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July 13, 2020

***VIA ELECTRONIC SUBMISSION***

USDA Forest Service Rocky Mountain Region  
Attn: Objection Reviewing Officer  
P.O. Box 18980  
Golden, CO 80402

Re: Rochelle Community Organization Working for Sustainability (RCOWS) Objection to Draft Record of Decision for the Thunder Basin National Grassland 2020 Plan Amendment: Medicine Bow-Routt National Forests and Thunder Basin National Grassland; Campbell, Converse, Crook, Niobrara, and Weston Counties, Wyoming

Dear Objection Reviewing Officer:

Please accept this objection to the Draft Record of Decision for the Thunder Basin National Grassland 2020 Plan Amendment (Draft ROD).<sup>1</sup> The Rochelle Community Organization Working for Sustainability (RCOWS) consists of past and present ranchers and landowners in eastern Wyoming who will be negatively affected by the Forest Service plan to manage black-tailed prairie dogs within the Thunder Basin National Grassland (TBNG). These ranchers own private lands within the grassland and hold permits for nearby federally managed grazing allotments. All of these lands are impacted by the management decisions made in the new plan. The members of RCOWS have all suffered severe economic hardship and destruction of their private property due to the widespread devastation caused by the infestation of prairie dogs that relentlessly encroach from lands managed by the Forest Service onto their private properties. Additionally, the lands managed as part of the TBNG

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<sup>1</sup> **Plan Amendment Objected To:** UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE, DRAFT RECORD OF DECISION FOR THE THUNDER BASIN NATIONAL GRASSLAND 2020 PLAN AMENDMENT (2020) [hereinafter PRAIRIE DOG DRAFT ROD].

**Responsible Official:** Russell M. Bacon, Forest Supervisor: Medicine Bow-Routt National Forest and Thunder Basin National Grassland.

(including the allotments permitted to some of these members) have suffered ecological devastation from the Forest Service's failure to properly manage the prairie dog populations. This not only hurts grazing capabilities within the allotments, but also the plant and wildlife diversity. The new plan fails to allay the concerns RCOWS and its members have expressed throughout the notice and comment period and provides minimal relief to the grasslands and those that depend on them.

***I. Prairie dog Area 3.67 violates the Bankhead-Jones Farm Tenant Act.***

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.<sup>2</sup> Thus, federal agencies must manage and administer acquired lands according to the purpose for which the federal government acquired them, unless Congress has authorized otherwise.<sup>3</sup> Congress acquired lands under the Bankhead-Jones Farm Tenant Act (BJFTA) for the purpose of restoring deteriorated range conditions and helping restore and improve the country's agricultural industry.<sup>4</sup> Over the years Congress has added additional purposes to the BJFTA for National Grasslands. Some of the purposes of the National Grasslands are to reduce soil erosion, promote reforestation, preserve natural resources, protect fish and wildlife, and protect the public land's health, safety, and welfare.<sup>5</sup>

The Draft ROD prioritizes the protection of prairie dogs over grazing, contrary to the intent of the BJFTA. Sustaining a goal of 10,000 acres of prairie dogs within Area 3.67 will place a great burden on the 42,000 acre area.<sup>6</sup> Almost 25% of the area is intended to be covered in prairie dog mounds, which means this area will suffer a great deal in terms of ecological health as discussed below. Consequently, grazing will feel these affects, and will likely see a reduction in animal unit months (AUM) available to livestock. Studies have shown that, in the TBNG, 5.2 acres of prairie dog colonies are equivalent

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<sup>2</sup> *Reichelderfer v. Quinn*, 287 U.S. 315, 318–20 (1932).

<sup>3</sup> *Id.* See also *United States v. Three Parcels of Land*, 224 F.Supp. 873, 876 (D. Alaska 1963); *United States v. 10.47 Acres of Land*, 218 F.Supp. 730, 733 (D.N.H. 1962).

<sup>4</sup> H.H. Wooten, U.S. Department of Agriculture Economic Research Services, *Land Utilization Program 1934 to 1964*, 6 (1965).

