



ROCKY MOUNTAIN WILD

Protecting wild lands for wildlife

January 26, 2021

By E-Mail and Certified Mail

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Dear Acting Secretary de la Vega, Acting Secretary Shea, Acting Regional Forester Angel, Deputy Regional Forester Buchanan, and Forest Supervisor Bacon:

On behalf of Western Watersheds Project and Rocky Mountain Wild, in accordance with the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), we are writing to provide you with notice that the United States Forest Service (“Forest Service” or “USFS”) is in violation of Section 7 of the ESA, 16 U.S.C. § 1536.

The Forest Service’s Final Record of Decision and associated Final Environmental Impact Statement for the Thunder Basin National Grassland 2020 Plan Amendment fails to

satisfy the agency's affirmative obligations under Section 7(a)(1) of ESA to use its authorities to carry out programs to conserve listed species. The Forest Service is likewise in violation of Section 7(c) of the ESA and implementing regulations at 50 C.F.R. § 402.12 because the Biological Assessment prepared for the 2020 Plan Amendment fails to satisfy the agency's obligations to thoroughly assess the Amendment's potential effects on black-footed ferrets, including impacts to potential reintroduction of the species to, and future recovery of the species on, the Thunder Basin National Grassland.

Pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g), this letter provides you with notice that, unless within 60 days of receipt of this letter the Forest Service withdraws the 2020 Plan Amendment Final Record of Decision and associated Final Environmental Impact Statement and Biological Assessment, and restores programs and protections that affirmatively conserve black-footed ferrets by promoting, facilitating, and emphasizing their reintroduction and recovery on the Thunder Basin National Grassland, Western Watersheds Project and Rocky Mountain Wild intend to challenge the Forest Service's ESA violations in federal district court.

I. THE PARTIES TO THIS LETTER

Western Watersheds Project and Rocky Mountain Wild have strong interests in the conservation of black-footed ferrets and associated species, including black-tailed prairie dogs, burrowing owls, mountain plovers, and swift fox, as well as a strong interest in the integrity of our nation's public lands.

Western Watersheds Project is a non-profit conservation organization founded in 1993 with the mission of protecting and restoring western watersheds and wildlife through education, public policy initiatives, and litigation. Headquartered in Hailey, Idaho, Western Watersheds Project has over 12,000 members and supporters and works in eleven states across the West, including Wyoming.

Rocky Mountain Wild is a non-profit conservation organization that protects, connects, and restores wildlife populations and wildlands in the Southern Rockies region. Public lands are fundamental for the protection of biodiversity in our region, and we actively engage in land planning processes, scientific research, public education, and advocacy to protect key habitats and wildlife movement corridors on Forest Service-managed lands. Rocky Mountain Wild has a long-standing interest in the habitat and species living in the Thunder Basin National Grassland, and our members use areas within the Grassland for recreation, wildlife-viewing, scientific exploration, and personal enjoyment. Rocky Mountain Wild has a history of working to protect prairie dog species and the federally endangered black-footed ferret.

II. LEGAL FRAMEWORK

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."¹ Congress enacted the ESA "to provide a program for the conservation of . . . endangered species and threatened species" and "to provide a means

¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”²

To receive the full protections of the Act, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA section 4.³ As the Supreme Court has held, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost . . . reflected not only in the stated policies of the Act, but in literally every section of the statute.”⁴ A thorough review of the statute’s sections by the Supreme Court showed a “conscious decision by Congress” to prioritize the conservation of listed species, even “over the ‘primary missions’ of federal agencies.”⁵

A. Section 7(a)(1) of the ESA

Section 7 of the ESA commands that all federal agencies “shall, in consultation with and with the assistance of” a federal wildlife agency⁶ “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered and threatened species”⁷ The ESA itself defines “conserve” in Section 2 to “mean to use and the use of *all methods and procedures which are necessary* to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.”⁸

While the ESA may not mandate specific activities pursuant to federal agencies’ Section 7(a)(1) obligations,⁹ agencies must take proper steps and prioritize conservation of ESA-listed species even above their primary missions.¹⁰ And while courts afford agencies some discretion in the fulfillment of Section 7(a)(1) duties,¹¹ insignificant measures that do not or are not reasonably likely to actually conserve and recover listed species do not satisfy Section 7(a)(1).¹²

² 16 U.S.C. § 1531(b); Pub. L. 97-304 (Oct. 13, 1982).

³ See 16 U.S.C. § 1533.

⁴ *Tenn. Valley Auth.*, 437 U.S. at 185.

⁵ *Id.*

⁶ U.S. Fish and Wildlife Service for terrestrial species like the black-footed ferret.

⁷ 16 U.S.C. § 1536(a)(1).

⁸ *Id.* § 1532(3) (emphasis added).

⁹ See *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410 (9th Cir. 1990).

¹⁰ *Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1031 (D. Nev. 2017) (citing *Tenn. Valley Auth.*, 437 U.S. at 183)); *Tenn. Valley Auth.*, 437 U.S. at 185.

¹¹ *Pyramid Lake Paiute Tribe of Indians*, 898 F.2d at 1418.

¹² *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008); *Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1031 (D. Nev. 2017); *Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d 802, 814 (E.D.N.C. 2018); *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, 797 F. Supp. 2d 949, 959 (D. Ariz. 2011); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1418-19 (9th Cir. 1990).

