill letter, *supra*, note 28. "We anticipate there will be an increased number of complaints from these hunters regarding the bait due to the unpleasant nature of the bait itself (odor, visual, aesthetics)."; letter from R.E. Greffenius, Forest Supervisor, Grand Mesa, Uncompaghre and Gunnison National Forests, USFS, to R. Bruce Gill (Aug. 8, 1989) (on file with *Animal Law*) ("The existence of bait on the Forest is also repugnant to other users of the Forest (campers, fishermen, hikers, etc.) at any time of the year.").

¹⁷⁴ Klock letter, *supra* note 170, at 2.

¹⁷⁵ See *supra* notes 1, 113. Under the Forest Service's proposed policy, the agency would "explicitly prohibit the issuance of a special use authorization to individuals for the specific act of placing bait on National Forest System lands for hunting purposes," although the agency is not proposing to amend its sanitation, and occupancy and use regulations in order to accomplish that result. 59 Fed. Reg. 11,767 (Mar. 14, 1994). This course of action, if followed, would appear to transgress the agency's own regulatory scheme. As described previously, under the agency's detailed prohibitions on littering and other activities—set forth at 36 C.F.R. §§ 261.10, 261.11—many actions associated with baiting are prohibited unless a special-use authorization is issued pursuant to 36 C.F.R. § 261.1a. These provisions supplement the agency's general special use regula-

Rather than continue to apply such a double standard—which has no basis in federal law and simply stems from an antiquated notion of federal deference to state preferences on all hunting activities—the Forest Service should instead apply the same policy considerations to admittedly “controversial” hunting practices such as bear baiting as it would to any other use of national forest lands. Simply stated, if Forest Service officials conclude that the practice is destructive of forest resources and lessens the enjoyment of other forest users (as they apparently already have), they must reach the same policy result that they would for any other, non-hunting practice—i.e., they should ban the practice rather than attempt to cajole the few states which allow it to change state policies.

Moreover, while the Forest Service has already recognized sufficient “federal interests” to ban bear baiting independent of the ethics of the practice, the agency has never articulated a coherent reason why ethical considerations can and should play no role along with other factors in the agency’s determination of an appropriate national policy regarding the practice of bear baiting. Rather, the agency has simply asserted—with no legal or policy explanation—that “it is not the role of the Forest Service to resolve moral or ethical questions.”¹⁷⁶

In one sense, of course, the ethical question cannot be divorced from the issue of whether prohibiting baiting is essential to promote the interests of the majority of “users” of national forests. Where, as here, many members of the public believe that a particular use of the national forests conflicts with their own use and enjoyment of the forests, the Forest Service plainly has a compelling basis for abolishing the offending use, irrespective of whether “ethical” considerations form some of the basis for the objection.¹⁷⁷

tions. 36 C.F.R § 251 Subpart B - Special Uses. The “Special Use” regulations designate “[a]ll uses of National Forest System land, improvements, and resources, . . . [as] ‘special uses’ [which] must be approved by an authorized officer.” *Id.* Certain non-commercial activities, including “camping, picnicking, hiking, fishing, *hunting*, horse riding, boating, or similar recreational activity,” are exempted from special use authorization requirements. *Id.* (emphasis added). The list of exempted items does not include “baiting,” nor does it include the various activities associated with baiting, *e.g.*, littering and building bait structures.

However, under the USFS’s proposed interpretation of its regulations, the far more detailed and specific prohibitions set forth in 36 C.F.R Part 261 would be nullified by the general exemptions found in 36 C.F.R § 251.50(c), which do not even expressly refer to bear baiting. Thus, according to the agency’s proposal, “[s]ince hunting *methods* subject to State regulation are included within the term ‘hunting,’” none of the activities related to bear baiting would even need a special use permit, even if those activities would otherwise—*i.e.*, if engaged in for any other purpose—be subject to specific agency prohibitions on littering, polluting streams, building structures and the like. 59 Fed. Reg. 11,767 (Mar. 14, 1994) (emphasis added).

¹⁷⁶ Environmental Assessment, *supra* note 5, at 13.

¹⁷⁷ *Cf.* Northwest Motorcycle Ass’n v. USDA, 18 F.3d 1468, 1477 (9th Cir. 1994) (upholding Forest Service’s restriction on off-road vehicle use because various individuals stated that they found these vehicles to “conflict” with their use and enjoyment of a national forest).