<sup>5</sup> 7 U.S.C. § 1010.

<sup>6</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 2.

to one AUM.<sup>7</sup> If 10,000 acres of prairie dogs are achieved, this could result in over 1,900 AUMs lost in Area 3.67, which only compounds the economic damage that prairie dogs and mismanagement have been causing to ranchers. Area 3.67 will not be the only portion of the TBNG to feel these affects. The entire region will suffer because the Forest Service has failed to set any kind of objective for the remainder of the grassland, effectively leaving it unmanaged and allowing prairie dogs to dominate the landscape. The Draft ROD does not discuss how the majority of the TBNG will be managed or what population of prairie dogs will be tolerated; this threatens to wreak havoc on the grassland and the those depending on it.

Local communities in the TBNG are largely dependent on agriculture and natural resources. As more land becomes claimed by prairie dog colonies, less grass will be available to livestock, forcing stocking rates to decline. Oil and gas activity is also hampered by the Draft ROD; activity is limited to specific seasons and daylight hours.<sup>8</sup> The economic harms caused to agriculture and other industries by the Draft ROD will inherently reduce net revenue payments to the counties in violation of the BJFTA's purpose to provide stability to county and local governments.<sup>9</sup> This has the potential to severely limit funds for rural school districts and local infrastructure.

Grazing is not the only purpose being ignored, however. The Draft seeks to protect prairie dogs and the animals dependent upon them, but only at the expense of other plants and animals in the TBNG. Prairie dogs remove plant life that sustain livestock and provide food and shelter necessary to other species' survival.<sup>10</sup> The removal of this foliage, creates opportunities for shorter structured plant species to move into the area, plants that are less palatable to livestock and provide less food and cover for other wildlife that inhabit the TBNG such as deer, antelope, elk, and sage-grouse.<sup>11</sup> For this reason and many others discussed in this objection, RCOWS and its members submitted a Petition for Rulemaking to the Forest Service calling for an amendment to the current TBNG Plan.<sup>12</sup> In that petition there were numerous examples of the

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<sup>7</sup> Denise Langley, Presentation before Wyoming Legislature Joint Agriculture, State and Public Lands and Water Resources Interim Committee (Sept. 14, 2015). *See also* SCOTT E. HYGSTROM & DALLAS R. VIRCHOW, *Prairie Dogs*, in *THE HANDBOOK: PREVENTION AND CONTROL OF WILDLIFE DAMAGE* B-87 (1994).

<sup>8</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 37–38.

<sup>9</sup> 7 U.S.C. § 1012.

<sup>10</sup> HYGSTROM & VIRCHOW, *supra* note 7, at B-88.

<sup>11</sup> *Id.*

<sup>12</sup> ROCHELLE COMMUNITY ORGANIZATION WORKING FOR SUSTAINABILITY, *Petition for Rulemaking to Revise the Thunder Basin National Grassland and Resource Management Plan and Amend the Thunder Basin National Grassland Prairie Dog Management Strategy* (2018) (hereinafter *Petition for Rulemaking*).

harm prairie dogs have caused in the TBNG.<sup>13</sup> This damage leaves a landscape incompatible with other wildlife in direct violation of the Forest Service's mandate to protect fish and wildlife in the National Grasslands.<sup>14</sup> Furthermore, the removal of plant life around colonies causes erosion that invites plants like cheat grass to flourish, creating severe fire hazards. The BJFTA requires the Forest Service to protect grasslands from erosion such as this.<sup>15</sup> This in turn inhibits reforestation as required by the BJFTA because erosion and degradation of top soil can take decades to restore.<sup>16</sup> The Draft ROD emphasizes prairie dog protection, fails to fully protect other wildlife and preserve other natural resources within the TBNG which is clearly opposite of the purposes established in the BJFTA.<sup>17</sup>