When Congress amended the ESA in 1982, it specifically stated that federal agencies' obligations toward "experimental populations" pursuant to Section 7(a)(1) would not change.¹³ Although Section 10(j) of the amended ESA treats "experimental populations" as "threatened" rather than "endangered,"¹⁴ this does not diminish federal agencies' conservation duties pursuant to Section 7(a)(1). Indeed, the Supreme Court recognized that "Congress' inclusion of 'threatened species' as a class deserving federal protection" is a "further indication of the comprehensive scope of the" ESA.¹⁵

1. Forest Service Manual Direction to Carry Out ESA Obligations

The Forest Service has articulated for itself a number of directives squarely aimed at fulfilling the agency's Section 7(a)(1) obligations. The Forest Service Manual states that the agency's policy regarding species listed under the ESA is to place top priority on listed and proposed species' conservation and recovery.¹⁶ The Manual directs the agency to use the planning process to "establish objectives for habitat management and/or recovery of populations," and to use the biological evaluation process to determine actions' effects on listed and proposed species.¹⁷ The Manual also states the agency's policy is to "[a]void all adverse effects on listed species," and to "[i]dentify and prescribe measures to prevent adverse modification or destruction of . . . habitats essential for the conservation of endangered, threatened, and proposed species."¹⁸

The Forest Service Manual assigns responsibility to Regional Foresters "to ensure compliance with law and policy," particularly through the planning process, and to "identify and approve management strategies to achieve conservation."¹⁹ Ultimately, Regional Foresters are responsible for ensuring that the agency meets its Section 7 ESA requirements.²⁰ Forest Supervisors share responsibility for ensuring "that legal and biological requirements for the conservation of endangered, threatened, and proposed plants and animals are *met* in forest land and resource management planning."²¹ Forest Supervisors must "develop quantifiable recovery objectives and develop strategies to *effect* recovery of threatened and endangered species."²² The Forest Service Manual requires the agency to treat "experimental populations" deemed "non-essential" the same as "threatened" species except for purposes of Section 7(a)(2) consultation.²³ The Manual further requires the agency to use "biological evaluations" to determine actions' effects on both listed and proposed species.²⁴

¹³ 16 U.S.C. § 1539(j)(2)(C)(i).

¹⁴ *Id.* §§ 1539(j)(2)(C) and 1536(a)(1).

¹⁵ *Tenn. Valley Auth.*, 437 U.S. at 180 n.25.

¹⁶ FSM 2670.31(1).

¹⁷ *Id.* 2670.31(2) and (3).

¹⁸ *Id.* 2670.31(4) and (6).

¹⁹ *Id.* 2670.44(1), (5), and (8).

²⁰ *Id.* 2670.44(10).

²¹ *Id.* 2670.45(1) (emphasis added).

²² *Id.* 2670.45(2) (emphasis added).

²³ *Id.* 2671.43(1) and (5).

²⁴ *Id.* 2671.44(1) and (2).

The Manual lays out standards for biological evaluations, requiring them to include an “identification and description of all occupied and unoccupied habitat recognized as essential for listed or proposed species recovery”²⁵ A biological evaluation must also include an “analysis of the effects of the proposed action on species . . . or on any unoccupied habitat required for recovery.”²⁶ Cumulative effects on the species must also be discussed.²⁷ Finally, a biological evaluation must include a determination of a proposed action’s “effect on the species and the process and rationale for the determination,” and also “[r]ecommendations for removing, avoiding, or compensating for any adverse effects.”²⁸

2. 2012 Planning Rule Requirements Regarding ESA Obligations

Beyond the Forest Service Manual, the agency has promulgated binding planning regulations directly aimed at fulfilling its ESA obligations. The 2012 planning rule requires the Forest Service to “provide the ecological conditions necessary to [] contribute to the recovery of federally listed threatened and endangered species.”²⁹ “Ecological conditions” encompass “the abundance and distribution of . . . habitats” and “human uses.”³⁰ The rule defines “recovery” as “[t]he improvement in the status of a listed species to the point at which listing as federally endangered or threatened is no longer appropriate.”³¹

B. Section 7(c) of the ESA

Section 7(c) of the ESA requires the Forest Service to produce biological assessments that identify ESA-listed species likely to be affected by proposed actions based on information provided by the U.S. Fish and Wildlife Service (acting for the Secretary of the Interior).³² Regulations promulgated to implement Section 7(c) require biological assessments to “evaluate the potential effects of the action on listed and proposed species . . . and determine whether any such species . . . are likely to be adversely affected by the action.”³³ “An analysis of the effects of the action” on species and habitat should include “consideration of cumulative effects.”³⁴ Implementing regulations define “effects of the action” as “*all* consequences to listed species . . . caused by the proposed action,” even those later in time or “outside the immediate area involved in the action.”³⁵

²⁵ FSM 2672.42(2).

²⁶ *Id.* 2672.42(3).

²⁷ *Id.* 2672.42(4).

²⁸ *Id.* 2672.42(5) and (6).

²⁹ 36 C.F.R. § 219.9(b)(1).

³⁰ *Id.* § 219.19.

³¹ *Id.*

³² 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.12(c) and (d).

³³ 50 C.F.R. § 402.12(a).

³⁴ *Id.* § 402.12(f)(4).

³⁵ *Id.* § 402.02 (emphasis added).

C. Applicable Standard of Review

Because the ESA contains no standard of review provision, courts review agencies' compliance with the provisions of the ESA under the Administrative Procedure Act's arbitrary and capricious standard.³⁶ Under this standard, agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."³⁷ An "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"³⁸

"An agency's decision is arbitrary and capricious if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment."³⁹ "In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's decision to be supported by the facts in the record."⁴⁰ Further, "[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure."⁴¹ An agency's decision may be upheld, if at all, based on "only the agency's reasoning at the time of decisionmaking," not "post hoc rationalizations"⁴²

III. FACTUAL BACKGROUND

A. Black-Tailed Prairie Dogs and Black-Footed Ferrets

Prairie dog species once occupied over 247 million grassland acres in North America.⁴³ The black-tailed prairie dog has been eradicated from all but two percent of its former range, and

³⁶ See *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 n.3 (10th Cir. 2010) (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 709 (9th Cir. 2005)); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 12, 146 F.3d 1249, 1252 (10th Cir. 1998); *Pyramid Lake*, 498 F.2d at 1414.