As noted above, in other contexts, the Forest Service has broadly asserted its right to restrict the "use and occupancy" of federal lands, including restrictions for reasons that were deemed to be contrary to generally accepted ethical standards.¹⁷⁸ Here, bear baiters are "occupying" national forests—among other activities, by building structures and littering the forests with animal carcasses and other debris—in order to engage in a practice that is considered both environmentally destructive and morally reprehensible by the vast majority of users of national forests. Indeed, as emphasized above, numerous surveys have been performed in various states in recent years and virtually all have found that the overwhelming majority of the public—including people who otherwise support hunting—consider baiting to be an ethically irresponsible practice that should be eliminated.¹⁷⁹

Under these circumstances, the public's perception of the ethics of a particular practice occurring on federal lands is at least a relevant factor in the decisionmaking calculus. Simply stated, the Forest Service need not and should not allow a practice that most users of the national forests and its own officials have denounced as ecologically unsound and ethically abhorrent, merely because a minority of state officials are out of step with the generally held ethical perception of the practice. To use a related hypothetical, if a particular state sanctioned the torturing of animals on national forest lands, the Forest Service would certainly not take the position that it must defer to the state. Thus, it is impossible to comprehend why the agency should not even consider, in adopting a national policy, the ethics of a "hunting" practice in which there is no element of fair chase involved but, rather, in which animals are purposefully habituated before being shot from point-blank range.

In fact, if the agency were to take such ethical considerations into account in adopting a national policy on bear baiting, it would be completely consistent with many other federal legislative and administrative actions. For example, in passing the Wild Free-Roaming Horses and Burros Act,¹⁸⁰ "Congress determined to preserve and protect the wild free-roaming horses and burros on the public lands of the United States," because:

[These animals] have been cruelly captured and slain . . . They have been used for target practice and harassed for 'sport' and profit. In spite of public

¹⁷⁸ See, e.g., *United States v. Hyams*, 463 F.2d 615 (10th Cir. 1972) (upholding the Forest Service's right to prohibit nude bathing, based on a regulation making it unlawful for members of the public to "indulg[e] in boisterous, abusive, threatening, or *indecent* conduct"; the court reasoned that the Forest Service may broadly regulate the "occupancy and use" of National Forests for reasons which have nothing to do with "destruction" of forest resources) (emphasis added).

¹⁷⁹ See *supra* note 11, *infra* notes 185-86.

¹⁸⁰ 16 U.S.C.A. § 1331-1340 (West 1985).

outrage, this bloody traffic continues unabated, and it is the firm belief of the committee that this senseless slaughter must be brought to an end.¹⁸¹

Hence, Congress expressly directed the USFS and the Bureau of Land Management to "protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands."¹⁸²

An even closer analogy involves Congress's enactment of the Federal Airborne Hunting Act, which prohibits anyone, "while airborne in an aircraft [from] shoot[ing] or attempt[ing] to shoot for the purpose of capturing or killing any bird, fish, or other animal," or "us[ing] an aircraft to harass any bird, fish, or other animal."¹⁸³ In August 1994, the FWS enforced that statute by issuing a final rule which will "prohibit[] hunters from shooting wolves and wolverines in national wildlife refuges in Alaska on the same day in which the person is airborne."¹⁸⁴ According to the FWS, the rule is necessary because "[a]ircraft provide a means by which animals can be efficiently detected and quickly killed in relatively large numbers, if not adequately regulated."¹⁸⁵ The FWS stressed its "commit[ment] to administering hunting and trapping on Alaska refuges in a way that does not unnecessarily interfere with the State of Alaska's ability to manage resident wildlife," but it explained that its rule was necessary because of its obligations under federal laws and because the practice of airborne hunting of wolves "violates accepted standards and Service policy for ethical hunting and trapping on refuges."¹⁸⁶ There is no discernible reason why the Forest Service should not rely on essentially identical considerations in adopting a national policy on bear baiting.¹⁸⁷

¹⁸¹ *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (quoting S. REP. NO. 242, 92d Cong., 1st Sess. (1971)).

¹⁸² 16 U.S.C.A. § 1333(a) (West 1985).

¹⁸³ 16 U.S.C.A. § 742j-1(a) (West 1985 & Supp. 1995).

¹⁸⁴ 59 Fed. Reg. 39,408 (Aug. 2, 1994). The regulation tracks a repealed state regulation that "ha[d] been accepted by most hunters." 58 Fed. Reg. 68,012-13 (Dec. 22, 1993).

¹⁸⁵ *Id.* at 68,012.

¹⁸⁶ The FWS has long maintained a policy that hunting and trapping on national wildlife refuges should incorporate elements of fair chase and ethical conduct. Thus, the "Service Refuge Manual (8 RM 5.5) states that refuge hunting programs should be administered to 'promote positive hunting values and hunter ethics such as fair chase and sportsmanship.'" 58 Fed. Reg. 68,012 (Dec. 22, 1993).

