



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Office of Environmental Policy and Compliance  
Denver Federal Center, Building 46  
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Denver, Colorado 80225-0007

*In reply refer to:*  
ER24/0116

May 9, 2024

Kim Dolatta  
125 North Main Street  
Chadron, NE 69337

Subject: Draft Environmental Impact Statement (DEIS) - Nebraska National Forests and  
Grasslands Undesirable Plant Management

Dear Kim Dolatta:

The U.S. Department of the Interior (Department) has reviewed the U.S. Forest Service (USFS) DEIS - Nebraska National Forests and Grasslands Undesirable Plant Management. The U.S. Fish and Wildlife Service (Service) and National Park Service (NPS) have provided the following comments.

## **Service's Comments**

The Service is responsible for conserving and protecting fish and wildlife resources for the benefit of the American public through our administration of the Endangered Species Act (ESA), Bald and Golden Eagle Protection Act (Eagle Act), and Migratory Bird Treaty Act (MBTA). The National Environmental Policy Act (NEPA) requires the lead federal agency, in this case the USFS, to assess the potential environmental impacts of the proposed project, including impacts to the resources protected by these statutes and their corresponding regulations.

Below is the Service Nebraska Ecological Service Field Office's (NEFO) review, organized by statute, of Chapter 3. Affected Environment and Environmental Consequences, the Listed and Sensitive Wildlife and Plants Section that starts on Page 51 of the DEIS pdf (63/186 of Adobe).

In the comments below, the NEFO refer to additional, more specific comments in the table attached to this letter.

## Endangered Species Act

Pursuant to section 7(a)(2) of the ESA, every federal agency, shall in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a federally listed species or result in the destruction or adverse modification of federally designated critical habitat. If a proposed project may affect federally listed species or federally designated critical habitat, section 7 consultation is required.

We acknowledge the USFS's determination of "no effect" for all federally listed species, made on page 62 of the EIS. While we acknowledge your determination, the Service does not understand how the USFS reached this conclusion for the federally threatened American Burying Beetle (ABB) or the endangered Northern Long-eared Bat (NLEB).

We find it difficult to understand how the USFS reached a "no effect" because the Nebraska National Forest in Thomas County and Samuel McKelvie National Forest in Cherry County, Nebraska, are located in the American Burying Beetle Northern Plains Analysis Area and both forests contain suitable habitat and documented occurrences of the species. Additionally, the indirect and direct effects of chemical, biological, prescribed fire, and mechanical forms of undesirable plant management, as described on pages 59 – 61, appear they will cause soil disturbance as defined in 85 FR 65241. To better support the USFS's effect determination, we recommend that the USFS assess this project in Information for Planning and Consultation tool (or IPaC) utilizing the American Burying Beetle 4d Determination Key and retain the documentation in an appendix to this EIS.

Similarly, we do not understand the USFS's "no effect" determination for the NLEB because the Nebraska National Forest and Samuel McKelvie National Forest contain suitable deciduous forest summer roosting habitat for this species and chemical, prescribed fire, and mechanical forms of undesirable plant management have the potential to impact the species. To help inform the USFS's effect determination, we recommend the USFS assess this project in IPaC utilizing the NLEB Rangewide Determination Key and retain the documentation received in the appendix with the ABB documentation.

It is important to note that if the USFS receives a "May Affect, Consistency Letter" this does not mean your project is reasonably certain to cause take of the species. If the USFS is able to adequately demonstrate probable absence of the NLEB by conducting surveys using the Service's *Indiana Bat and Northern Long-eared Bat Summer Survey Guidelines*, dated March 2024, or demonstrate the proposed action is not reasonably certain to cause take of the species via implementation of additional conservation measures or best management practices then take may not be reasonably certain occur and justify a "may affect, not likely to adversely effect" determination.