³⁷ 5 U.S.C. § 706(2)(A).

³⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

³⁹ *Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1100-01 (D. Colo. 2012 (citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (internal citation omitted)).

⁴⁰ *Superior*, 913 F. Supp. 2d at 1101 (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994)).

⁴¹ *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (citing *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986)).

⁴² *New Mexico ex rel. Richardson*, 565 F.3d at 704 (quoting *Utahns for Better Transp.*, 305 F.3d at 1165)).

⁴³ Viability Impacts to Mountain Plover, Burrowing Owl, and Black-Footed Ferret Based on 2013 State of Wyoming Prairie Dog Strategy Amendment Request, p. 4 (U.S. Forest Service 2013).

now occupies just 0.01% of its former range in the state of Wyoming.⁴⁴ Prairie dogs are a “keystone” species that creates habitat for a suite of other species, including mountain plovers, burrowing owls, and black-footed ferrets.⁴⁵ This ecosystem development and habitat creation cannot be duplicated by other species.⁴⁶

Due to their highly social behavior, black-tailed prairie dogs are very susceptible to plague,⁴⁷ a non-native disease that arrived on the Thunder Basin National Grassland in the late 1990s.⁴⁸ They are also threatened by continued habitat loss, recreational shooting, and the commonly held perspective that they are “pests,” resulting in poisoning and shooting.⁴⁹ Because most private landowners in Wyoming prefer to eradicate prairie dogs from their property,⁵⁰ federally-managed national grassland acres are disproportionately important for development of prairie dog complexes capable of supporting reintroduced black-footed ferret populations.

The federal government first recognized the black-footed ferret as endangered in 1967, a designation carried forward following the enactment of the Endangered Species Act in 1973.⁵¹ The fate of the endangered black-footed ferret is inextricably linked to the health and distribution of prairie dog populations.⁵² The black-footed ferret depends almost exclusively on prairie dogs for prey and prairie dog burrows for habitat.⁵³

Because prairie dogs have been reduced from so much of their historic range, wild ferrets disappeared from North America.⁵⁴ Today, of the 29 sites where ferrets have been reintroduced, just 14 remain active.⁵⁵ The U.S. Fish and Wildlife Service recently stated that conservation efforts must increase from current levels to ensure the viability of black-footed ferrets going forward.⁵⁶

A team of researchers found that only reintroduction sites greater than 10,621 acres had self-sustaining ferret populations over multiple years.⁵⁷ Forest Service biologists for Thunder Basin National Grassland have recognized this 10,621-acre threshold as the minimum number

⁴⁴ Viability Impacts, p. 2.

⁴⁵ *See id.*, p. 6.

⁴⁶ *Id.*

⁴⁷ Viability Impacts, p. 8.

⁴⁸ FEIS Appendix E, p. E-31.

⁴⁹ Viability Impacts, p. 8.

⁵⁰ A Reference Guide for the Black-Tailed Prairie Dog and Associated Species for Thunder Basin National Grassland, p. 7 (U.S. Forest Service 2014).

⁵¹ *Id.*

⁵² *See* Viability Impacts, p. 12.

⁵³ 2013 Black-Footed Ferret Recovery Plan, pp. 5 and 14 (U.S. Fish and Wildlife Service 2013).

⁵⁴ Viability Impacts, p. 12.

⁵⁵ Species Status Assessment, Black-Footed Ferret (U.S. Fish and Wildlife Service, 2019).

⁵⁶ *Id.*

⁵⁷ The importance of thinking big: Large-scale prey conservation drives black-footed ferret reintroduction success (Jachowski *et al.* 2011).

needed to support a viable population of ferrets.⁵⁸ Further, in 2018 the Threatened, Endangered, and Sensitive Species Program Leader for Region 2 of the Forest Service affirmed that between 11,000 and 13,000 acres of prairie dog colonies sustained a small ferret population through a plague outbreak at a South Dakota reintroduction site.⁵⁹

B. Black-Footed Ferret Reintroduction Efforts on Thunder Basin National Grassland

The Thunder Basin National Grassland has long been identified as a potential reintroduction site for black-footed ferrets due to the Grassland's relatively large number of contiguous federal land acres that can accommodate sufficiently expansive prairie dog colony complexes.⁶⁰ No other Forest Service-managed lands in Wyoming have been identified as potential ferret reintroduction sites.⁶¹ The Thunder Basin National Grassland has at times been named one of the top three sites for future reintroduction.⁶²

In 2007, the Regional Forester "committed the USFS to providing habitat for future ferret reintroduction and said: 'Despite our important contribution to the national recovery program to this point, recovery of the black-footed ferret still remains tenuous at best.'"⁶³ The Regional Forester went on to say, "Opportunities likely remain for the Forest Service to continue to be a leader in the national recovery effort."⁶⁴

Yet in 2017, caving to pressure from agricultural interests, the Forest Service joined an Interagency Statement with the U.S. Fish and Wildlife Service and Wyoming Game and Fish Department announcing an agreement that "the reintroduction of black-footed ferrets on the Grassland is not appropriate at this time."⁶⁵ This announcement came just over a year after the Governor of Wyoming, Wyoming Game and Fish Department, Wyoming Office of State Lands and Investments, and Wyoming Department of Agriculture sent letters informing the Forest Service the state does not support reintroduction.⁶⁶

⁵⁸ Viability Impacts, pp. 20-21; 2015 Black-Tailed Prairie Dog Conservation Assessment and Management Strategy, p. 12 (U.S. Forest Service).

