APPEAL TO THE REGIONAL FORESTER, TOM TIDWELL, NORTHERN REGION, USDA FOREST SERVICE, FROM A DECISION OF THE DAKOTA PRAIRIE GRASSLANDS MCKENZIE DISTRICT RANGER

DEFENDERS OF WILDLIFE
WILDEARTH GUARDIANS

v.

RONALD HECKER
MCKENZIE DISTRICT RANGER,
DAKOTA PRAIRIE GRASSLANDS

Responsible Official

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Defenders of Wildlife ("Defenders") is a 501(c)(3) nonprofit organization founded in 1947 with approximately 500,000 members and supporters. Defenders is dedicated to the protection and restoration of native wild animals and plants in their natural communities. Our programs encourage conservation of entire ecosystems and interconnected habitats while protecting predators that serve as "umbrella" species for ecosystem health. Defenders has a demonstrated long-standing interest in the management of national forests, national grasslands, roadless areas, the wildlife that inhabit those lands, and all of the ecological values of those lands. Defenders has actively participated in management of national grasslands including the McKenzie Ranger District, and the resources within them, and will continue to do so.

WildEarth Guardians works to protect and restore wildlife, wild places, and wild rivers in the American West. WildEarth Guardians' staff and members work to protect, and recreate on and enjoy, the prairie ecosystems on National Grasslands managed by the U.S. Forest Service, including the Little Missouri National Grassland. WildEarth Guardians is keenly interested in protection of the black-tailed prairie dog and the ecosystem this keystone, strongly interactive species creates and sustains. Poisoning, shooting, and other forms of lethal control will adversely impact the black-tailed prairie dog as well as associated wildlife. WildEarth Guardians petitioned the U.S. Fish and Wildlife Service to list the black-tailed prairie dog under the Endangered Species Act in 2007, and we work to ensure that federal agencies - such as the U.S. Forest Service - do not permit activities that further imperil this imperiled species.

The Forest Service's failure to prepare a legally adequate and sound plan for prairie dog management and conservation directly and adversely affects all Appellants', their staffs', and their members' use and enjoyment of the McKenzie Ranger District of the Dakota Prairie Grasslands.

Additionally, all Appellants achieve their conservation objectives, in part, by reviewing, commenting upon, appealing, and, in some cases, challenging in court many Forest Service decisions. Appellants have strong, continuous interests in ensuring that Forest Service decisions are based on accurate, objective, and scientifically sound environmental information. Appellants' ability to assess, comment on and appeal the McKenzie Ranger District Black-tailed Prairie Dog Management Project Environmental Assessment (EA) has been and is impaired by the Forest Service's failure to properly and

legally prepare these documents. The Forest Service's failure to properly analyze the environmental impacts of its decisions has led to, and will continue to lead to, the Forest Service making uninformed decisions based on incomplete, inaccurate, and scientifically unsound analyses and conclusions. As a result of this uninformed decision-making, the Forest Service has undertaken or permitted, or will undertake or permit, activities on the McKenzie Ranger District which have, or will have, harmful environmental impacts that could be mitigated or avoided if the Forest Service properly analyzed the impacts of its decisions and of the forest plan. These poor decisions have, and will continue to, destroy aesthetic values, harm wildlife, and diminish the recreational experiences of Appellants, Appellants' staffs, and Appellants' members who use and enjoy the McKenzie Ranger District.

Appellants bring this appeal on their own behalf and on behalf of their adversely affected members. Appellants' interests and those of their members are within the zone of interests protected by the statutes at issue in this appeal and would be redressable in the federal courts.

NOTICE OF APPEAL

On May 16, 2008, Ronald Hecker (Responsible Official), District Ranger of the McKenzie Ranger District, signed the Black-tailed Prairie Dog Management Project Decision Notice (DN) and Finding of No Significant Impact (FONSI) to implement Alternative 1 of the Black-tailed Prairie Dog Management Project Environmental Assessment (EA).

Beginning with the purpose and need, this EA is flawed. The first sentence of the purpose and need accurately identifies that the long term objective is to increase prairie dogs, and notes that the Grasslands Record of Decision (ROD) recognizes the importance of the national grasslands in increasing prairie dog numbers and improving prairie dog viability, and the importance of prairie dogs to black-footed ferret recovery. The purpose and need then brushes these central issues aside and focuses solely on eradication. It prioritizes one direction – the "good neighbor" policy – as noted in a discretionary review by Deputy Undersecretary David Tenney, and then interprets it in isolation rather than in the way it was meant to be implemented: within the framework of the overall Grasslands Plan. At the same time, by rejecting translocation, it ignores the part of the "good neighbor" direction that requires agency officials to "use the *full suite* of management tools available to them to reduce the potential for prairie dog colonies to expand onto adjacent non-federal lands." Finally, it prioritizes this "good neighbor" direction over laws passed by the U.S. Congress, including NEPA, NFMA, APA, and ESA.

The EA, DN, and FONSI are not consistent with the Grasslands Plan. By framing the Purpose and Need so narrow as to allow discussion and analysis only of "control" and thereby reject any possibility to implement the overall direction for prairie dog management within the Grasslands Plan, these documents send the McKenzie Ranger District in the opposite direction of that described in the Grasslands Plan. As a result, large prairie dog colonies or complexes become even less likely to occur in the future. As will be made clear in the Statement of Reasons, large prairie dog colonies are critical for prairie dogs and for associated wildlife. As will also be made clear, one cannot simply assume net increases in prairie dog numbers in the future and that the proposed poisoning of 15 percent of the district's prairie dogs is therefore no big deal.

We also point out that the lands at stake are public lands available and legally obligated to provide habitat for all native wildlife. The EA, DN, and FONSI impact populations of prairie dogs and the many other species that are part of the plant and animal community associated with prairie dogs.

Alternative 1, among other things: irrationally ignores all prairie dog management direction other than poisoning as "outside the scope of the purpose and need"; contains virtually no enforceable standards for the protection of viable populations of wildlife species; ignores the very real threat of plague and does not include plague management strategies; and threatens extirpation of prairie dogs and associated species from the McKenzie Ranger District, especially in conjunction with the possibility of plague and the ongoing and completely unregulated shooting.

The Forest Service is aware of the significance of the prairie dog populations to a host of other species. Prairie dogs are fundamental to the proper functioning of the grassland ecosystem, and large prairie dog colonies are relied on by a host of species. The poisoning and reduction of prairie dogs through the EA, DN, and FONSI – and repeated refusal to consider mitigation that would protect or expand prairie dog populations elsewhere on the grassland such as translocations or shooting closures – are inconsistent with the agency's duties toward these species and the plant and animal communities to which they belong.

The underlying Grasslands Plan is flawed, as evidenced in Appellants' appeal of that plan, for example by failing to provide for the diversity of plant and animal communities as required by the National Forest Management Act ("NFMA"). The EA, DN, and FONSI, however, go beyond the Grasslands Plan and expand its flaws to allow eradication of prairie dogs with no clear mitigation for such action.

We also bring to your attention comments sent to the USFS by the Environmental Protection Agency (EPA) in 2008 regarding the prairie dog management plan for the Thunder Basin National Grassland. The EPA raised multiple concerns over the Thunder Basin plan and asked USFS to further consider how lethal control of prairie dogs will impact black-footed ferret reintroduction and the viability of black-tailed prairie dogs given declining prairie dog population trends on the Thunder Basin National Grassland. The EPA requested a non-lethal alternative that relies on translocation and visual barriers to manage prairie dogs. See Attachment 1: 2008 Letter from Environmental Protection Agency to USFS Regarding Thunder Basin National Grassland.

