

4W Ranch, 1162 Lynch Road
Newcastle, Wy. 82701

12 July 2020

Ref: 2020 Thunder Basin Plan Amendment Final Environmental Impact Statement
and Draft Record of Decision 4W Ranch Objection #4

Russ Bacon, Forest Supervisor
Attention: Rob Robertson, Douglas District Ranger and Objection Reviewing Officer
Medicine Bow-Routt National Forest, Thunder Basin National Grassland
Douglas Ranger District
2250 East Richards Street
Douglas, WY. 82633

Dear Forest Supervisor Bacon, District Ranger Robertson and Objection Reviewing
Officer,

The 4W Ranch is providing the following Objections on the 2020 Final Environmental
Impact Statement and the Draft Record of Decision to amend the Ferret Introduction
Area, MA 3.63 of the 2001 Revised Thunder Basin National Grassland Land
Resource Management Plan. The objections will be divided into individual papers
relating to separate subjects covered or not covered in the 2020 Final Environmental
Statement. (2020 FEIS)

This document is 2020 FEIS and Draft Record of Decision Objection #4

The 4W Ranch will in this document discuss legal discrepancies of the Forest
Service's interpretations of their administration of the Bankhead-Jones Farm Tenant
Act.

Bankhead Jones Farm Tenant Act

- Bankhead Jones Farm Tenant Act of July 22, 1937, (7 U.S.C. sections 1000 et seq, as amended). This act directs the Secretary of Agriculture to develop a program of land conservation and land use to correct maladjustment in land use, and thus, assist in controlling soil erosion; mitigating floods; preventing impairments of dams and reservoirs; conserving surface and subsurface moisture; protecting watersheds of navigable streams; and protecting the public lands, health, safety, and welfare. Land Utilization Project lands, now largely included in national grasslands and national forests, were acquired under this act prior to the repeal of the Land Acquisition Authority Act of October 23, 1962.

- ♦ Management direction for the administration of National Forest System lands under Title III of the Bankhead-Jones Farm Tenant Act, 36 CFR section 213(b) states “the National Grasslands shall be a part of the National Forest system and permanently held by the Department of Agriculture for administration under the provisions and purposes of title III of the Bankhead-Jones Farm Tenant Act.” Further, the Bankhead-Jones Farm Tenant Act provides:
- Section 213(d) states “the resources shall be managed so as to maintain and improve soil and vegetative cover, and to demonstrate sound and practical principles of land use for the areas in which they are located.”

For purposes of objection the 4W Ranch will be quoting or referencing from North Dakota Law Review [Vol. 78:409] Titled:

MANAGEMENT OF THE NATIONAL GRASSLANDS

ELIZABETH HOWARD*

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THE BANKHEAD-JONES FARM TENANT ACT OF 1937

Congress enacted the **BJFTA** to establish "a more permanent status for the land utilization program" as it existed under the administration of the Resettlement Administration,⁹⁸ "promote more secure occupancy of farms and farm homes," and "correct the economic instability resulting from some present forms of farm tenancy."⁹⁹ To carry out these purposes, Title **III** of the BJFTA authorized and directed the Secretary of Agriculture to "develop a program of land conservation and land utilization."¹⁰⁰ It also directed the Secretary to protect lands acquired under the BJFTA and to adapt them to their best use.¹⁰¹

The **BJFTA** did not change the basic structure of the existing land program, but it did narrow its scope. New projects developed under the **BJFTA** were limited to agricultural projects, isolated settler projects, and water conservation projects.¹⁰² In reality, however, "[n]early all new projects [established under

the BJFTA] were similar to the agricultural adjustment projects established prior to fiscal year **1938.**”(103)

102. Gray, *supra* note 74, at 2. Agricultural projects provided for the purchase and improvement of submarginal land as a means of developing an economically sound pattern of land use for a maximum number of families. WOOTEN, *supra* note 2, at 12. Gray, *supra* note 74, at 2. Isolated settler projects allowed the agency to purchase scattered farms on submarginal lands to permit "the effectuation of certain economies in public administration and adjustment to some better adapted use such as forestry, game conservation, grazing, recreation, or a combination of such uses." WOOTEN, *supra* note 2, at 12. Finally, water conservation projects provided for the purchase of land and the construction of water developments in areas where conservation of water was essential to proper land use. *Id*

103. WOOTEN, *supra* note 2, at 13. In all, 2.6 million acres, or 22% of the land utilization acres, were acquired under the BJFTA. *Id.* at 14. **Most of these acres were within projects established before 1937.** *Id.* However, the Secretary of Agriculture did establish several new projects and made large additions to old projects in the Great Plains. *Id.* at 13-14