¹⁸⁷ In adopting its restrictions on airborne hunting of wolves, the FWS further stated that, "[t]o disregard or fail to consider and respond to ethical considerations of fair chase and other perceptions and views shared by the majority of the general public may ultimately jeopardize the future of hunting and trapping opportunities on national wildlife refuges." 59 Fed. Reg. 39,410 (Aug. 3, 1994). The FWS also noted that a 1992 poll showed that 66% of Alaskans opposed "shoot[ing] wolves that are located with use of aircraft." *Id.* at 39,409. Hence, the FWS' approach stands in stark contrast to the Forest Service's refusal to take ethical considerations into account, even though it has conceded that most people who have registered opposition to bear baiting "mentioned ethical or moral reasons as at least part of their opposition to bear baiting." Environmental Assessment, *supra* note 5, at 11, 13.

Indeed, as the FWS has recognized, ethical and ecological concerns often dovetail. Many of the “hunting” techniques—such as airborne hunting of wolves and bear baiting—which raise the most serious ethical concerns are, not coincidentally, also the most ecologically devastating because they are so efficient at wiping out wildlife populations. In such circumstances, where it is plainly good conservation policy and ethically proper to ban or severely restrict a particular hunting activity, the USFS can no longer just pass the buck to state wildlife agencies.

B. The Forest Service’s Proposed Policy Is Internally Inconsistent

Even on its own terms, the Forest Service’s proposed policy makes no sense, from either a policy or legal vantage point. Thus, the agency has explained that, largely because of the controversy over baiting in Wyoming, it “decided that national direction was needed to end the conflict and controversy.”¹⁸⁸ The proposed policy, however, accomplishes none of these objectives—it neither establishes “national direction,” nor, most assuredly, will it “end the conflict and controversy” over baiting. It will have precisely the opposite effect. It will heighten Forest Service officials’ involvement in site-specific baiting controversies and force these officials to spend more time and resources explaining why they are treating baiting a particular way in a particular location.

To begin with, it is obvious that the proposed policy accomplishes the very antithesis of establishing a “national direction” on the controversial practice of bear baiting in national forests. The policy, as discussed above, merely leaves it up to individual foresters to decide, on a case by case basis, whether to prohibit or regulate bear baiting. Moreover, especially because the policy expressly informs Regional Foresters or Forest Supervisors that they need not make any “specific decision[s]” regarding bear baiting practices,¹⁸⁹ the regulation will result in an even more complex crazy quilt of regulatory practices and standards than previously existed.

Indeed, the proposed policy appears to invite haphazard and inconsistent regulation. After setting forth three “mandatory causes for prohibiting or restricting baiting”—which are described in only the most cursory of terms—the proposed policy provides that:

the authorized officer also *may* prohibit baiting, regardless of the adequacy of States regulations, based on consideration of the likely impact of baiting on such matters as water quality, public health and sanitation, the potential for litter, or the potential to threaten the viability of wildlife.¹⁹⁰

Of course, this statement suggests that authorized officers may choose not to prohibit baiting even where such considerations exist—

¹⁸⁸ 59 Fed. Reg. 17,759 (Apr. 14, 1994).

¹⁸⁹ *Id.* at 17,761.

¹⁹⁰ *Id.* at 17,760 (emphasis added).

which flatly violates the Forest Service's statutory mandate and implementing regulations. Beyond that concern, the "policy" would make chaotic and arbitrary regulation unavoidable. Obviously, some authorized officers who are opposed to bear baiting—some on ethical grounds—may opt to ban or restrict the practice. Under identical circumstances, meanwhile, other officials will not only allow the practice to continue but will be under no clearcut obligation to even make a "specific decision" on the matter. Thus, the policy largely forecloses formal public review or involvement which could assist in encouraging consistent regulatory practices.

It is simply impossible to comprehend how this approach can be characterized as providing "national direction" or as one that meaningfully solves the core problem which led the Service to embark on this exercise. Moreover, if the Service believes that it will be ending "controversy" by adopting this ill-conceived approach, it has not yet come to grips with either the growing intensity of the public's opposition to bear baiting or the way in which its decentralized policy will encourage controversy and conflict over the practice.

Indeed, by expressly inviting inconsistent practices in different locations, the policy is likely to trigger far greater conflict and controversy than the Forest Service has previously encountered on this matter—particularly since the Forest Service has, for the first time, acknowledged the national scope and significance of the issue. The unavoidable result of raising this matter as a national policy issue and then insisting on doing nothing truly "national" about it is that individual forest officials will find themselves spending even more time and resources explaining why they have elected to deal with bear baiting in the manner that they have. For example, if, under similar environmental conditions, bear baiting is banned by one Regional Forester but not another, there will be a massive outcry on both sides of the fence, and each Forester will be called on to justify his or her decision-making process. Simply stated, if the Forest Service desires to wash its hands of this issue once and for all, it will not accomplish that result by adopting its proposed policy.