Furthermore, the Service does not understand how the numerical rationale descriptions used to inform Table 15, on page 54 of the DEIS, is being considered for the proposed project. In the Service's opinion, while the descriptions and table demonstrate that the USFS is considering the species ranges and seasonal variability in presence and use of suitable habitat by federally listed species (and other federally protected species), but the USFS does not mention how they are considering these factors across all forest and grassland sites in Nebraska and South Dakota. Also, if this table is intended serve as support of a 'no effect' determination for federally listed species the rationale as presented is overly generalized and does not clearly support the USFS conclusion. See comment number 7 on the attachment for the Service's suggestion on organizing Table 15.

Additionally, the listing statuses for the NLEB, Whooping Crane, and ABB are misidentified in Table 15 on page 54. The NLEB is an endangered species (88 FR 4908) and the Whooping Crane is endangered (32 FR 4001). The American BB was identified as both threatened and endangered, but it is threatened with a subsequent 4d Rule (85 FR 65241).

Generally, in an EIS, the lead federal agency includes their Official Species List and outcomes of any determination keys obtained from the IPaC along with any email coordination between the Service in an appendix of the EIS. This information was missing from the DEIS in Chapter 4: Consultation and Coordination, and not included as an appendix. We suggest you include this documentation with the final draft.

Lastly, the Service is interested in learning what February 25, 2022, letter (referenced on page 62) is the USFS referring to.

### **Bald and Golden Eagle Protection Act**

The bald eagle (*Haliaeetus leucocephalus*) and golden eagle (*Aquila chrysaetos*) are protected from a variety of harmful actions via take prohibitions in the MBTA and Eagle Act. The Eagle Act, enacted in 1940 and amended several times, prohibits take of bald eagles and golden eagles, including their parts, nests, young or eggs, except where otherwise permitted pursuant to federal regulations. Incidental take of eagles from actions such as electrocutions from power lines or wind turbine strikes are prohibited unless specifically authorized via an eagle incidental take permit from the Service.

The Eagle Act provides penalties for persons who "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof."

The Eagle Act defines take to include the following actions: "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest or disturb." The Service expanded this definition by regulation to include the term "destroy" to ensure that "take" also encompasses destruction of eagle nests. Also, the Service defined the term disturb which means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

The Service has developed guidance for the public regarding means to avoid take of bald and golden eagles:

- The 2007 *National Bald Eagle Management Guidelines* (Eagle Management Guidelines) serve to advise landowners, land managers, and others who share public and private lands with bald eagles when and under what circumstances the protective provisions of the Eagle Act may apply. They provide conservation recommendations to help people avoid and/or minimize such impacts to bald eagles, particularly where they may constitute "disturbance," which is prohibited by the Eagle Act: <https://www.fws.gov/migratorybirds/pdf/management/nationalbaldeaglenanagementguidelines.pdf>.

The Service's primary concern with the proposed project currently is its potential to disturb eagles. In the Affected Environment and Environmental Consequences section of the EIS, the USFS identifies that both bald and golden eagles are present in the proposed project area and that protection measures will be implemented to eliminate impacts to the species. However, the USFS does not indicate the protection measures they plan to implement nor acknowledge the Service's Eagle Management Guidelines. The Service recommends that the USFS review the Service's Eagle Management Guidelines, apply them to the proposed project, and specify how they will be implemented in the EIS to demonstrate their compliance with the Eagle Act.

### **Migratory Bird Treaty Act**

The conservation and management of migratory birds and their habitats continues to be a priority for the Service. Therefore, we are providing our recommendations to help the USFS conserve and minimize impacts to migratory birds and their habitats from the proposed project because the USFS does not specify in the EIS what conservation conditions they are going to implement to demonstrate compliance with MBTA.