The **BJFTA** did not explicitly apply to lands acquired before **1937**. However, in **1938** the President directed the Secretary of Agriculture to administer all lands acquired, or in the process of acquisition, as part of the land utilization projects under Title **III** and the relevant parts of Title IV of the **BJFTA**.¹⁰⁶

106. Exec. Order No. 7906 (June 9, 1938), 3 Fed. Reg. 1358 (1938). Congress provided the President with authority to make this instruction in Title IV of the BJFTA. BJFTA of 1937, Pub. L. No. 75-210, § 45, 50 Stat. 530 (1937), *repealed by* Pub. L. No. 87-128, § 341, 75 Stat. 318 (1961).

Congress designed the land program codified in the BJFTA for the purpose of restoring and applying the acquired lands to their most beneficial (114) use. **It also intended implementation of the BJFTA land program to "reestablish livestock, farm, and ranch enterprises on a secure land tenure base."**¹¹⁵ To accomplish these purposes, the SCS developed important objectives for grassland management, which included the following: (1) **"graze the land within its capacity in order to produce forage and maintain productive capacity,"** and (2) **maximize use of the land to contribute to a "sound, permanent agriculture economy for the area."**¹¹⁶

116. Grest, *The Range Story*, *supra* note 81, at 46. **These objectives were also articulated as a goal of helping ranchers reclaim and conserve their permitted grazing lands and achieve economic and social stability for their communities.**

In 1963 the Secretary of Agriculture amended Forest Service regulations in order to reinforce the original mission of the land utilization projects, to promote grassland agriculture and sustained yield management while demonstrating sound land use practices to adjacent landowners.

Following enactment of the NFMA in 1976, the Forest Service combined grazing regulations for the national grasslands with those designed for the national forests.¹³⁸

135.

136. *Id.*

137.

138. Brooks, *supra* note 49, at **11**. The only mention of the national grasslands made by Congress in the language and extensive legislative history of NFMA is that which is now codified. 16 U.S.C. § 1609(a) (2000) (stating "[t]he 'National Forest System' shall include all national forest lands . . . , the national grasslands and land utilization projects administered under Title III of the Bankhead-Jones Farm Tenant Act"). **This language clearly did not give the Forest Service authority to modify the national grasslands management to a scheme other than one that promotes grassland agriculture as the most beneficial use of these acquired lands.**

The federal government acquired national grasslands in Wyoming for use in connection with the Northeastern Wyoming Land Adjustment Projects. This purpose was to be accomplished by "correcting serious maladjustments in land use and effecting readjustments which will prevent their recurrence." **The focus of these readjustments was to return the acquired submarginal lands to grazing purposes, the "very best use to which these lands can be put," and to change the farm economy of the area from one based on crop production to one emphasizing the production of livestock.**

In sum, the federal government acquired the grasslands within the Thunder Basin National Grasslands to prevent and control soil erosion, conserve and develop water resources, demonstrate proper grazing

techniques, control destructive animal life, provide relief for unemployment, and stabilize agriculture by returning the land to grazing uses. These purposes are important to consider when evaluating the Forest Service's management of the lands.

B. FEDERAL LAW REQUIRES THE FOREST SERVICE TO ADMINISTER THE NATIONAL GRASSLANDS FOR THE PURPOSES FOR WHICH THEY WERE ACQUIRED

When the federal government acquires land for a particular public purpose, only Congress has the power to change that purpose or dispose of the acquired land.⁽¹⁶³⁾ As a result, federal agencies must manage and administer acquired lands according to the purpose for which the federal government acquired them, unless Congress has authorized otherwise.⁽¹⁶⁴⁾ This principle prohibits Forest Service management practices that deviate from the original purposes for acquiring the national grasslands.

163. *Reichelderfer v. Quinn*, 287 U.S. 315, 318-20 (1932).

164. *Id.*; *see also* *United States v. Three Parcels of Land*, 224 F. Supp. 873, 876 (D. Alaska 1963) (determining that the court is without authority to revest title to premises once vested in the United States, and the matter is entrusted by Congress to the discretion of the Attorney General under the Declaration of Takings Act, 40 U.S.C. § 258(t)); *United States v. 10.47 Acres of Land*, 218 F. Supp. 730, 733 (D.N.H. 1962) (stating that title to acquired property vested in the United States cannot be returned to original landowners without congressional authorization).