The EPA rated the Thunder Basin plan as "EC-2," which means that EPA identified potential environmental impacts that should be avoided in order to provide adequate protection of environmental resources, and the draft EIS does not contain sufficient information for the EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment. See Attachment 1. In its detailed comments on the Thunder Basin prairie dog plan, among other things, the EPA further advised USFS to consider the 2007 petition to list the black-tailed prairie dog under the Endangered Species Act (ESA). See Attachment 2: 2008 Detailed Comments by Environmental Protection Agency to USFS Regarding Thunder Basin National Grassland.

The same issues EPA raised on the Thunder Basin apply to McKenzie Ranger District. USFS should consider in entirety the issues EPA raised, particularly the impact of a lethal prairie dog management plan on the black-footed ferret and the black-tailed prairie dog; the 2007 ESA listing petition; and the need for consideration of a non-lethal alternative. See Attachments 1 & 2. In addition, EPA's warning for the Thunder Basin is relevant for the McKenzie Ranger District: the EA, FONSI, and DN would cause environmental impacts that should be avoided in order to provide adequate protection of environmental resources, and the EA, FONSI, and DN do not contain sufficient

information for full assessment of environmental impacts that should be avoided in order to fully protect the environment.

We therefore urge you to revise the EA to include this significant new information and also include in the revised EA a new alternative that prohibits all lethal control of prairie dogs (including poisoning, shooting,[1] and any other form of lethal control) across the entire McKenzie Ranger District.

The threat from plague was dismissed in the EA. It is imperative that the EA be revised to consider the potential for plague, as it has significant environmental consequences. It should also impact your selection of an alternative. The only alternative that is appropriate is a new alternative that prohibits all lethal control of prairie dogs across the entire McKenzie Ranger District given that the ability of the prairie dog ecosystem (prairie dogs and associated species) to persist across most of the McKenzie Ranger is in serious doubt due to the threat from plague alone. As noted earlier, EPA recommended to the USFS in a similar situation that a non-lethal alternative be added to a draft EIS.

In its decision to remove the black-tailed prairie dog from the ESA candidate list, the U.S. Fish and Wildlife Service assumed that the plague line would hold, and all of South Dakota would remain plague-free. 69 FR 51217, 51224. The epizootic underway in Conata Basin and spreading across South Dakota undermines that assumption. Compounding the threat from plague with lethal control on USFS lands in the Dakotas will therefore contribute to the need to list this species under the ESA.

In addition, WildEarth Guardians and other conservation groups submitted a petition to list the black-tailed prairie dog on August 1, 2007 (Attachment 3: WildEarth Guardians et al. August 1, 2007 Black-tailed Prairie Dog Endangered Species Act Listing Petition). By documenting new threats not addressed in your EA, this petition also presents substantial new information and presents the best available information on the status of the black-tailed prairie dog across its range.

USFS must therefore revise its EA to disclose and consider the substantial new information we have documented in this appeal: 1) the relevance of EPA comments on a similar prairie dog management plan to the environmental issues being considered in the McKenzie Ranger District prairie dog management plan; 2) how lethal control will compound the threat to these species from the very real possibility of plague; and 4) the extent to which USFS alternatives that include lethal control contribute to the need to list a species under the ESA.

The EA is not sufficient, as it fails to consider the environmental impact of authorizing lethal control on a prairie dog population that is susceptible to plague. You must consider the potential impact of plague on black-tailed prairie dogs and associated

[1]The U.S. Fish and Wildlife Service determined for montane populations Gunnison's prairie dog *(Cynomys gunnisoni)* that, while the agency does not consider shooting a threat on its own, shooting can compound the adverse impacts of poisoning and plague. 73 FR 6660, 6674.

wildlife in your decision regarding prairie dog management. You must also consider the best available science on the biological status of the black-tailed prairie dog. We believe this information is significant enough to warrant a new analysis within an EIS that is based on the best available information. Scientists and the public should be provided with an opportunity to comment on a new EIS on this issue under the provisions of the National Environmental Policy Act. In addition, the revised EIS should include an alternative that prohibits all lethal control of prairie dogs across the entire McKenzie Ranger District.

Pursuant to 36 C.F.R. § 215, Appellants hereby appeal District Ranger Hecker's decision to approve the unlawfully inadequate plan. As noted above, Appellant organizations have members, supporters, and/or staff who use and enjoy the McKenzie District; Appellants previously commented upon the plan.[2]

Appellants will demonstrate that the District Ranger's decision is in error and not in accordance with the legal requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and its implementing regulations, the National Forest Management Act (NFMA), 16 U.S.C. § 1600 et seq., and its implementing regulations, the Administrative Procedure Act (APA), 5 U.S.C. § 706, and Forest Service policy and guidance, among others.

The decisions in the Black-tailed Prairie Dog Management Project Environmental Assessment (EA) directly and significantly affect Appellants. Staff and members of appellant groups regularly use the McKenzie Ranger District. Implementation of the EA, DN, and FONSI will adversely affect Appellants because they will result in: degradation of wildlife habitat for a variety of species; recreational user conflicts; and the reduction of visual and recreational quality, among other impacts, in and around the analysis area.

In short, the McKenzie Ranger District still has a long way to go to live up the Forest Service's duty to comply with law and policy, and to ensure the protection of the Grassland's values for generations of Americans to come.

[2]Forest Service regulations permit "any person or any non-Federal organization or entity may challenge a decision" to amend or revise a Forest Plan. 36 C.F.R. § 217.6(a).

STATEMENT OF REASONS

I. AT LEAST ONE ADDITIONAL COMMENT PERIOD IS REQUIRED.

The scoping notice for this prairie dog management project was the public's only opportunity to comment, but the scoping notice clearly was not intended to be a NEPA environmental analysis document. For example, the project description provided no information regarding the direct, indirect and cumulative impacts of the proposed action. The scoping notice was simply a general document alerting the public to a forthcoming project, providing a possible outline of what that project may look like, and soliciting early public input into shaping the draft project. Despite its purposely restricted nature, in order to properly comply with NEPA, the scoping notice must provide the public an opportunity to review and comment on the full proposal and its accompanying environmental effects.[3]

The practice of accepting comments only at the project scoping state is based on revised appeal regulations. 36 C.F.R. § 215.5(a)(2) (2003) provides that Responsible Officials may now choose the "most effective timing" for providing public comment on a project, eliminating the need to provide comment at the same administrative stage for all projects. However, applying this provision so that comments are only accepted at a project's "scoping" stage is nonsensical because there is very little project information for the public to comment on, is inconsistent with the Appeal Reform Act's goal of providing uniformity in the public comment and appeals process, and is inconsistent with NEPA.

The Forest Service acknowledges that NEPA applies to its actions, but in taking a "scoping-only" approach to comments, incorrectly assumes that NEPA does not require comment on an EA. The Forest Service has argued that this approach complies with the uniformity goals of the Appeals Reform Act (ARA): "[A]llowing the Responsible Official flexibility in determining when to give legal notice for the opportunity to

[3] The Forest Service must "insure that environmental information is available to public officials and citizens before decisions are made . . .", 40 C.F.R. § 1500.1(b); "to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d); "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing [environmental] assessments;" 40 C.F.R. § 1501.4(b); and "involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs." 46 Fed. Reg. 18026, 18037 (March 23, 1981)("Forty Most Asked Questions Concerning CEQ's NEPA Regulations," Answer to Question 38.) The Forest Service must "[p]rovide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected," 40 C.F.R. § 1506.6(b), including EAs and EIS, 40 C.F.R. § 1508.10, and in order to "[s]olicit appropriate information from the public." § 1506.6 (d).Ultimately, "'[t]he public must be given an opportunity to comment on draft EAs and EISs.'" Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003), quoting Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002); see also Environmental Protection Information Center v. Blackwell, 2004 U.S. Dist. LEXIS 20717 (* p. 77) (N.D. Cal. 2004); Montana Wilderness Association v. Fry, 310 F. Supp. 2d 1127, 1144 (D. Mont. 2004); Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704 (9th Cir. 1993). The preparation and circulation of the environmental review document "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

comment meets the intent of the ARA. It provides a clearly defined, uniform period when public comment on specific Forest Service projects and activities is solicited." 68 Fed. Reg. at 33,586; see also id. ("the Responsible Official [has] discretion to determine the most effective timing for providing the 30-day comment period."). This explanation, however, can not overcome the ARA's goal of uniformity.