In Nebraska, most migratory bird nesting activity occurs during the period of April 1 to July 15. However, some migratory birds can nest outside of this primary nesting season period. For example, raptors can nest in woodland habitats during February 1 through July 15, whereas American goldfinch, which occurs in a variety of shrubby habitats, normally nests from July to

September. To avoid or minimize impacts to migratory birds, the Service recommends that the USFS voluntarily avoid tree removal or impacts to vegetation during the primary nesting season of breeding birds (April 1 to July 15). In addition to this recommendation, there are other suggestions for reducing project impacts to birds from specific industries or types of projects to help avoid and minimize impacts to all birds and those can be found on the following Service websites:

- [Avoiding and Minimizing Incidental Take of Migratory Birds](#)
- [Nationwide Standard Conservation Measures](#)
- [Threats to Birds](#)

The Nebraska Ecological Service's Field Office is happy to participate on a coordination call at the USFS's convenience to discuss our comments in greater detail. Please also include the South Dakota Ecological Service's Field Office on any coordination call requests.

### **NPS Comments**

Badlands National Park strives to maintain as natural an acoustic environment as possible, to preserve ecological integrity, protect wilderness character, and provide for visitor enjoyment. However, use of piloted aircraft or unmanned aerial systems for aerial chemical treatments of undesirable plants has the potential to negatively impact the acoustic environment of the National Park and the Badlands Wilderness Area. If piloted aircraft depart the Wall Municipal Airport to apply chemical treatments to the inventoried undesirable plants in Wall Southwest and Wall Southeast geographic areas (Wall Ranger District Office, the northeastern portion of Buffalo Gap National Grassland), they will need to fly over Badlands National Park and the Badlands Wilderness Area. And if Unmanned Aerial Systems (UAS) are operated near the borders of the Park, the low-elevation, high frequency noise they emit has the potential to disturb wildlife and annoy visitors, even if the UAS themselves do not travel over the Badlands National Park airspace.

As the DEIS currently does not include potential home airports or aircraft routes for aerial chemical treatments, nor does it evaluate potential acoustic impacts of aerial chemical treatments, the NPS would like to see both included, as well as mitigation measures.

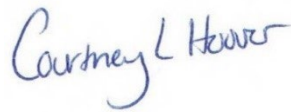
Please note that the recently completed Air Tour Management Plan for the Badlands National Park requires commercial air tour operators to conduct all air tours beyond 0.5 mile from the boundary or stay at least 5,000 feet above ground level when over the park.

**Coordination on Comments**

For USFWS Comments, please coordinate with Amanda Ciurej at [amanda\\_ciurej@fws.gov](mailto:amanda_ciurej@fws.gov). For NPS Comments, please coordinate with Tyra Olstad, Interdisciplinary Scientist - Natural Sounds and Night Skies Division National Park Service, at [tyra\\_olstad@nps.gov](mailto:tyra_olstad@nps.gov).

If you have any additional questions for the Department, please contact me at (303) 478-3373, or [courtney\\_hoover@ios.doi.gov](mailto:courtney_hoover@ios.doi.gov).

Sincerely,

A handwritten signature in blue ink that reads "Courtney Hoover". The signature is written in a cursive, flowing style.

Courtney Hoover  
Regional Environmental Officer  
Office of Environmental Policy and Compliance