⁵⁹ Email from Peter McDonald, Threatened, Endangered, and Sensitive Species Program Leader, Region 2, U.S. Forest Service (July 25, 2018).

⁶⁰ See Viability Impacts, p. 20.

⁶¹ See Letter from U.S. Fish and Wildlife Service to Regional Forester (March 16, 2007).

⁶² Email from Peter McDonald, Threatened, Endangered, and Sensitive Species Program Leader, Region 2, U.S. Forest Service (Dec. 9, 2016); see also Scoping comments on 2020 Plan Amendment provided by John Sidle to Forest Supervisor Bacon (May 18, 2019).

⁶³ Viability Impacts, p. 20.

⁶⁴ *Id.*

⁶⁵ Interagency Statement (Dec. 4, 2017).

⁶⁶ See Thunder Basin and Black-Footed Ferrets Talking Points, Wyoming Game and Fish Department (Aug. 14, 2018).

C. Systematic Elimination of Ferret Reintroduction Habitat Protections

1. 2002 Grassland Plan

In 2002, the Forest Service designated 53,830 acres of the Grassland as Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat.⁶⁷ Within this Management Area, the agency prohibited the shooting of prairie dogs.⁶⁸ The 2002 Plan also limited poisoning of prairie dogs anywhere on the Grassland to the immediate vicinity of homes and cemeteries and to address public health and safety risks within specific locations.⁶⁹ The 2002 Plan required the agency to replace net losses of ferret habitat due to prairie dog poisoning within one year.⁷⁰ The 2002 Plan also required the Forest Service to manage all prairie dog colonies within Management Area 3.63 as though they were occupied by black-footed ferrets.⁷¹

Notably, in the FEIS for the 2002 Plan Revision (a combined analysis with other Northern Great Plains plan revisions), the Forest Service determined that alternatives that did not allocate potential reintroduction habitat (Management Area 3.63) were “likely to adversely affect” black-footed ferrets.⁷² The Forest Service recognized that regardless of current occupation of habitat, a failure to manage for reintroduction habitat negatively impacts the species.⁷³

2. 2009 Plan Amendment

In 2009, the Forest Service amended the 2002 plan to reduce the size of Management Area 3.63 to 44,420 acres, a loss of over 9,000 acres previously managed for ferret reintroduction.⁷⁴ The 2009 amendment also eliminated the requirement to replace net losses of ferret habitat due to prairie dog poisoning.⁷⁵

⁶⁷ 2020 Plan Amendment FEIS, p. 8, available at https://www.fs.usda.gov/nfs/11558/www/nepa/110862_FSPLT3_5291566.pdf (last visited Jan. 12, 2021).

⁶⁸ 2002 Plan, p. 3-17, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5357291.pdf (last visited Jan. 12, 2021).

⁶⁹ 2002 Plan, p. 1-23, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5357288.pdf (last visited Jan. 12, 2021).

⁷⁰ *Id.*, p. 1-15.

⁷¹ 2002 Plan, p. 3-16.

⁷² 2002 Plan FEIS, pp. 3-270 and 3-274, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5166439.pdf (last visited Jan. 15, 2021).

⁷³ *See id.*

⁷⁴ 2009 Plan Amendment Record of Decision, pp. 22-23, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5166986.pdf (last visited Jan. 12, 2021).

⁷⁵ *Id.*, p. 11.

The 2009 amendment established four categories of prairie dog areas.⁷⁶ The Category 1 area included most of Management Area 3.63.⁷⁷ Within Category 1, poisoning would be prohibited unless prairie dog colonies exceed 18,000 acres.⁷⁸ Poisoning in Category 1 colonies would only be allowed within a half a mile of the Grassland boundary, and after other non-lethal options have been tried and found ineffective.⁷⁹ The 2009 amendment continued to prohibit shooting prairie dogs in Management Area 3.63 and Category 1 and 2 lands, but allowed prairie dog shooting on Category 3 and 4 lands.⁸⁰

In the Record of Decision for the 2009 amendment, the Forest Supervisor explained that shooting prairie dogs would be prohibited on Forest Service Category 1 and 2 lands because recreational shooting “can disrupt prairie dog behavior and affect population dynamics.”⁸¹ The Forest Supervisor also stated that the “Forest Service remains committed to the goal of reintroducing the endangered black-footed ferret to the TBNG,”⁸² despite the agency’s awareness that [m]ost livestock producers in the Great Plains do not support the expansion of prairie dog colonies because . . . they are viewed as competing for forage for their livestock.”⁸³

According to the Forest Supervisor, the 2009 amendment was “expected to provide long term conservation of prairie dogs and contribute to conditions necessary to support a future ferret reintroduction in [Management Area] 3.63.”⁸⁴ The selected alternative “would help to gain local public support for prairie dog conservation and black-footed ferret recovery on the TBNG, which would facilitate a future reintroduction while still maintaining for viability and conservation of these species,” according to the Forest Service.⁸⁵

3. 2015 Conservation Assessment and Management Strategy

In 2015, the Forest Service adopted a Black-Tailed Prairie Dog Conservation Assessment and Management Strategy that further rolled back protections for black-tailed prairie dogs and black-footed ferret habitat. The 2015 strategy consolidated the four categories of prairie dog colony acres adopted by the 2009 amendment into three categories.⁸⁶ Within Management Area 3.63, the 2015 strategy continued to set an 18,000-acre objective and trigger point for prairie dog poisoning.⁸⁷ Outside of Management Area 3.63, the 2015 strategy set objectives for an additional

⁷⁶ 2009 Plan Amendment Record of Decision, p. 16.

⁷⁷ *Id.*, p. 14.