Furthermore, the 10,000 acre prairie dog population proposed by the Forest Service is in itself a problem. Black-tailed prairie dogs are rodents and are a leading carrier of the bacterium, *Yersinia pestis*, which causes deadly forms of the plague.<sup>18</sup> When a prairie dog is infected with *Yersinia pestis*, the infection quickly spreads to the entire colony and other nearby colonies because of prairie dog social structures.<sup>19</sup> In turn, due to the large size of these colonies and the close proximity to humans and other animals in the area, the plague has a greater chance of spreading to other species whenever a plague event inevitably occurs again. The Forest Service is mandated to protect the health safety and welfare of the National Grasslands.<sup>20</sup> The Draft ROD only says "[a] plague management plan will be developed," which means the Forest Service does not currently know how it will deal with this threat. The proposed acreage of Area 3.67 will increase the probability of another plague event within the prairie dog population, which could then spread to both humans and animals within the region and harm the health, safety, and welfare of the TBNG in violation of the BJFTA.<sup>21</sup>

Many of the suggestions made in the Petition for Rulemaking were not followed in the Draft ROD, such as reducing the size of colonies, creating wider buffer zones, and initiating reclamation activities. If these suggestions had been followed closer, the Draft ROD would comply with the BJFTA. To now

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<sup>13</sup> See *id.* at 18–20, figures 1–5, 21, figure 6.

<sup>14</sup> 7 U.S.C. § 1010.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* See also *Petition for Rulemaking*, *supra* note 12, at 28, figure 7, 8.

<sup>17</sup> *Id.*

<sup>18</sup> David A. Hanson, et al., *High Prevalence of Yersinia Pestis in Black-tailed Prairie Dog Colonies During an Apparent Enzootic Phase of Sylvatic Plague*, SPRINGER LINK (2006).

<sup>19</sup> *Id.*

<sup>20</sup> 7 U.S.C. § 1010.

<sup>21</sup> *Id.*

become compliant with the BJFTA, the Draft ROD must stop prioritizing prairie dogs over grazing and agriculture. As discussed above, grazing and agriculture was the original purpose for which the TBNG was created. To better fulfill the original purpose of the BJFTA the Forest Service should count prairie dog colonies across the entire grassland toward the goal of 10,000 acres of prairie dogs. This will ensure a decrease in the concentration of prairie dogs in one area, allowing all purposes of the TBNG to flourish. This decrease in population will also serve the initiative to limit plague outbreaks in the prairie dog population that can spread to livestock, wildlife, and humans in the grassland. The Forest Service must also implement reclamation activities in places that have been devastated by prairie dogs. This will decrease erosion in these areas and allow for other wildlife to move back into the locale, continuing to support the purposes of the grassland.

## ***II. The Draft ROD will harm surrounding private and state property.***

Forest Service regulations governing management of National Grasslands provide that the Chief of the Forest Service must, to the extent feasible, enact management policies that “exert a favorable influence for securing sound land conservation practices on associated private lands.”<sup>22</sup> The Draft ROD is anything but “favorable” to securing sound land conservation practices on private lands within and neighboring the TBNG. Prairie dog infestation has never been limited to the boundaries of the TBNG. Colonies have spread at alarming rates onto private and state property surrounding the grassland. The Draft ROD provides no real security to property owners outside of Area 3.67. The Forest Service seeks to maintain 10,000 acres of prairie dogs within the Area, but its only solution to mitigate the spread of these prairie dogs onto private property is to provide a quarter mile buffer zone between Area 3.67 and private or State lands.<sup>23</sup> The quarter-mile buffer zone offers little assurance to neighboring landowners and is clearly not backed by science when one realizes that prairie dog juveniles migrate two to six miles from their birth places to establish new colonies every year.<sup>24</sup> The buffer provided in the Draft ROD is inadequate to prevent the prairie dogs from wreaking havoc on private and state lands. While the Forest Service also claims a one-mile buffer will be provided around “residences anywhere on the national grassland,”<sup>25</sup> they have done a very poor job of enforcing this in the past and it is likely the same practices will continue.

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<sup>22</sup> 36 C.F.R. § 213.1(d).

<sup>23</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 3.