In our scoping comments, we urged the Forest Service to accept comments on the EA for this project, but this request was rejected with the following: "We followed requirements for scoping/comment for this project. It is the commenter's opinion that it was not adequate. We received a great deal of helpful input on this project during the scoping/comment period." This response does not address the detailed and legally supported points raised in our scoping comments and repeated in this appeal.

II. AN EA IS NOT ADEQUATE; AN EIS IS REQUIRED.

The McKenzie District's prairie dog management proposal encompasses prairie dog colonies scattered across the entire 500,000-acre District. Wildlife that benefits from prairie dog colonies in the area ranges from migratory songbirds to raptors to burrowing owls to badgers, and many others.

Within this context, and in an area where prairie dog colonies have already largely been eliminated, the Proposed Action would eradicate up to an additional 18% of the little that remains over a period of at least two years. Each year's proposed poisoning would substantially affect wildlife and habitat. An environmental impact statement (EIS) is required by the National Environmental Policy Act (NEPA) for all such federal actions that significantly affect the quality of the human environment. 42 U.S.C. 4332 (C).[4]

The National Environmental Policy Act ("NEPA") "encourage[s] productive and enjoyable harmony between man and his environment . . . [and] promote[s] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. In pursuit of these lofty goals, NEPA establishes "action-forcing" procedures that force agencies to take a "hard look" at environmental consequences. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

[4] If a major federal action (defined by 40 CFR §1508.18) will either individually or cumulatively have a significant effect on the environment, or even if there are questions as to its significance, the agency must take a "hard look" at environmental consequences such as the cumulative impacts of the activity and prepare an Environmental Analysis (EA). Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976).The EA determines whether possible impacts are significant, thereby warranting an EIS. Council on Environmental Quality (CEQ) regulations require that an EIS discuss cumulative—direct and indirect—impacts. An EIS must "catalogue adequately the relevant past projects in the area" and describe them with sufficient specificity to permit adequate review of their cumulative impact. City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1160, 1175 (9th Cir. 1997). "Without such detailed information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1379(9th Cir. 1998).

NEPA requires that all agencies of the Federal Government shall . . . include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332.

This statement is referred to as an environmental impact statement ("EIS"). In determining whether a federal action requires an EIS (*i.e.*, whether it is a "major" action "significantly affecting the quality of the human environment"), an agency must prepare an environmental assessment ("EA"), 40 C.F.R. § 1501.4(b), that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact [("FONSI")]" and which also, among other things, briefly discusses the environmental impact of the proposed action.33 40 C.F.R. § 1508.9.

In the present case, the Forest Service prepared an EA in which they found that Alternative 1 would have no effect on the environment. Accordingly, the Forest Service issued a FONSI. Appellants challenge the EA's findings that Alternative 1 would have no effect on the environment and contend that the Forest Service should have prepared a full EIS.

In reviewing an agency's decision not to prepare an EIS under NEPA, [the Court] employ[s] an arbitrary and capricious standard that requires [it] to determine whether the agency has taken a "hard look" at the consequences of its actions, "based its decision on a consideration of the relevant factors," and provided a "convincing statement of reasons to explain why a project's impacts are insignificant." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998), and *Metcalf*, 214 F.3d at 1142). [A]n EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor. To trigger this requirement, a plaintiff need not show that significant effects *will in fact occur*; raising substantial questions whether a project may have a significant effect is sufficient. *Idaho* Sporting Congress v. Thomas, 137 F.3d 1146, 1149–50 (9th Cir. 1998) (quotations omitted).

Although the first sentence of the EA notes that "control of black-tailed prairie dogs (prairie dogs) has been and continues to be a controversial topic," the DN and FONSI makes the following claim as to why the issue of prairie dog management is not controversial for the purposes of requiring an EIS rather than an EA:

> "Based on the involvement of Forest Service resource specialists and members of the public, I do not expect the effects of the selected

> alternative to be highly controversial in a scientific context. Some respondents disagree with the proposed action; however, the opinions they expressed, and which are considered within the EA, did not disclose any significant adverse effects that would result from the project."

FONSI at p.6. This could not be further from the truth. The cumulative effect of adjusting the boundaries to remove active prairie dog colonies from the ferret management area 3.63 followed by this decision to poison those same prairie dog colonies is just one blatant and significant adverse effect.

As is stated below, appellants believe the level of prairie dog eradication called for in this EA will jeopardize viability for prairie dogs and many associated species, contrary to Forest Service claims. These beliefs are backed with substantial scientific evidence.

III. THE EA VIOLATES NEPA BY FAILING TO PROVIDE A RANGE OF REASONABLE ALTERNATIVES.

The EA violates NEPA because it fails to provide a full range of alternatives concerning prairie dog management and because it fails to consider significant environmental impacts of the proposed prairie dog management goals for each alternative.

The Forest Service clearly recognizes the importance of the black-tailed prairie dog *(Cynomys ludovicianus)* as an integral member of the short-grass prairie. For example, the Forest Service designated the prairie dog as a Management Indicator Species (MIS) for the prairie dog community which, in turn, is listed as a Management Indicator Community (MIC). See FEIS at Appendix G-13. The Forest Service also understands the importance of this species and community, as is evident by these classifications and from numerous discussions within this EA. Some of these other species include: the black-footed ferret, an endangered species that has been extirpated from the McKenzie Ranger District; the western burrowing owl, a sensitive species; and the ferruginous hawk, a sensitive species.

NEPA and regulations implementing it require agencies to consider a range of reasonable alternatives to an agency action in preparing EISs. NEPA requires agencies to:

> [s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

42 U.S.C. § 4332(2)(E).

That the EA failed to provide a reasonable range of alternatives regarding prairie dog management is clear. Only one alternative other than the no action alternative is evaluated. No alternative includes a requirement to maintain a complex of anything more than 1,000 acres, which amounts to 0.2% of the McKenzie Ranger District. In fact, the

proposed action would poison prairie dogs to within a few acres of the 1,000 acre minimum complex size.

All requests from the public that the EA offer an alternative with a more significant minimum requirement – one that approaches historic occupancy levels of 10-20% of the McKenzie Ranger District – were ignored. The McKenzie Ranger District once again fails to provide for variation in the management of this species and the ecosystem for which they serve as a keystone species. Because the prairie dog community is a unique, native, and essential habitat of the shortgrass prairie, maintenance at such a miniscule level with no deviations in any alternatives considered violates NEPA. 42 U.S.C. 4332(2)(C)(iii).

In order to "sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public," environmental documents must explore and evaluate "all reasonable alternatives." Id.; see also 36 C.F.R. § 219.12(f); Forest Service Handbook 1909.15 - Environmental Policy and Procedures Handbook, 1909.15-92-1, § 14, 57 Fed. Reg. 43180, 43198 col.2 (Sep. 18, 1992); Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971) ("detailed" EIS required "to ensure that each agency decision maker has before him and takes into account *all possible approaches* to a particular project ... which would alter the environmental impact and the cost-benefit balance.") (emphasis added).