In *Rawson v. United States*,¹⁶⁵ the Ninth Circuit recognized that the national grasslands, **which were "reacquired by the United States are not by mere force of the reacquisition restored to the public domain.** Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses, such as parks, national monuments, and the like."¹⁶⁶ **The Ninth Circuit also denied the President, and by implication any federal agency, the authority to impute uses to the acquired national grasslands other than those for which the federal government acquired the lands.**¹⁶⁷

In *United States v. Three Parcels of Land*,¹⁶⁸ the Ninth Circuit reaffirmed the principle espoused in *Rawson*.⁽¹⁶⁹⁾

The Sixth Circuit endorsed the same principle in *Higginson v. United States* (172)

The Old and New Project Lands

Title III of the BJFTA authorized and directed the Secretary of Agriculture to develop a program of land conservation and land utilization, which was to be accomplished through the retirement of submarginal lands and correction of maladjustments in land use.⁽¹⁸¹⁾ To accomplish this program, Congress provided the Secretary with power to acquire submarginal lands and protect, improve; develop, administer, and construct structures on such lands in order to adapt them to their most beneficial use.¹⁸² The lands acquired under these provisions became known as the "new project lands." **The "old project lands" acquired prior to the BJFTA, became a part of the BJFTA's program of land conservation and land utilization pursuant to Presidential transfer eleven months after Congress enacted the BJFTA.**⁽¹⁸³⁾

178. Exec. Order No. 7908, 3 Fed. Reg. 1389 (June 9, 1938); *see also* Grest, *Brief History supra* note 73, at 4. This transfer was authorized by Congress in Title IV of the BJFTA. of 1937, Pub. L. No. 75-210, § 45, 50 Stat. 530 (1937).

4. Old Project Lands Under Title IV of the BJFTA Must Be Administered for the Purposes for Which They Were Acquired

The President transferred the old project lands to the Secretary of Agriculture so the lands could be administered under Title III and Title IV of the BJFTA. In contrast to Title III, the sole title under which the new lands were administered, Title IV authorized the Secretary to use and dispose of the old project lands in such manner as would best carry out the objectives of the BJFTA. ⁽¹⁹³⁾ These provisions could be interpreted as authorizing a change in use of the national grasslands.⁽¹⁹⁴⁾

Before the Secretary realized the scope of his authority, Congress repealed Title IV of the BJFTA in 1961, removing any opportunity for the Secretary to modify the uses or the terms and conditions of use for the **old projects lands**, which had become part of the national grasslands. ⁽¹⁹⁸⁾ As a result, the Secretary has no authority under the **BJFTA** to administer the national grasslands for purposes **other than those for which they were acquired, namely to promote grassland agriculture and to stabilize local grassland-dependent communities.**

198. Pub. L. No. 87-128, § 341, 75 Stat. 318 (1961). Arguably, the Secretary's 1960 regulations requiring the Forest Service to administer the national grasslands for outdoor recreation, range, timber, watershed, and wildlife and fish purposes could have modified the administration of the national grasslands. MUSYA, 36 C.F.R. § 213.1(c) (1960). **However, the regulations only allowed development of multiple uses on the national grasslands if those uses promoted grassland agriculture. 36 C.F.R. § 213.1(d). This limiting factor suggests that the multiple uses, if developed at all, would have had to be secondary to the dominant use of grassland agriculture.**

**** More importantly, the regulations were adopted under the authority of Title III, not Title IV. *Id.* **The Forest Service has no authority under Title III to modify the purposes for acquiring the old project lands. In fact, the only authority the Secretary of Agriculture has under Title III with respect to old project lands was that enumerated in Public Law Number 75-210, § 32(d):** The Secretary may make dedications or grants of these lands for any public purpose, and may grant licenses and easements on the lands under such terms as he deems reasonable. Pub. L. No. 75- 210, § 32(d), 50 Stat. 526 (1937). **Because the Secretary did not have the authority to change the purpose of the national grasslands under Title III of the BJFTA, the 1960 regulations could not have legally modified the purposes of the national grasslands.** The regulations also cite to the Multiple Use Sustained Yield Act (MUSYA) as authority for their promulgation. **However, as discussed in Part IV.D., the MUSYA did not give the Forest Service authority to promulgate the regulations. ******

APPLICATION OF NATIONAL FOREST SYSTEM LEGISLATION: THE MULTIPLE USE SUSTAINED YIELD ACT AND THE NATIONAL FOREST MANAGEMENT ACT

The Multiple Use Sustained Yield Act of 1960 Did Not Provide Legal Authority to Modify National Grasslands Administration