At an absolute minimum, even if the Forest Service declines to adopt a nationwide ban on bear baiting, it should at least consider a policy under which National Foresters and other authorized officials are required to make specific, affirmative decisions, following public notice and comment, regarding whether baiting should take place in particular national forests in light of the various factors set forth in the proposed policy, i.e., impacts on endangered and threatened species, viability of black bear populations, the public's use and enjoyment of the national forests, etc. As suggested above, there is no legitimate reason for the Forest Service to decline to at least require an affirmative decision on this issue from authorized officials.

At bottom, the agency's desire to avoid future compliance with federal laws such as NEPA and ESA—which plainly underlies the decision not to require "specific decisions" by Regional Foresters and

others—is not a legitimate reason for the agency to reject a system which would provide a minimal level of protection in the national forests from the adverse impacts associated with bear baiting. Neither can the agency's apparent desire to eliminate formal public involvement on this concededly controversial issue be reconciled with the public participation objectives of NEPA and the NFMA. The latter requires that the USFS give the "public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service Programs."¹⁹¹

V. CONCLUSION

As Forest Service officials have tacitly recognized, there is only one truly "national policy" regarding bear baiting which has the virtue of both providing a definitive "national direction" on this issue and also satisfying the other objectives that Service officials have articulated in the past: avoiding the expenditure of administrative costs in connection with the practice and ensuring that there are no conflicts with other uses of national forest lands. That "policy," of course, is to bring all national forest lands into line with the practices in the overwhelming majority of states by prohibiting the environmentally destructive and ethically unacceptable practice of bear baiting on all national forest lands. The Forest Service can, and should, no longer refuse to adopt that policy merely because a minority of hunters and a handful of states disagree with it.

ADDENDUM

After completion of this article, the USFS issued a final policy on the use of bait for hunting in National Forest lands. Although it received more than 1200 comments, most opposing bear baiting on National Forest lands, the agency has issued only an Environmental Assessment and a Finding of No Significant Impact and has refused to prepare a Programmatic Environmental Impact Statement. The agency also failed to engage in "formal consultation" as required by the Endangered Species Act, but instead obtained the written concurrence of the Fish and Wildlife Service that the final policy was not likely to adversely impact endangered and threatened species.¹⁹²

In issuing the final policy, the USFS continues to assert that anything characterized as a hunting practice is purely a matter for state control until it "become[s] a land or resource management issue."¹⁹³ Of particular note, the Forest Service has disclaimed any responsibility

¹⁹¹ 16 U.S.C.A. § 1612 (West 1985).

¹⁹² Letter from Jamie Rappaport Clark, Assistant Director for Ecological Services, USFWS to Robert D. Nelson, Director, Wildlife, Fish and Rare Plants, USFS (Mar. 14, 1995) (on file with *Animal Law*).

¹⁹³ 59 Fed. Reg. 11,767 (Mar. 14, 1995).

for the health of black bear populations.¹⁹⁴ Furthermore, the agency refused to even consider the concerns of members of the public and other forest users that view bear baiting as “disgusting’, ‘offensive’, ‘revolting’, ‘repulsive’, ‘inhumane’, unsporting’ and ‘unethical.’”¹⁹⁵

In substance, the final policy essentially tracks the proposed policy criticized in this article. It largely delegates to the States the authority to allow or disallow bear baiting and does not require USFS personnel to make affirmative decisions on whether baiting will impact recreational, wildlife, aesthetic or other interests in particular national forests.¹⁹⁶ The Forest Service does, for the first time, direct its personnel to “take action [to close areas to baiting] if State regulations do not protect Federal interests,” and to monitor baiting on national forests.¹⁹⁷ However, because the final policy “does not compel an authorized officer to undertake a specific decision to allow baiting,”¹⁹⁸ and does not provide any clear guidance as to when State regulations should be considered “[in]adequate to protect forest land, other resources or users in a particular location,”¹⁹⁹ it is unlikely that the final policy will provide a consistent national solution to the ecological and ethical problems posed by bear baiting in the national forests.

¹⁹⁴ U.S. Forest Service, Environmental Assessment, National Policy on Use of Bait in Hunting on National Forest System Lands, Appendix A Comment Summary 15 (undated) (“The status of the black bear population and the causes for its increase or decline is the responsibility of State agencies.”)

¹⁹⁵ 60 Fed. Reg. 14,721 (1995).

¹⁹⁶ *Id.* at 14,720-23.

¹⁹⁷ *Id.* at 14,721.

¹⁹⁸ *Id.* at 14,723.

¹⁹⁹ *Id.*