This duty to consider reasonable alternatives is independent and of wider scope than the duty to complete an environmental impact statement ("EIS"). Although an agency need not consider every possible alternative, it must consider reasonable alternatives "necessary to permit a reasoned choice." Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1180-81 (9th Cir. 1990). Put differently, it must consider those alternatives that "would alter the environmental impact and the cost-benefit balance." Bob Marshall Alliance, 852 F.2d at 1228, quoting Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d at 1114.

An agency is "entitled to set some parameters and criteria . . . for generating alternatives to which it would devote serious consideration." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1522 (9th Cir. 1992). However, it may not "consider only those alternatives with [the same] end result." State of California v. Block, 690 F.2d 753, 767 (9th Cir. 1982) (finding that Forest Service failed to consider adequate range of alternatives in recommending development of wilderness study area).

Further, NEPA specifically mandates the evaluation of the environmental consequences of federal agency action:

> The National Environmental Policy Act requires federal agencies to evaluate the environmental consequences of their actions prior to commitment to any actions which might affect the quality of the human environment.

Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C.Cir. 1983). Moreover, it is well settled that a NEPA document must provide the decision-maker with adequate information to fully assess the impacts of an action. "If the decision was reached procedurally, without individualized consideration and balancing of environmental factors – conducted fully and in good faith – it is the responsibility of the courts to reverse. Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1115 (D.C. Cir. 1971); 42 U.S.C. Section 4332 (1976).

In our scoping comments, we urged the Forest Service to provide a range of reasonable alternatives. One specific suggestion was translocation rather than poisoning. This proven tool was considered in one alternative but rejected in the EA for the flimsiest of reasons: "because translocation is primarily a tool to augment or start colonies, which is not the purpose and need of this proposal." Even though the Tenney letter directed the USFS to use a full suite of tools available to reduce prairie dog migration on to private lands, and even though a range of reasonable alternatives would include nonlethal tools such as translocation, and even though translocation is a tool that can achieve the "good neighbor" policy while advancing the overall direction of the Grasslands Plan which even mentions translocation, the USFS decided to reject including an alternative that includes translocation. It seems the USFS is struggling to avoid any solutions which may actively improve the situation for prairie dogs even though the Grasslands Plan calls for just this.This was

IV. THE EA, DN, AND FONSI VIOLATE THE APA BY ACTING IN AN ARBITRARY AND CAPRICIOUS FASHION.

The McKenzie Ranger District has violated the APA by arbitrarily and capriciously choosing to maintain a prairie dog complex at a minimum of only 1,000 acres, or .2% of the McKenzie Ranger District. This flies in the face of scientific knowledge that prairie dogs historically inhabited 10-20% of the Great Plains. See Whicker and Detling 1988; Flath and Clark 1986; Summers and Linder 1978. This restriction also fails to acknowledge the massive depopulation that prairie dogs have endured, reducing them to less than 2% of their former range. See Wuerthner 1997; Miller et al. 1994; Samson and Knopf 1994; Whicker and Detling 1993.

The Administrative Procedure Act, 5 U.S.C.§ 706, requires all agency actions to conform with general standards of regularity and rationality. The courts will overturn agency decisions that are "arbitrary, capricious, or an abuse of discretion." (Ibid.) The Supreme Court has held that: "[N]ormally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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." Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

It is not apparent that the McKenzie Ranger District adequately applied standards of regularity or rationality in constructing a plan that allows poisoning to reduce the one and only complex of prairie dog colonies so long as a mere 1,000 acres remain.

V. THE EA, DN, AND FONSI VIOLATE NFMA BY FAILING TO MANAGE FOR THE DIVERSITY OF NATURAL COMMUNITIES, THE VIABILITY OF THE BLACK-TAILED PRAIRIE DOG, AND THE WIDE DISTRIBUTION OF THIS NATIVE COMMUNITY.

The National Forest Management Act (NFMA) directs the Secretary of Agriculture to issue regulations that will "provide for diversity of plant and animal communities ... in order to meet overall multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B). Pursuant to this statute, the Forest Service adopted regulations that charge the agency with managing fish and wildlife habitat to maintain viable populations of existing native and desired non-native vertebrate species within the planning area. 36 C.F.R. § 219.19 (1995). The regulations state that:

> For planning purposes, a viable population shall be regarded as one which has the estimated number and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to ensure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.

36 C.F.R. § 219.19. The "planning area" across which viable populations must be distributed is defined as the area of the National Forest System covered by a regional guide or forest plan. 36 C.F.R. § 219.3.

The plain language of the regulations thus requires the Forest Service to protect the viability of species on land under its jurisdiction by determining:

-- the estimated numbers and distribution of reproductive individuals across the planning area;

-- that the estimated number and distribution of reproductive individuals would insure its continued existence within the planning area;

-- that the habitat requirements necessary to support, at least, a minimum number of reproductive individuals have been met; and

-- that the distribution of habitat ensures that individuals can interact with others in the planning area.

Several courts have concluded that "the viability regulation requires the agencies to look to species populations -- not merely to habitat for hypothetical populations." Seattle Audubon Society v. Lyons, 871 F.Supp. 1291, 1316 (W.D. Wash. 1994), aff'd sub nom Seattle Audubon Society v. Mosely, 80 F.3d 1401; see also Sierra Club v. Glickman, 974 F.Supp. 905 (E.D. Tex. 1997) slip op. at 52-53, (citing favorably the SAS v. Mosely passage quoted above).

However, the Forest Service's duty to protect viable populations is not limited to individual species, for it also "requires planning for the entire biological community – not for one species alone." Seattle Audubon Society v. Moseley, 798 F.Supp. 1484, 1489 (W.D. Wash. 1992) quoting unpublished March 7, 1991, Order on Motions for Summary Judgment and Dismissal.

A memorandum from the Chief's office provides relevant guidance on the meaning of the population viability requirement. The memorandum emphasizes that "it is essential" that size and distribution of management areas "should be based on the specific biological requirements of the management indicator species such as home range size and dispersal capabilities. Hilmon (1982) at 1. Furthermore, "distribution of habitat [must] enable individuals to move among suitable habitat within their existing range" and the species' "general distribution" must not be affected by reductions in density. Id.

The duty to ensure viable or self-sustaining populations applies with special force to "sensitive" species. Or. Natural Resources Council v. Lowe, 836 F.Supp. 727, 733 (D.Or. 1993) (sensitive species "require additional attention" under viable population provision); Or. Natural Resources Council v. Marsh, 52 F.3d 1485, 1490-91 (9th Cir. 1995). Sensitive species are those species:

> for which population viability is a concern because they have significant current or predicted downward trends in population numbers or density, or for which there is a significant downward trend in their current or predicted habitat which would reduce their distribution.

Id.; see also FSM Supp. § 2670.5(19), WO Amendment 2600-95-7 (1995).

A. The EA fails to provide for the diversity of prairie communities based on the suitability of the McKenzie Ranger District.

The Forest Service must provide for the diversity of the entire prairie dog community based on the suitability of this area. The National Forest Management Act (NFMA) requires the Secretary of Agriculture to promulgate regulations that:

> shall include...specifying guidelines for land management plans developed to achieve the goals of the program which...provide for diversity of plant and animal communities based on the suitability and capability of the specific land area...within multiple use objectives of [the] land management plan...

16 U.S.C. § 1604(g)(3)(B)). The Forest Service must therefore manage not only for certain individual species, but for the diversity of "communities" as well.

The McKenzie Ranger District violates NFMA's requirement that "management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities...so that it is at least as great as that which would be expected in a natural forest..." (36 C.F.R. § 219.27(g)). "Diversity" here is defined as "the distribution and abundance of different plant and animal communities and

species within the area covered by a land and resource management plan" (36 C.F.R. § 219.3). Forest Plans must "provide for the diversity of plant and animal communities...consistent with the overall multiple-use objectives of the planning area" (36 C.F.R. § 219.26).