⁷⁸ *Id.*, p. 4.

⁷⁹ *Id.*, p. 4.

⁸⁰ *Id.*, p. 16.

⁸¹ *Id.*, p. 20.

⁸² *Id.*, p. 22.

⁸³ *Id.*, p. 21.

⁸⁴ *Id.*, p. 22.

⁸⁵ *Id.*, p. 24.

⁸⁶ 2015 Black-Tailed Prairie Dog Conservation Assessment and Management Strategy, p. 4, available at https://www.fs.usda.gov/nfs/11558/www/nepa/110862_FSPLT3_4638365.pdf (last visited Jan. 12, 2021).

⁸⁷ *Id.*, p. 12.

15,000 acres of prairie dog colonies, but removed the 2009 amendment’s restrictions on prairie dog shooting in Category 2 areas when acreage objectives have been met.⁸⁸

In the 2015 strategy document, the Forest Service stated: “It is anticipated that 18,000 acres will be sufficient habitat to allow ferrets to persist through a plague epizootic and recover naturally along with the prairie dog populations, particularly since a *minimum* of 10,621 acres of prairie dogs at a moderate density are needed to support a self-sustaining population of ferrets (Jachowski *et al.* 2011).”⁸⁹

4. 2020 Plan Amendment

At the behest of livestock interests,⁹⁰ the Forest Service adopted another plan amendment in 2020 that replaces Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat with Management Area 3.67 – Short-Stature Vegetation Emphasis (“replacement management area”).⁹¹ The 2020 amendment reduces the prairie dog colony objective in this replacement management area to 10,000 acres. During drought years, which the Forest Service recognizes will occur more frequently in the future due to climate change,⁹² the objective is just 7,500 acres.⁹³ Once prairie dog colonies grow beyond 7,500 acres within Management Area 3.67, the Forest Service may authorize poisoning throughout the area to limit their growth, despite not yet reaching the 10,000-acre objective.⁹⁴ The 2020 amendment also expands prairie dog poisoning options to boundary management zones and one-mile residence buffers.⁹⁵ Further, recreational shooting of prairie dogs may now occur in the replacement management area for five and a half months of each year.⁹⁶

According to the Forest Service, the action alternatives considered for the 2020 amendment all “de-emphasize” the reintroduction of ferrets to re-focus management on providing forage for livestock grazing.⁹⁷ Despite severely limiting the natural expansion of prairie dog colonies, the agency contends the 10,000-acre objective “*approximates the minimum* colony extent necessary to provide ecological conditions for prairie dog-associated species,”⁹⁸ despite just a few years earlier finding that 18,000 acres would be “sufficient” to allow ferrets to persist through plague epizootics, and that ferrets require a *minimum* of 10,621 prairie dog

⁸⁸ 2015 Black-Tailed Prairie Dog Conservation Assessment and Management Strategy, p. 9.

⁸⁹ *Id.*, p. 12 (emphasis added).

⁹⁰ See Letter from Wyoming Department of Agriculture to Forest Supervisor Bacon (Dec. 28, 2018).

⁹¹ 2020 Plan Amendment Record of Decision, p. 3, available at https://www.fs.usda.gov/nfs/11558/www/nepa/110862_FSPLT3_5538534.pdf (last visited Jan. 12, 2021).

⁹² 2020 Plan Amendment FEIS, p. 69.

⁹³ 2020 Plan Amendment Record of Decision, p. 3.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 2020 Plan Amendment FEIS, p. 60, and FEIS Appendix C, p. C-2.

⁹⁸ 2020 Plan Amendment FEIS, p. 70 (emphasis added).

colony acres for a self-sustaining population.⁹⁹ The 2020 amendment sets an aspirational objective for the development of a “plague management plan” for the Grassland within three years,¹⁰⁰ and requires the Forest Service to take an “integrated approach” to annual plague management within Management Area 3.67.¹⁰¹ The FEIS and Biological Assessment for the 2020 amendment do not examine the cumulative impacts of increased poisoning, recreational shooting, and plague on prairie dog colony acres or ferret reintroduction habitat.

Both the Biological Evaluation and the Biological Assessment for the 2020 amendment determined that because black-footed ferrets have been extirpated from the Grassland, the amendment would have “no effect” on the species,¹⁰² despite dramatically altering management to the species’ unoccupied habitat earlier identified as key to future reintroduction and recovery, and despite major expansions of shooting and poisoning prairie dogs within the former Management Area 3.63 and throughout the Grassland.

The Biological Assessment and Biological Evaluation contained no analysis of how the 2020 plan amendment would impact future reintroduction of black-footed ferrets to the Grassland. The FEIS, meanwhile, only examined impacts to future reintroduction through the lens of prairie dog acreage requirements found in the 2013 Black-Footed Ferret Recovery Plan and 2018 Wyoming Black-Footed Ferret Management Plan: 4,500 acres for 30 breeding adult ferrets and 15,000 for 100 breeding adult ferrets.¹⁰³

The Forest Service undertook no analysis of how removing Management Area 3.63, increasing poisoning within the new Management Area 3.67 and throughout the Grassland, and lifting the previous prohibition against prairie dog shooting within Management Area 3.63 for five and a half months of the year would impact future reintroduction and recovery of black-footed ferrets. Nor did the agency recognize its previous statement that a minimum of 10,621 acres of prairie dog colonies is required to support a viable, self-sustaining ferret population.

IV. VIOLATIONS OF LAW

A. Section 7(a)(1) of the ESA – Affirmative Duty to Conserve

The 2020 Plan Amendment continues a pattern of eroding protections for black-tailed prairie dogs and black-footed ferret reintroduction habitat on Thunder Basin National Grassland. However, the complete removal of the Management Area 3.63 – Black-Footed Ferret

⁹⁹ Viability Impacts, pp. 20-21; 2015 Black-Tailed Prairie Dog Conservation Assessment and Management Strategy, p. 12 (U.S. Forest Service).