Regulations promulgated soon after the **MUSYA** became law directed the Forest Service Chief to apply multiple use principles to the national grasslands. (201) However, because the **MUSYA** did not provide legal authority for the application of multiple use principles to the national grasslands, **those regulations do not appear to be legally enforceable.** 202

202. 16 U.S.C. §528; Hankins, *supra* note 19, at 4. Title III of the BJFTA was also cited as legal authority for the promulgation of the 1963 regulations. **However, Title III does not support application of multiple use principles to the national grasslands. See *supra* text accompanying note 190.**

The lack of authority to promulgate these regulations may explain the conditional language employed by the Secretary in the regulations, which

approved the Forest Service's implementation of multiple uses, **but only to the extent it would not interfere with the purposes for which the federal government created the national grasslands.** (203) The regulations also required the Forest Service to **promote the development of grassland agriculture,**²⁰⁴ **thereby restricting multiple uses to the extent they did not promote grassland agriculture on the national grasslands.**

In summary, any attempt to rely on the MUSYA to modify management of the national grasslands was and remains legally ineffective because the MUSYA did not authorize the Forest Service to implement multiple use management on the national grasslands. The Forest Service must administer the national grasslands for the purposes they were originally acquired-to promote grassland agriculture and stabilize local grassland-dependent communities.

The National Forest Management Act of 1976 Did Not Provide Legal Authority to Modify National Grasslands Uses

In 1974, Congress incorporated the national grasslands into the simply declare that the diverse lands administered by the Forest Service National Forest System. The outstanding purpose of this action was to simply declare that the diverse lands administered by the Forest Service were part of a unitary system . (208) Nevertheless, one former Forest Service attorney claimed that integrating the national grasslands into the National Forest System also subjected the national grasslands to a number of laws that have historically been applied to National Forest System lands, but not to the national grasslands. (209) This assertion is unfounded for at least two reasons. **First, these laws specifically do not apply to the national grasslands,**²¹⁰ and second, the phrase used in the **NFMA** to incorporate the national grasslands into the National Forest System states that the national grasslands are administered under the BJFTA. (211) Therefore, the **NFMA did not modify the purposes and uses for which the national grasslands are to be administered.**

210. See, e.g., Organic Administration Act, 16 U.S.C. §§ 473-539k (2000) (applying its provisions to the national forests only). Over the years, **Congress has repeatedly recognized the unique legal status of the national grasslands and excluded them from laws applicable to other National Forest System Lands.** As noted previously, even though the Secretary of Agriculture transferred the national grasslands to the Forest Service in 1954, **Congress did not apply the sweeping requirements of the MUSYA to the national grasslands.** The MUSYA only applied

to national forests. 16 U.S.C. §§ 528-539k. **Congress also recognized the unique nature of the national grasslands by including the national forests but excluding the national grasslands from the broad rangeland and grazing provisions of the 1976 Federal Land Policy and Management Act (FLPMA) and the Public Rangelands Improvement Act, which supplemented FLPMA. 43 U.S.C. §§ 1751-1753 (2000).** This is especially important in light of the fact that the national grasslands are some of the most productive rangelands in the country. HOLECHECK ET AL., *supra* note 24, at 75, 81-83.

Finally, as recent as October 30, 2000, Congress excluded the national grasslands from a law that made payments to counties from all other National Forest System lands more stable and predictable. Pub. L. No. 106-393, § 3(l)(A) (Oct. 3, 2000). **As Congress has repeatedly treated the national grasslands as separate and distinct from other National Forest System lands, it has memorialized the unique legal status of the national grasslands.** No matter how the Forest Service might try to justify its actions, **the plain language of the NFMA does not give the Forest Service the legal authority to act contrary to congressional intent and modify the unique purposes and distinct management requirements for the national grasslands.**

211. 16 U.S.C. § 1609(a). The NFMA states that the "National Forest System shall include..., the national grasslands and land utilization projects *administered under title III of the Bankhead-Jones Farm Tenant Act.*" 16 U.S.C. § 1609(a) (emphasis added). *** **This language directly contradicts the Forest Service's claim that it can administer the national grasslands under a panoply of laws enacted to govern the national forests.** *** See OLSON, *supra* note 2, at 21.