As noted above, historically 10-20% of the Great Plains was probably occupied by prairie dogs. See Whicker and Detling 1988; Flath and Clark 1986; Summers and Linder 1978. Therefore, National Grasslands in the northern Great Plains should allocate at least this percentage to prairie dogs. This is not presently the case. Further, the EA, DN, and FONSI will preclude the McKenzie Ranger District from approximating the natural range of acreage for prairie dogs. The range of prairie dog acreage to be maintained on the McKenzie Ranger District falls drastically short of the 10-20% of land occupied by prairie dogs in a natural setting.

Ten to twenty percent of the available land base would be a reasonable allocation if, in fact, prairie dogs still occurred in relative proportions throughout their historic range. But detailed surveys in many states show that prairie dogs exist on much smaller percentages of private lands than on public or tribal lands. Therefore, the proportion of the prairie dog community found on public lands should be substantially *greater* to make up for the loss of habitat elsewhere. Even using 10-20% of the land base as a benchmark, however, the McKenzie Ranger District is failing to meet the standards imposed by NFMA regulations. The McKenzie Ranger District would have to increase its prairie dog acreage more than tenfold to approximate the "natural setting" which it is required to approximate, under federal regulation.

The entire prairie dog community must be maintained at levels at least as great as would occur in "nature." It seems apparent that sufficient habitat is not being maintained if important community members such as black-footed ferrets are not present within the planning area in numbers sufficient to establish their viability within the planning area. Given that past experience includes the Forest Service's oversight of the extirpation of the black-footed ferret from the McKenzie Ranger District, this reference is without basis.

The majority of the McKenzie Ranger District contains habitat suitable for the prairie dog community. Because prairie dogs alter vegetative conditions, they create a unique community within the expanse of grasslands. This increases the overall vegetative diversity of the grassland and promotes an increase in other animal species that are a part of this community. Therefore, by allowing no protection of these areas (from shooting, for example), the McKenzie Ranger District is limiting the diversity and capability of the planning area.

B. The EA fails to provide for the viability of prairie dogs based on the suitability of the McKenzie Ranger District.

Under NFMA regulations, "habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning

area" (36 C.F.R. § 219.19). A "viable" population "shall be regarded as one that has the estimated numbers and distribution of reproductive individuals to insure its continued existence" (36 C.F.R. § 219.19). In this Plan, the McKenzie Ranger District violates this obligation to manage for the viability of the black-tailed prairie dog.

The viability level may be difficult to determine, but it is certainly something greater than a mere 1,000 acre complex. That so few small colonies could easily be eradicated by one plague event is apparent.

There is ample evidence that prairie dog suppression has resulted in an overall regional decline in the number of prairie dogs. Present estimates are that prairie dog population levels are at less than 2% of previous levels. See Wuerthner 1997; Miller et al. 1994; Samson and Knopf 1994; Whicker and Detling 1993. Remaining prairie dog colonies on Forest Service land tend to be isolated and fragmented, and are consequently more susceptible to local extirpation by factors such as sylvatic plague. See Wuerthner 1997; Miller, Reading and Forrest 1996.

The threats to prairie dog viability are ongoing. The most significant present threats are sylvatic plague, poisoning, shooting, and colony isolation/fragmentation. See Wuerthner 1997. Plague is an important threat to prairie dogs.

Sylvatic plague is not, however, the only threat to prairie dog viability. The McKenzie Ranger District has conducted inadequate analysis, as it has failed to consider the significance of threats to prairie dogs, and it consequently cannot ensure the viability of prairie dogs on the Grassland.

The threat that poisoning poses to prairie dogs cannot be overstated, but it is not adequately considered by the Forest Service in Alternative 1. Rather, Alternative 1 proposes to increase this threat significantly.

The threat that prairie dog shooting poses to prairie dog viability on the McKenzie Ranger District is also not adequately considered by the Forest Service. Shooting can suppress prairie dog numbers directly and through behavioral effects.[5] Shooting will reduce the prey base available to predators, and limit or eliminate prairie dog expansion. Shooting will also leave lead shot on the landscape and in prairie dogs, leading to possible lead poisoning of predators via poisoned prairie dogs.[6]

Shooting of prairie dogs reduces the prey base for certain predators. This is objectionable given the dependence of a broad range of avian and mammalian predators on prairie dogs as prey. This reduction may take the forms of decreased population levels and decreased prairie dog densities. The danger here is apparent:

[5] J. N. Pauli. Ecological Studies of the Black-Tailed Prairie Dog (*Cynomys ludovicianus*): Implication for Biology and Conservation. M. S. Thesis, University of Wyoming. Laramie, Wyoming. 2005. P. 77.
[6] Id. (evidence of lead in shot prairie dog bodies).

> Viable populations of associated species cannot be expected at low prairie dog densities. Based on our observations of other prairie dog complexes in Montana, prairie dog complexes need to be broadly distributed and with relatively high occupancy to assure minimal viable populations of associated species.

See Knowles and Knowles 1994. Consequently, management activities which may not result in the eradication of a town, but do result in the reduction of prairie dog population density, must be prohibited. This speaks directly to the need to prohibit prairie dog shooting.

Shooting alters prairie dog behavior. Researchers have found that a significant effect of shooting is behavioral alteration. See Irby and Vosburgh 1994. These scientists find that even light shooting has a significant effect on prairie dog behavior, with 42% of prairie dogs retreating to the burrows on a lightly shot colony, contrasted with a 22% retreat rate on unshot colonies, and 55% retreat rate on heavily shot colonies. Further, Irby and Vosburgh find that prairie dog shooters prefer higher densities of prairie dogs. This causes shooters to spread the pressure of their activity dependent on population density. Consequently, shooters may cause uniformity in prairie dog populations across colonies. Such uniformity is destabilizing to prairie dog populations.

Studies also report that shooting may decrease colony expansion rates. See Miller et al. 1993; Reading et al. 1989. One study found that a colony in Montana had a 15% annual expansion rate when prairie dogs weren't hunted, contrasted with a 3% expansion rate when they were. See Miller, Biggins, and Crete 1993. This dramatic decrease in rates of expansion represents decreased migration, which constitutes human interference with an integral population dynamic in prairie dogs: prairie dog dispersal. Even without shooting pressure, there is a low percentage of survival of dispersing males. See Garrett and Franklin 1981. In addition, prairie dog dispersal takes place in late spring (See Knowles 1985; Garrett and Franklin 1981), which is one of the most popular times of the year for recreational prairie dog shooting. The negative impacts of shooting on prairie dog migration may therefore be considerable.

Indeed, anything significantly altering prairie dog behavior is an interruption of the natural processes which have evolved over an estimated one million years that prairie dogs have inhabited the Great Plains of North America. See Clark 1968, cited in Sharps and Uresk 1990. Shooting's alteration of prairie dog behavior is significant and contrary to the adaptations prairie dogs have made to survive amidst non-human adversity. Skewing these behaviors may spell disaster for prairie dog viability.

Further, there is no evidence to suggest that prairie dog shoots do not result in the harming or killing of nontarget species, such as the burrowing owl, swift fox, ferruginous hawk, and mountain plover. First-hand accounts indicate that these shoots do result in the harming and killing of a variety of wildlife species other than prairie dogs. See Jon C. Sharps, pers. comm. 1997. In particular, imperiled species which conduct a major part of their activities on the ground within prairie dog colonies, such as ferruginous hawks,

mountain plovers, and burrowing owls, are all at risk of injury or death during prairie dog shooting.