¹⁰⁰ 2020 Plan Amendment Record of Decision, p. 71.

¹⁰¹ *Id.*, p. 74.

¹⁰² 2020 Plan Amendment Biological Assessment, p. 8, available at https://www.fs.usda.gov/nfs/11558/www/nepa/110862_FSPLT3_5327114.pdf (last visited Jan. 15, 2021); 2020 Plan Amendment Biological Evaluation, FEIS Appendix E, p. E-42, available at https://www.fs.usda.gov/nfs/11558/www/nepa/110862_FSPLT3_5291564.pdf (last visited Jan. 15, 2021).

¹⁰³ 2020 Plan Amendment FEIS, pp. 133-36.

Reintroduction Habitat designation marks a clear turn away from science-based and legally valid conservation efforts by the Forest Service on the Grassland. The 2020 amendment reduces management for prairie dog colonies by over two-thirds from the 2009 amended plan and 2015 Management Strategy.¹⁰⁴ No longer will habitat be managed to facilitate future reintroduction in the new Management Area 3.67 designation. Instead, forage for private livestock grazing will be emphasized, with prairie dog colony growth subject to severe restrictions. Poisoning and shooting of prairie dogs – absolutely essential as ferret food and habitat – will be drastically expanded within the previously protected Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat, compounding the threat of colony extirpation in light of the likely plague outbreaks in the future.

Courts have made clear that insignificant measures that do not or are not reasonably likely to conserve endangered or threatened species fail to satisfy federal agencies’ Section 7(a)(1) obligations.¹⁰⁵ The 2020 Plan Amendment’s aspirational (*i.e.*, optional, non-mandatory) objective to manage for 10,000 acres of prairie dog colonies within the new Management Area 3.67 amounts to an insignificant measure, because it is not reasonably likely to support a viable, self-sustaining black-footed ferret population according to the best available science previously and repeatedly recognized by the Forest Service.¹⁰⁶ To be clear, when considering a State of Wyoming proposal that would reduce prairie dog colony acres to approximately 10,000, the Forest Service itself determined in 2013 that the proposal “*would preclude the opportunity to implement black-footed ferret reintroductions.*”¹⁰⁷

Further, the aspirational 10,000-acre objective in the 2020 amendment contains a gaping loophole such that, as often as not, the agency will be managing for just 7,500 acres of prairie dog colonies.¹⁰⁸ The 2020 amendment sets an objective of 7,500 acres of prairie dog colonies during drought years, which the Forest Service recognizes are likely to become more and more common due to on-going climate change affecting the Grassland.¹⁰⁹ Further, even when prairie dog colonies only total 7,500 acres during *non*-drought years, the 2020 amendment authorizes poisoning of prairie dogs within those colonies, inhibiting their growth.¹¹⁰

The 2020 Plan Amendment also does not meaningfully address the threat of plague to prairie dog colonies on the Grassland. The 2020 amendment merely adopts a non-mandatory objective to develop a plague management plan within three years, and requires the use of an

¹⁰⁴ 2020 Plan Amendment Record of Decision, p. 21.

¹⁰⁵ *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008); *Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1031 (D. Nev. 2017); *Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d 802, 814 (E.D.N.C. 2018); *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, 797 F. Supp. 2d 949, 959 (D. Ariz. 2011); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1418-19 (9th Cir. 1990).

¹⁰⁶ Viability Impacts, pp. 20-21; 2015 Black-Tailed Prairie Dog Conservation Assessment and Management Strategy, p. 12 (U.S. Forest Service).

¹⁰⁷ Viability Impacts, pp. 2 and 17 (emphasis added).

¹⁰⁸ 2020 Plan Amendment Record of Decision, p. 71.

¹⁰⁹ 2020 Plan Amendment FEIS, p. 69.

¹¹⁰ 2020 Plan Amendment Record of Decision, p. 72.

undefined “integrated approach” to annual plague management. The amendment contains no commitments to dust for plague or take other measures necessary to prevent extirpation of the small number of prairie dog colonies that remain after the last plague epizootic. Instead, the amendment imposes new stressors to prairie dog colony development through expanded shooting and poisoning of prairie dogs, without an underlying analysis of how these combined stressors may result in extirpation of prairie dogs from the Grassland. Without adequate populations of prairie dogs, of course, the Grassland will cease entirely to provide black-footed ferret reintroduction habitat.

The 2020 Plan Amendment’s rollback of all meaningful protections designed to facilitate a return of black-footed ferrets to their native habitat on the Thunder Basin National Grassland fails to “conserve” the species according to the ESA’s definition. The elimination of Management Area 3.63—a designation previously found necessary to avoid adversely impacting the endangered species—and the expansion of poisoning and shooting prairie dogs even when colony acres are below the minimum needed for viable ferret populations run directly counter to the Forest Service’s obligation to use “all methods and procedures [] necessary to bring” black-footed ferrets back from the brink of extinction.¹¹¹

The Forest Service states that one of the 2020 amendment’s purposes is to “not preclude reintroduction of the black-footed ferret” to the Thunder Basin National Grassland.¹¹² But this turns the ESA’s affirmative Section 7(a)(1) mandate on its head: By law, the Forest Service must proactively “conserve,” not do the bare minimum so as not to preclude conservation. Further, the agency itself earlier acknowledged that managing for 10,000 acres *would* in fact preclude ferret reintroduction on the Grassland. “Approximating” the minimum extent of prairie dog colonies needed for associated species by managing toward 10,000 acres does not suffice to fulfill Section 7(a)(1)’s mandate.¹¹³

And that does not even consider the likelihood that in many years due to drought, the Forest Service intends to manage for just 7,500 acres of prairie dog colonies in Management Area 3.67. The agency justifies its decision by asserting that 7,500 and 10,000 acres are multiple times greater than the minimum acreage requirements listed by FWS and WGFD for ferret reintroduction,¹¹⁴ without any recognition of its previous admission that a *minimum* of 10,621 acres is necessary for a viable, self-sustaining ferret population.