As a result, adding the national grasslands to the National Forest System and including them in NFMA's planning process **did not modify the purpose for which the individual national grasslands were acquired.** Because the NFMA does not require the Forest Service to convert the national grasslands to new uses and the NFMA's planning provisions do not require the Forest Service to manage for more MUSYA uses on the national grasslands than those uses **(or that one use) for which they were acquired, the Forest Service must continue to administer the national grasslands for the purposes they were acquired.**

To summarize, **case law has prohibited the Forest Service from modifying uses of the national grasslands to uses other than those for which they were originally acquired.** As to the new and old project lands that became national grasslands, the BJFTA, MUSYA, and NFMA **did not provide the Forest Service with authority to modify the purposes for which the national grasslands were acquired.** In addition, although the BJFTA provided the Secretary of Agriculture with authority to make use modifications for a limited

time on old project lands, he failed to make any such modifications. As a result, the Forest Service **must also manage all project lands** that became national grasslands **for the original purposes for which they were acquired, namely to promote grassland agriculture and stabilize local national grasslands communities.**

V. CONCLUSION

Because the Secretary of Agriculture **lacks authority to modify the original purposes** for which the federal government acquired the national grasslands, the Forest Service **must administer national grasslands for the purposes they were acquired. Unfortunately, the Forest Service is failing to administer the Thunder Basin National Grasslands in accordance with this well-established legal principle.** By implementing alternative five, or for that matter any other specific alternatives set forth in the Final EIS accompanying the proposed Revisions, **the Forest Service will unlawfully divert the Thunder Basin National Grassland to uses other than those for which it was originally acquired.** Specifically, implementation of alternative five will **interfere with efforts to demonstrate the proper grazing of livestock and to maintain a stable agriculture economy through grazing uses, which are purposes for which the Thunder Basin National Grassland was acquired.**

Although the Forest Service may espouse eloquent and lofty reasons for its proposed modifications, the stark reality is that implementation of the Forest Service's proposed 2020 Thunder Basin Plan Amendment management strategy on the Thunder Basin National Grasslands **would continue to be a clear violation of federal law**, just as the 2001 Revised Land and Resource Plan is without proper amendments. **The Forest Service must manage the Thunder Basin National Grasslands for the purposes it was originally acquired. The law simply allows no other alternative.**

The above excerpts from Attorney ELIZABETH HOWARD'S paper has raised many questions as to the legality of the present Thunder Basin National Grasslands 2001 revised Land and Resource Management Plan and the 2020 Plan Amendment.

All of the Federal Lands within the 4W Ranch Unit are **old projects lands** as described above with **valid existing rights or pre-existing rights** attached to them for which they

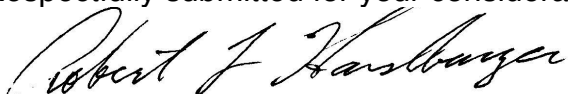
must be recognized by law. These rights have not been recognized since day one of the Thunder Basin Land and Resource Management Plans. Now is the time to recognize these rights in the 2020 Thunder Basin Plan Amendment. The 4W Ranch **objects** to the fact that these rights are not recognized. Furthermore, the 4W Ranch **objects** to the fact that **old project lands** within the 4W Ranch Unit are not being managed for their original and acquired purposes. The 4W Ranch must reiterate that all of the 'Federal Lands' within this ranch unit that were **reacquired or withdrawn** from the 'Public Domain' was for one purpose and one purpose only, that being the primary purpose of the Northeastern Wyoming Land Utilization and Land Conservation Project WY - LU - 1, **that was initiated in 1934 and was for "grassland agriculture", which is for livestock grazing and the economic stability of the local ranches.**

The 4W Ranch **objects** to the terms of Alternative 5 of the 2020 FEIS that gives the black-tailed prairie dog more rights to the use of the land and the forage produced in MA 3.67 than it does for the permitted livestock of the 4W Ranch. The laws and courts do not recognize any rights for this soil erosion inducing destructive rodent. Just the opposite is the case, both federal and state laws call for the **control** of this declared 'destructive agricultural pest'.

Short-Stature Vegetation Emphasis is another term for bare ground or nearly bare ground. Bankhead-Jones calls for increased forage production in all lands administered under Title III of this act. The 4W Ranch **objects** to the fact that the 2020 Plan Amendment does not follow the law, Title III, of the Bankhead-Jones Farm Tenant Act in regards to soil conservation and controlling erosion.

This concludes the 4W Ranch Objection #4 document to the 2020 Final Environmental Impact Statement and the Draft Record of Decision of the 2020 Thunder Basin Plan Amendment.

Respectfully submitted for your consideration and rectification as required by law.

A handwritten signature in cursive script, reading "Robert L. Harshbarger".

Major Robert L. Harshbarger, USAF Retired
Thunder Basin Federal Lands Rancher