**Attachment - Additional U.S. Fish and Wildlife Service (Service) Comments**

| <b>Comment Number</b> | <b>Page Number</b> | <b>Referenced Text</b>                                                                                                                                                                                                                                                                                                                                                               | <b>Comment</b>                                                                                                                                                             |
|-----------------------|--------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1                     | 52                 | “On February 25, 2023, a list of threatened, endangered, and proposed species, to include critical habitat, that may be present in the action area was requested from the United States Department of Interior (USDI) Fish and Wildlife Service (hereafter Fish and Wildlife Service). The list of species was received on February 25, 2023 (USDI Fish and Wildlife Service 2023).” | The Service recommends adding Official Species List as an appendix to this EIS.                                                                                            |
| 2                     | 53                 | “Habitat is completely absent or lacks vital components inside activity area, making it unsuitable for occupancy or use by the species in question.”                                                                                                                                                                                                                                 | What about habitat present adjacent to the proposed project area that could be indirectly effected? Make sure indirect effects are assessed.                               |
| 3                     | 54                 | Northern Long-eared Bat (T) (Mammal)                                                                                                                                                                                                                                                                                                                                                 | Northern Long-eared Bat is now listed as an endangered under the Endangered Species Act (88 FR 4908 4910).                                                                 |
| 4                     | 54                 | Whooping Crane (T) (Avian)                                                                                                                                                                                                                                                                                                                                                           | Whooping Crane is a federally endangered species.                                                                                                                          |
| 5                     | 54                 | American Burying Beetle (E ) (Invertebrate)                                                                                                                                                                                                                                                                                                                                          | ABB is a T, not E.                                                                                                                                                         |
| 6                     | 54                 | Threatened in American Burying Beetle Row                                                                                                                                                                                                                                                                                                                                            | Change to “Threatened with a 4d Rule”                                                                                                                                      |
| 7                     | 62                 | “Per communications with the Fish and Wildlife Service (letter dated February 25, 2023), the Nebraska does not contain federally listed or proposed critical habitats; therefore, both alternatives would have “No effect” on critical habitat.”                                                                                                                                     | The February 2023 letter is not provided with this EIS and should be. It is unclear what coordination between the USFS and the Service occurred prior to issuing the DEIS. |

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|  |  |  | <p>Table 15, in addition to the descriptions of the indirect and direct effects of chemical, biological, prescribed fire, and mechanical forms of plant management, do not support a "no effect" determination for at least the American Burying Beetle and Northern long-eared Bat for Endangered Species Act compliance.</p> <p>The descriptions of indirect and direct effects indicate take of these species may occur. Although, it is unclear if take is reasonably certain to occur or not based on the contents in the DEIS.</p> <p>Additionally, it is unclear what conservation conditions the USFS is going to implement to ensure take as defined under 50 CFR 22.6 of the Bald and Golden Eagle Protection Act does not occur. Although, based on the descriptions of the indirect and direct effects of the forms of management, disturbance to eagles is the Service's primary concern and it appears to be likely. Therefore, the Service recommends that USFS look at the Service's Eagle Management Guidelines at the buffer distances to implement around any active or inactive nests to ensure disturbance does not occur.</p> <p>Similarly, it's unclear how USFS is specifically avoiding or</p> |
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|   |    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <p>minimizing impacts to migratory birds in compliance with Migratory Bird Treaty Act.</p> <p>As a suggestion to help address these comments is to reorganize this section of the EIS and organize it by statute instead of throwing all federally protected resources into one table (i.e. Table 15). For example, USFS can organize section by:</p> <p>Federally Listed, Proposed, and Candidate Species<br/>Migratory Birds and Eagles<br/>Other Species of Conservation Concern</p> |
| 8 | 64 | <p>“For the modified proposed action, a determination of ‘May adversely impact individuals, but not likely to result in a loss of viability in the planning area, nor cause a trend to federal listing or a loss of species viability range wide’ was again reached for sensitive species. Rationale for this determination is based on the fact that there is a suite of tools that can be used to control undesirable plant species including biocontrol, chemical applications (ground based and aerial), mechanical, and prescribed fire. In general, these activities are expected to enhance habitat for many sensitive or management indicator species.</p> <p>However, during the implementation phase of the project, some of these activities can be stressful for</p> | <p>See DOI’s comment letter under the USFWS Nebraska ESFO comments on MBTA.</p>                                                                                                                                                                                                                                                                                                                                                                                                         |

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|  |  | wildlife if conducted within a certain proximity to individuals or cause wildlife to disperse into less desirable areas making them more susceptible to death or harm due to predation and other environmental factors. Equipment used to control undesirable plants could be fatal to wildlife if it was to collide with individuals, and some of the chemicals used in these treatments can be toxic to wildlife causing allergic reactions, sickness, or death when contacted or consumed by individuals.” |  |
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