There are consequently multiple reasons to prohibit prairie dog shooting on the McKenzie Ranger District. First, it causes a decrease in prairie dog population levels at a time when those levels need to be systematically increased, both for the viability of the prairie dog, and as a prey base for prairie dog predators. Second, this decrease in prairie dog populations will lead to a decrease in the environmental manipulation effected by prairie dogs and benefiting associate species. Third, prairie dog shooting results in altered prairie dog behavior, which has negative implications for prairie dog viability. Finally, it is reasonable to suspect that prairie dog shooting may directly injure or kill nontarget animals.

Colony isolation and fragmentation also represents a significant threat to prairie dog viability which is not addressed in the Forest Plan Revision. Given the Forest Service obligation to manage for the viability of the prairie dog, the McKenzie Ranger District must encourage the expansion of currently isolated small colonies. As mentioned above, remaining prairie dog colonies on U.S.F.S. land tend to be isolated and fragmented, which increases their vulnerability to sources of extirpation, such as sylvatic plague. See Wuerthner 1997; Miller, Reading and Forrest 1996.

Scientists have described the basis for this increased susceptibility, as they observe the critical role played by stochastic processes in the survival of small populations. See Brussard and Gilpin 1989; Miller, Reading and Forrest 1996. There are three types of these processes:

(l) populational or demographic uncertainty,
(2) environmental uncertainty, and
(3) genetic uncertainty.

The first type of stochastic process, demographic factors, comprises the following:

- random variation in sex ratios,
- age of first reproduction,
- number of offspring,
- distribution of offspring over the lifetime of an individual, and
- age at death.

See Brussard and Gilpin 1989:37. Research attention has generally not been directed to the role of demographic uncertainty in de-stabilizing small prairie dog populations.

The second type of stochastic process, uncertain environmental factors, involves, for prairie dogs, the presence or absence of pandemic diseases and fire. The most ominous environmental factor for prairie dogs is the sylvatic plague, to which the prairie dog has almost no natural immunity. See Barnes 1993; Cully 1993.

The McKenzie Ranger District can manage for plague by ensuring extensive prairie dog complexes. Researchers have found that the only reason prairie dogs have not been extirpated by plague is because of the historic existence of extensive prairie dog acreage. See Knowles and Knowles 1994. The USFS is consequently obligated to manage for expansive prairie dog complexes in order to ensure prairie dog viability.

The third type of stochastic process, genetic uncertainty, includes a reduction of variation through genetic drift, and inbreeding. See Brussard and Gilpin 1989. In an analysis of population reduction and genetic variability in prairie dogs, a researcher concluded that:

> In cases of more severe colony isolation, the effects of population control would probably be more noticeable, because genetic variability lost during bottlenecks would be less likely to be replaced through immigration.

See Daley 1992: 219. In terms of specifying the conditions for such immigration, Daley suggests that successful immigration is probably impacted by dynamics such as the distance between colonies and fluctuations in population density. Isolation would therefore serve to inhibit successful immigration, and would consequently have negative ramifications on genetic variability. This finding coincides with observations on habitat fragmentation. Two consequences of fragmentation reported by Wilcox and Murphy are 1) the loss of sources of immigration; and 2) the obstruction of recolonization and genetic exchange. See Wilcox and Murphy 1985.

In addition, a researcher finds that prairie dogs avoid extreme inbreeding through several mechanisms: 1) young males leave their natal coterie before breeding, while females remain; 2) adult males leave their breeding coteries before their daughters mature; 3) young females are less likely to come into estrus with their fathers present in the coterie; and 4) estrous females avoid mating with their fathers, sons, or brothers. See Hoogland 1982.

These mechanisms, however, can be distilled down to two dynamics: male dispersal and female avoidance. The first of these dynamics underscores the importance of unfettered migration by prairie dogs to ensure genetic variability. With hindered dispersal of males, a highly sophisticated schema for avoiding extreme inbreeding may be destroyed. This importance of male migration to prevent inbreeding is reported elsewhere. See Foltz and Hoogland 1983. In terms of the second dynamic, of female avoidance, states Hoogland: "Even when individuals avoid mating with close genetic relatives such as parents, offspring, and siblings, inbreeding coefficients can be high if populations are small and isolated..." See Hoogland 1982:1641. It is therefore clear that small, isolated prairie dog populations are more vulnerable to inbreeding.

The dynamics involved in these stochastic factors indicate that the surest route for maintaining viability of small populations is to encourage these populations to increase in size. Small, isolated prairie dog populations are not viable populations. The McKenzie

Ranger District, under its mandate to ensure the viability of native wildlife, must therefore encourage the expansion of prairie dogs from small colonies to large and medium size colonies in order to mitigate the stochastic processes faced by prairie dogs in small colonies with small populations.

The McKenzie Ranger District must also provide for a mosaic of prairie dog colonies, which vary in size and age, which is the naturally occurring pattern of prairie dog colonies. Differing age and size of prairie dog colonies is important for the diversity in rangeland conditions necessary for different associated species. Uniformity, achieved through poisoning, shooting or other means, is potentially destabilizing and therefore is less likely to maintain the viability of prairie dogs as required by NFMA regulation.

Research indicates that the most stable prairie dog system is one in which there is a highly skewed distribution of such variables as colony size, colony interspersion, prairie dog density and so forth. See Klebanoff et al. 1991; Lamberson et al. 1989. Thus, within the legal constraint that prairie dogs be "well distributed throughout the planning area" (36 C.F.R. § 219.19), the distribution of prairie dog colony sizes should include numerous large colonies with a continuum of progressively fewer small colonies.

In addition, core areas of undisturbed prairie dogs should be established and maintained. These refugia will provide a source to recolonize colonies that go locally extinct through intentional management or through natural causes. Because of the danger associated with epizootics of plague, there should be more than one core area within each planning area, so that prairie dog patches that go locally extinct due to plague may be quickly recolonized from unaffected areas.

In yet another different way, prairie dog viability depends on naturally occurring sizes of prairie dog colonies and complexes. Prairie dogs are a colonial species, and one of the benefits of increased colony size is less time devoted to predator detection. One researcher traced the relationship between prairie dog alertness and colony size, and found that relationship to be a negative one, with prairie dogs in larger colonies able to spend a smaller portion of their time on predator detection. Spending less time being on the alert for predators leaves more time for activities such as feeding and breeding. See Hoogland 1979. Alternatively, USFS management for small colonies imposes more constraints on prairie dog activity.

This recommendation for the expansion of prairie dogs will not result in unbridled growth, however, as prairie dog colonies do not expand exponentially. Rather, the expansion rate of the colony tends to be directly linked with the colony's age. In old colonies, the expansion rate is significantly slowed, to the range of 2-3% expansion per year (See Knowles and Knowles 1994), partially on account of increased prairie dog infanticide[7] (See Hoogland 1995; 1985), but also because of increased physical barriers

[7] Checks on prairie dog population increase in old and physically restricted colonies, with 51% of litters destroyed through infanticide and cannibalism (Hoogland 1985). Other estimates of infanticide casualties are at 39% of newborn litters (Hoogland 1995). New colonies, which are typically less than 10 hectares in size, expand rapidly, period. It is also important to acknowledge here that prairie dogs do not reproduce at

to expansion. See Reading et al. 1989; Garrett et al. 1982. A mix of new and old colonies will provide a reasonable rate of growth for USFS land management. The McKenzie Ranger District has failed to provide such a management plan, and therefore again fails to address adequately a significant threat to prairie dog viability.

C. The EA fails to Provide for a Wide Distribution of the Prairie Dog Community Throughout the McKenzie Ranger District.

NFMA requires that "habitat must be provided to support, at least, a minimum number of reproductive individuals and must be well distributed so that those individuals can interact with others in the planning area". 36 C.F.R. § 219.19. The current plan to require prairie dogs in only a few areas and reduce or eliminate them elsewhere therefore violates NFMA.