The Supreme Court has made clear that federal agencies must prioritize conservation of listed species, even above their own “primary missions.”¹¹⁵ Thus, in carrying out its ESA obligations, the Forest Service may not prioritize other activities that not only conflict with black-footed ferret conservation, like increased prairie dog shooting and poisoning, but inhibit it. Further, the Forest Service’s determination that the 2020 Plan Amendment will not preclude black-footed ferret reintroduction on the Grassland runs counter to the evidence before the

¹¹¹ 16 U.S.C. § 1532(3).

¹¹² 2020 Plan Amendment Record of Decision, p. 8.

¹¹³ Reviewing Officer’s Response to Eligible Objections, p. 24.

¹¹⁴ Reviewing Officer’s Response to Eligible Objections, p. 10.

¹¹⁵ *Tenn Valley Auth.*, 437 U.S. at 185.

agency. On multiple occasions the Forest Service has acknowledged that successful black-footed ferret reintroduction sites require a minimum of 10,621 acres, drawing on published, peer-reviewed scientific research.¹¹⁶ Yet the 2020 amendment caps prairie dog colony acres at 10,000, and during more and more common drought years, just 7,500, in direct contradiction to evidence before the agency.

1. The 2020 Plan Amendment Is Inconsistent with the Forest Service Manual

As noted above, the Forest Service Manual articulates directives designed to facilitate the agency's fulfillment of its ESA obligations. However, with the 2020 Plan Amendment, the Forest Service runs afoul of numerous provisions of the Manual, further evidence that the agency has not satisfied its Section 7(a)(1) conservation mandate. For example, the Manual directs the Forest Service to "place top priority" on listed species' conservation and recovery, and to avoid adverse impacts to such species.¹¹⁷ Where habitat is essential for a listed species' recovery, the Manual directs the Forest Service to prescribe measures to protect it.¹¹⁸

With the 2020 Plan Amendment, the Forest Service clearly deviated from these stated policies by expressly subordinating black-footed ferret reintroduction below the desires of livestock interests, by adopting severe restrictions and limits on prairie dog colony growth, and by imposing increased poisoning and shooting stressors on prairie dogs within habitat previously identified as key to ferret reintroduction and recovery on the Grassland. Examples of the Forest Service's shift away from prioritizing ferret reintroduction and recovery include the 2020 amendment's removal of a plan standard limiting activities and uses of Management Area 3.63 that "do not reduce habitat below the level needed to support a long-term sustainable black-footed ferret population,"¹¹⁹ the elimination of desired conditions for ferret reintroduction,¹²⁰ the change of theme away from ferret reintroduction,¹²¹ and most pointedly, the elimination of Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat.¹²²

Forest Service officials overseeing the 2020 Plan Amendment process further acted inconsistently with the responsibilities assigned to them by the Manual. For example, Regional Foresters must ensure the agency meets its Section 7 ESA requirements,¹²³ but here, the record shows that as recently as 2017 the Regional Forester pushed to "break the link between [black-footed ferrets] and [prairie dogs] in plan components."¹²⁴ Further, Regional Foresters and Forest Supervisors must ensure management plans *meet* both the legal and biological requirements for

¹¹⁶ Viability Impacts, pp. 20-21; 2015 Black-Tailed Prairie Dog Conservation Assessment and Management Strategy, p. 12 (U.S. Forest Service).

¹¹⁷ FSM 2670.31(1) and (4).

¹¹⁸ *Id.* 2670.31(6).

¹¹⁹ 2020 Plan Amendment Record of Decision, p. 71.

¹²⁰ *Id.*, p. 70.

¹²¹ *Id.*

¹²² *Id.*, p. 54.

¹²³ FSM 2670.44(1).

¹²⁴ U.S. Forest Service Rocky Mountain Regional Office Meeting Notes (Feb. 4, 2019).

conservation of listed species.¹²⁵ Forest Supervisors must also develop objectives and strategies that actually “*effect* recovery of threatened and endangered species.”¹²⁶

By the Forest Service’s own previous admissions, the 2020 Plan Amendment will *not* meet the biological requirements for successful, sustainable black-footed ferret reintroduction on Thunder Basin National Grassland, and thus fails to meet the agency’s conservation obligations under Section 7(a)(1) of the ESA. Nominally managing downward toward 10,000 prairie dog acres, or 7,500 during more and more common drought years, while simultaneously allowing widespread prairie dog poisoning and shooting and “de-emphasizing” black-footed ferret reintroduction, will *not* “effect recovery” of this critically endangered species.