Prairie dogs now occur under conditions of extreme fragmentation. While many of these isolated, small, colonies appear to be maintaining population numbers where not impacted by plague (See Knowles and Knowles 1994), these small, isolated populations cannot be expected to persist in the long term because in the event of severe reductions in an isolated population, recolonization from other areas is unlikely. It is even more unreasonable to expect that species dependent on prairie dogs will be able to persist under conditions of prairie dog colony fragmentation observed today.

In our scoping comments, we urged the Forest Service to consider NFMA requirements to manage for diversity and viability, cited scientific literature identifying prairie dog numbers required for these goals, and specified how the proposal violated these requirements, but these comments were rejected as "outside the scope of this particular project."

VI. THE EA, DN, AND FONSI VIOLATE NFMA AND THE INTENT OF THE ENDANGERED SPECIES ACT BY FAILING TO PREVENT ADVERSE MODIFICATION OF HABITAT CRITICAL FOR THE ENDANGERED BLACK-FOOTED FERRET.

Alternative 1 falls far short of the Forest Service's duties under the ESA, especially Section 7(a)(1), to conserve and recover listed species. In fact, habitat adequate for a viable black-footed ferret population according to this EA is apparently a minimum acreage of only 1,000 acres in a single complex.

We urge the Forest Service to do more to advance black-footed ferret recovery, and do less to counteract ferret recovery efforts. The FS is under an obligation to "utilize [its] authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 USC § 1536(a)(1). The term "conservation" means "to use and the use of all methods and procedures which

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especially high rates. Female prairie dogs are in estrus only several hours of one day per year, producing an average litter of four (4) pups. The Nature Conservancy (1995).

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." 16 USC § 1532(3).

Instead of fulfilling this obligation, the Forest Service is compromising any future possibility of ferret recovery and recovery areas with its approval and implementation of the EA. Amazingly, the DN states that Supervisor Pieper authorized boundary adjustments of Management Area 3.63 "black-footed ferret reintroduction habitat" via a letter to District Ranger Hecker on September 26, 2007 to remove areas from 3.63 so that the prairie dog colonies could be poisoned. This is exactly contrary to the intent of the Grasslands Plan allowance for management area boundary adjustments "to facilitate management and protect intended values." Removing active prairie dog colonies from 3.63 so that they may be poisoned is a clear abuse of this authority. Ferret recovery will be precluded by the ROD in important and rare ferret habitat.

A. The Forest Service Violates NFMA by Failing to Prevent Adverse Modification of Habitat Critical for the Black-Footed Ferret.

Under the NFMA regulations, "[h]abitat determined to be critical for threatened and endangered species shall be identified, and measures shall be prescribed to prevent the destruction or adverse modification of such habitat" (36 C.F.R. § 219.19(a)(7)). The Forest Service is required, where possible, to include special areas to meet the protection and management needs of such species.

While the regulations do not specifically state that the Forest Service is required to provide habitat for certain endangered species (like the black-footed ferret) which have been extirpated from the national forest, such a reading is consistent with the Forest Service's mandate to "establish objectives for maintenance and improvement" of habitat for management indicator species chosen under § 219.19(a), which include threatened and endangered species. It would be an inconsistent application of NFMA if some National Forests were exempted from NFMA requirements to provide habitat for endangered and threatened species if such species were locally extirpated as a direct result of the agency's past management practices, as is the case for black-footed ferrets. The McKenzie Ranger District is therefore in compliance with NFMA regulations only if it provides habitat that, at a minimum, meets the protection needs of black-footed ferrets, whether they happen to be present on the planning area at a particular time or not.

A number of modeling efforts have been undertaken to estimate viability thresholds for the black-footed ferret, which result in estimates of the number of prairie dogs required to support such a population. Harris et al. (1989) determined that a population of 90 to 100 black-footed ferrets would have a 95% probability of persistence for 50 to 100 years. Harris et al. estimated that prairie dogs totaling 4,763 ha would be required to contain such a population. Based partly on this analysis, the U.S. Fish and Wildlife Service (1992) recommended that sites with 4,735-9,510 ha of active prairie dog colonies were likely necessary to sustain such a population for 50 to 100 years, given factors such as local extinction and recolonization, which leaves some colonies

unoccupied. The result is that long-term mean population is well below carrying capacity, therefore area needs should be higher. See Lamberson et al. 1989. The higher area requirement is supported by other research. See Klebenoff et al. 1991. Thus, the McKenzie Ranger District should be managing at a minimum 5,000-10,000 ha of black-tailed prairie dogs to meet its obligations under NFMA with respect to black-footed ferrets.

B. The Forest Service Violates the Spirit and Intent of the ESA by Failing to Prevent Adverse Modification of Habitat Critical for the Black-Footed Ferret.

The purpose spelled out in the Endangered Species Act is very explicit: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species..." 16 U.S.C.A. § 1531 (b). The goal is clear: species and the ecosystems on which they depend must be conserved. The McKenzie Ranger District is violating the purpose of the ESA by failing to protect an endangered species, the black-footed ferret.

That the ESA recognizes the danger which habitat destruction, in particular, poses to species is apparent in its criteria for listing species, the first of which is "the present or threatened destruction, modification, or curtailment of its habitat or range" 16 U.S.C.A. § 1533 (a)(1)(A). This is precisely what is at issue in the McKenzie Ranger District's failure to recognize the importance of protecting the prairie dog colony habitat on which the survival of the endangered black-footed ferret is exclusively dependent, and the McKenzie Ranger District is therefore in violation of the intent of the ESA.

VII. THE EA, DN, AND FONSI VIOLATE NFMA AND FSM RULES BY FAILING TO MANAGE FOR THE VIABILITY OF NATIVE WILDLIFE SPECIES ASSOCIATED WITH BLACK-TAILED PRAIRIE DOGS.

Many sensitive species are positively influenced by the presence of prairie dog towns. We will focus on two: ferruginous hawk and western burrowing owl. Keeping prairie dog populations at unnaturally low levels has and will continue to reduce the viability of these species within the planning area and continue the trend to federal listing of these species. The McKenzie Ranger District fails to provide the protective measures needed to assure sensitive species viability and distribution. The failure to collect population data, to analyze population trends, to survey important habitat components, and to initiate conservation plans for many sensitive species violates NFMA and the Forest Service Manual.

A. The McKenzie Ranger District failed to collect sufficient population data and analyze population status and trends for sensitive species on the Forest.

Section 2670.45 of the Forest Manual directs Forest Supervisors to determine the distribution, status, and trend of threatened, endangered, sensitive, and proposed species and their habitats on Forest lands. To determine the effects of management activities, the Forest Service must select, inventory, and monitor the populations and population trends of MIS (as opposed to only maintaining habitat and assuming species are present). This direction is reinforced by the recent Sierra Club v. Glickman suit in Texas, which determined,

> With respect to the Forest Service's inventorying and monitoring obligations, the Forest Service is not collecting population data on wildlife to ensure viable populations. The Forest Service instead is relying on hypothetical models to assess habitat capability and then assuming that viable populations of species are in existence and well-distributed on the forest land. The Forest Service's failure to collect population data forecloses its ability to evaluate forest diversity in terms of wildlife and to adequately determine the effects of its management activities."

Sierra Club v. Glickman, No. 9:85-CV-69, slip op. (E.D. Tex, August 14, 1997).

The McKenzie Ranger District has failed to provide adequate inventory and monitoring prescriptions in regard to sensitive species associated with prairie dogs, and therefore provides little basis for concluding that viable populations of these species will be ensured. The McKenzie Ranger District's failure to disclose these prescriptions are in violation of NFMA's implementation regulations and the Forest Service Manual. By neglecting their responsibility to conduct surveys and inventories for population data and analysis, the McKenzie Ranger District failed to protect species viability. On-the-ground population data and trend analysis is necessary and essential to determining species distribution and viability. The McKenzie Ranger District has failed to assure that viability due to their lack of data and analysis.

B. The McKenzie Ranger District failed to assess important habitat components for sensitive species.

Forest Service Regulations require:

> Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area . . . In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with other in the planning area.

36 C.F.R. § 219.19. This explicit requirement for habitat protection is violated by the McKenzie Ranger District.

C. The McKenzie Ranger District failed to assure species viability for sensitive species on the Grassland.

Department of Agriculture Regulation 9500-4 directs the Forest Service to "[a]void actions which may cause a species to become threatened or endangered." The Forest Service Manual reiterates, "Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions" (Forest Service Manual 2670.22(1)).

For several sensitive species on the McKenzie Ranger District, Alternative 1 will not have a beneficial impact on them or their habitat because it proposes to eradicate prairie dog towns. Because population status and trend data is not available, there is no way to ascertain that maintaining the status quo or merely "not likely to adversely effect" these species and their habitat is sufficient to prevent a loss of viability and a trend towards listing under the ESA. For example, if a sensitive species had a negative population trend, then the status quo would most likely continue that trend and lead toward a loss of viability and a need for listing.

The number of species in the prairie dog ecosystem with observed declines suggests that a host of problems are imminently likely to occur if prairie dog losses are not only stemmed, but rehabilitated to a number able to stop declines in the other species. American prairies are 98% less productive in prey biomass than in former times, which has had profound effects on higher trophic species, both birds and mammals, of the prairies.

1. The McKenzie Ranger District Fails to Ensure the Viability of the Western Burrowing Owl.

The Forest Service has provided an inadequate basis for concluding that its management activities will not incur a loss of viability or a trend to federal listing for the western burrowing owl (Athene cunicularia).

Prairie dogs benefit burrowing owls by providing shelter and increasing prey abundance (Agnew et al. 1987). Consequently, the decline in prairie dog habitat causes declines in burrowing owl numbers (Knowles and Knowles 1994). Although burrowing owls may be able to persist for a short time after a prairie dog colony has become inactive, the highest population densities of burrowing owls are found on active prairie dog colonies (Butts 1973), and burrowing owls prefer extensive prairie dog complexes (Hughes 1993). The restoration of active and extensive prairie dog colonies will be an important step toward insuring the viability of the burrowing owl in the Great Plains portion of its range. Yet, the Forest Service is proposing to reduce the already limited prairie dog-occupied acreage. The implications for such a prescription on the viability of burrowing owls on the McKenzie Ranger District are not adequately addressed. It remains unclear how the viability of the western burrowing owl will be ensured under a policy of severely curtailing prairie dog populations. While the potential for a sylvatic plague epizootic does represent an important threat to prairie dog populations, the Forest

Service is clearly empowered to prescribe management prescriptions which ensure that the plague threat is not compounded by other threats, including poisoning and shooting of prairie dogs.

Further this analysis is inadequate in its failure to answer important questions, which directly relate to the issue of insuring viability for the burrowing owl on the McKenzie Ranger District. These questions include:

-- Does "past experience" indicate a pattern of decline for the burrowing owl on the McKenzie Ranger District? If so, how can a management plan which provides little visible discontinuity from past policy ensure that past trends will be reversed?;

-- How does Alternative 1 in any way ensure burrowing owl viability, given its reduction of prairie dog populations, alongside its neglect of any prescription to address this reduction?;

-- How does Alternative 1 provide for the viability of burrowing owls when it provides no enforceable prescriptions for ensuring extensive, active prairie dog colonies?

Certainly none of these questions are addressed to the degree necessary to discern whether McKenzie Ranger District policies will ensure the viability of the western burrowing owl.

As stated above, the Forest Service Manual states, "Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions" (Forest Service Manual 2670.22(1)). The McKenzie Ranger District has failed to develop or implement management plans for any of these sensitive species.

INDEPENDENT APPEAL POINTS

-A significant issue is that the ROD does not exclude inholdings from consideration of the use of poison to stop encroachment. Poisoning prairie dogs around inholdings will have substantially greater impacts than poisoning them simply adjacent to the outer edge of the federal land parcels. We appeal to the Forest Service to redefine where poisoning will be considered so that private land parcels fully surrounded by federal lands are excluded. Private landowners fully surrounded by federal land are free to enter into a land exchange with the Forest Service.

REQUEST FOR RELIEF, INTERIM MANAGEMENT, AND STAY

In this Statement of Reasons, Appellants demonstrate that the EA, DN, and FONSI suffer from a number of legal, factual, and policy errors.

I. REQUEST FOR RELIEF.

To correct these deficiencies and avoid judicial invalidation of the EA, Appellants respectfully request that the Regional Forester direct the District Ranger to withdraw the EA, and prepare an EIS based on a revised purpose and need that advances the "good neighbor" policy only within the parameters of the overall direction of the Grasslands Plan to increase prairie dog numbers, and based on a new analysis prepared pursuant to NEPA. Such analysis must comply with NEPA, NFMA, and other statutes, implementing regulations, and policy which Appellants have demonstrated herein that the McKenzie Ranger District has violated.

In addition to the points raised in the Statement of Reasons section, Appellants set forth the modifications that must be made to remedy their principal deficiencies.

We request that the Regional Forester remand the decision approving the EA for reconsideration, and that the District Ranger be directed to amend the EA as follows:

(1). Revise the purpose and need to one that advances the "good neighbor" policy only within the parameters of the overall direction of the Grasslands Plan to increase prairie dog numbers.

(2). Disclose the impacts of the EA's prairie dog management goals, including impacts to the long-term viability of the black-tailed prairie dog, impacts to the potential for a successful black-footed ferret reintroduction, and impacts to the western burrowing owl and other associated species.

(3). Disclose the cumulative impacts of the EA's prairie dog management goals with the potential impacts of a future plague event, current and planned control efforts, and current levels of prairie dog sport shooting.

(4). Initiate strategies to maintain and protect prairie dogs at populations that will allow for a successful reintroduction of the locally-extirpated black-footed ferret, and that will allow for an increase in the population of associated sensitive species (western burrowing owl and others).

(5). Collect population data, analyze population trends, survey important habitat components, and initiate conservation plans for the burrowing owl.

(6). Identify and maintain core areas of prairie dog colonies with shooting and poisoning closures and relocations to reduce cumulative impacts and to improve the chances of species recovery.

II. REQUEST FOR INTERIM MANAGEMENT.

Appellants also request that the Chief immediately impose for the duration of the appeal, and for the duration of the formulation of a new EIS consistent with this appeal, the following interim management:

-- allow no poisoning of prairie dogs on the McKenzie Ranger District;
-- allow no shooting of prairie dogs on the McKenzie Ranger District.

CONCLUSION

The McKenzie Ranger District still has a long way to go to live up the Forest Service's duty to comply with law and policy, and to ensure the protection of the Grassland's values for generations of Americans to come. We look forward to working with the McKenzie Ranger District to ensure that it takes steps toward legal compliance as quickly as possible.

Appellants are willing to meet with the Regional Forester and staff, the Supervisor of the Dakota Prairie Grasslands and staff, and District Ranger of the McKenzie Ranger District and staff, pursuant to 36 C.F.R. § 217.12, to discuss the issues raised in this appeal, in order to attempt to resolve them.

RESPECTFULLY SUBMITTED this 8th day of July, 2008.



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