Finally, the Biological Evaluation prepared as part of the 2020 Plan Amendment process fails to meet the standards laid out in the Forest Service Manual. The Biological Evaluation does not analyze the effects of the 2020 amendment on “unoccupied habitat required for recovery” of black-footed ferrets.¹²⁷ Instead, the Biological Evaluation tersely concludes that because ferrets have been extirpated from the Grassland, the 2020 amendment would have “no effects” on the species, ignoring the fact that the agency previously identified the unoccupied habitat of Management Area 3.63 as key to ferret reintroduction and recovery on the Grassland.¹²⁸ The Forest Service also ignores the fact that the agency previously determined that *failure* to designate a Management Area 3.63 on certain national grasslands would likely *adversely affect* black-footed ferrets.¹²⁹

2. The 2020 Plan Amendment Violates the 2012 Planning Rule

The 2020 Plan Amendment will not contribute to the recovery of the black-footed ferret, as required by the 2012 Planning Rule.¹³⁰ To the contrary, the 2020 amendment fails to “provide the ecological conditions necessary” to facilitate reintroduction of a viable, self-sustaining population of ferrets on Thunder Basin National Grassland.¹³¹ The 2020 amendment sets a non-mandatory objective of 10,000 prairie dog colony acres in newly designated Management Area 3.67, but this is below the *minimum* number of acres necessary for successful ferret reintroduction established in the best available science and previously recognized by the Forest Service.¹³² Furthermore, in the years going forward, the Forest Service may only manage for 7,500 acres of prairie dog colonies due to increasingly common droughts—thousands of acres below what scientists have found will sustain reintroduced ferret populations.

¹²⁵ FSM 2670.44(1) and 2670.45(1).

¹²⁶ *Id.* 2670.45(2) (emphasis added).

¹²⁷ FSM 2672.42(3).

¹²⁸ Biological Evaluation, FEIS Appendix E, p. E-42.

¹²⁹ 2002 Plan FEIS, pp. 3-270 and 3-274.

¹³⁰ *See* 36 C.F.R. § 219.9(b)(1).

¹³¹ *Id.*

¹³² Viability Impacts, pp. 20-21; 2015 Black-Tailed Prairie Dog Conservation Assessment and Management Strategy, p. 12 (U.S. Forest Service).

The 2012 rule defines “ecological conditions” to include “human uses,” indicating human uses may need to be limited to allow for listed species’ recovery. Yet rather than protect potential ferret habitat from such human uses, the 2020 amendment *increases* harmful human activities, including the poisoning and shooting of prairie dogs in a previously protected area. When combined with plague—the other main stressor prairie dogs face—and arbitrary and inadequate acreage targets, the Forest Service has failed to provide ecological conditions that genuinely contribute to the black-footed ferret’s recovery. Although the agency claims the 2020 amendment will “not preclude” reintroduction, information well-known to the agency and brought to its attention throughout the amendment process indicates that successful reintroduction will be impossible under the 2020 plan amendment’s components.

All of these deviations from the directives of the Forest Service Manual and 2012 Planning Rule further make clear the agency has failed to satisfy the affirmative conservation mandate of Section 7(a)(1) of the ESA. The biologically and legally inadequate 10,000-acre prairie dog colony objective runs counter to evidence before the agency. It also amounts to an insignificant measure that will not conserve black-footed ferrets or their habitat, particularly when viewed in the context of the drought loophole, increased poisoning and shooting, and the lack of clear plague management commitments in the 2020 Plan Amendment. The Forest Service has offered no explanation for its failure to follow the spirit and letter of its own policies and directives regarding threatened and endangered species in its Manual, or the mandatory requirements of 36 C.F.R. § 219.9(b)(1).

B. Section 7(c) of the ESA – Biological Assessment

The Biological Assessment for the 2020 Plan Amendment reached an arbitrary “no effect” determination because it did not consider impacts of the amendment to reintroduction efforts or recovery of the black-footed ferret. Premised on the past extirpation of black-footed ferrets from the Thunder Basin National Grassland, the Biological Assessment failed to examine the 2020 amendment’s effect on potential reintroduction habitat or efforts. Furthermore, the FEIS for the 2020 amendment only discussed effects to reintroduction through the limited lens of recovery and management plan minimum criteria,¹³³ *not* through an examination of the best available science or biological requirements for successful, self-sustaining reintroduced ferret populations.

ESA implementing regulations require biological assessments to analyze proposed actions’ effects on listed species, *i.e.*, *all* potential consequences.¹³⁴ This encompasses an analysis of a proposed action’s impact on the likelihood of reintroduction or recovery of a listed species where the species’ habitat requirements are directly implicated. A “no effect” determination for harmful actions *within* a listed species’ specifically identified future reintroduction site, not merely in the general vicinity, is arbitrary and capricious, not in

¹³³ 2020 Plan Amendment FEIS, pp. 133-36.

¹³⁴ 50 C.F.R. §§ 402.02 and 402.12.

accordance with the law, and violates the Forest Service’s obligations under Section 7(c) of the ESA.¹³⁵

Further, the “no effect” determination for the 2020 Plan Amendment also runs directly counter to the Forest Service’s earlier determination that failure to *designate* Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat on national grasslands would be likely to *adversely affect* the species.¹³⁶ Here, the Forest Service has *removed* Management Area 3.63 and replaced it with a management area focused instead on livestock forage. The Forest Service offers no explanation for its departure from its past precedent, underscoring the arbitrariness of the Biological Assessment and FEIS for the 2020 Plan Amendment.

V. CONCLUSION

As set forth above, Western Watersheds Project and Rocky Mountain Wild intend to pursue litigation in federal court after sixty days, and will seek injunctive, declaratory, and other relief, including an award of fees and costs incurred in investigating and prosecuting this action. To avoid litigation, the Forest Service should immediately withdraw the Biological Assessment, FEIS, and Record of Decision for the 2020 Plan Amendment and reinstate the 2015 Prairie Dog Conservation Assessment and Management Strategy and Thunder Basin National Grassland Plan as amended in 2009.

If you have any questions or wish to discuss this matter further, please contact us.

Sincerely,



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¹³⁵ See *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 95 (D.D.C. 2012) (recognizing BLM’s “no effect” determination for black-footed ferrets in light of “the distance of the [leasing] area from future reintroduction sites.”).

¹³⁶ 2002 Plan FEIS, pp. 3-270 and 3-274.