<sup>24</sup> W.F. Andelt & S.N. Hopper, *Managing Prairie Dogs*, COLO. ST. U. EXTENSION, 2 (2016).

<sup>25</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 8.

Private property developed for a certain purpose should not be forced to suffer additional time and expense to maintain the use because of the Forest Service's prairie dog management objectives within the TBNG. This places a great burden on landowners to manage the invasion of prairie dogs on their lands and has the potential to create a nuisance enabled by Forest Service management. Damage caused to private and state lands by prairie dogs will harm the economic sustainability of the area in violation of Forest Service regulations.<sup>26</sup> The growth of the prairie dog population on private property limits the livestock these lands can sustain and forces ranchers to destock their operations, even forcing some to sell out.<sup>27</sup> The decrease in stocking rates will limit revenue in agriculture, causing economic harm to the area as a whole. Additionally, limiting buffer zones to only a quarter mile buffer will stifle conservation efforts on private property. Instead of improving their land through conservation practices, landowners will be forced to utilize their resources just to manage prairie dog infestations and maintain the status quo.

There are several ways the Draft ROD should be amended to protect private property rights. First, the Forest Service should implement larger buffer areas based on science that will actually inhibit prairie dogs from entering private property. As discussed above, prairie dogs are known to travel two to six miles to establish new colonies. Many prairie dogs tend to travel closer to two miles, so a buffer area of at least three miles should be implemented to slow down the encroachment onto private property.<sup>28</sup> Second, the Forest Service should include satellite colonies when evaluating the overall population objectives of prairie dogs as suggested in Alternative 3.<sup>29</sup> Instead of having a specific area that must have at least 10,000 acres, colonies should never exceed 10,000 acres across the entire TBNG. This would allow for more flexibility in treating colonies that are expanding onto state and private land. Third, the Forest Service should work to utilize land exchanges to reduce conflicts between prairie dogs and affected landowners. Perhaps the greatest barrier to land exchanges in the Thunder Basin National Grassland is the length of time it has taken to successfully complete a land exchange. Some land exchanges have taken over a decade to complete. A leading reason for the unreasonable length of time for these exchanges to be completed is because the Forest Service has refused to perform small land exchanges and instead continues to combine all land exchanges into one package. The result is that there is a perpetual land exchange project that continues to increase in size

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<sup>26</sup> 36 C.F.R. § 219.8(b).

<sup>27</sup> HYGNSTROM & VIRCHOW, *supra* note 7, at B-88.

<sup>28</sup> Andelt & Hopper, *supra* note 23, at 2.

<sup>29</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 11.



without ever being completed because of the heavy regulatory requirements to perform a land exchange. In order to streamline land exchanges in the area, the Forest Service should begin accepting smaller land exchanges that will require less capital and resources to complete compared to massive land exchanges. These smaller land exchanges should target areas that are currently being overrun by prairie dogs from the TBNG. Fourth, along with better managing the prairie dogs in the TBNG, the Forest Service should repair the damage wrought by years of mismanaging prairie dogs. Large tracts of land will need to be reseeded, reclaimed, sprayed for cacti and noxious weeds, have something placed on it for ground cover to stop the soil erosion and refurbish the lands. Land and forage treatments will help the land recover more quickly. The final plan should be amended and develop policies that will prioritize these kinds of reclamation projects on lands harmed by prairie dog encroachment.

**III. *The current location of Area 3.67 will likely harm Greater Sage-Grouse priority-core habitat areas.***

The Draft ROD promises to be very threatening to sage-grouse habitat because the proposed Area 3.67 overlaps key sage-grouse area. This will likely prove detrimental to the Greater Sage-grouse population in the TBNG. The *Greater Sage-grouse Record of Decision for Northwest Colorado and Wyoming* was a collaborative effort between Wyoming, Colorado, the Bureau of Land Management, and the Forest Service to revive the declining sage-grouse population by improving the health of sage-grouse habitat.<sup>30</sup> In that decision, the plan for Wyoming included desired conditions for sage-grouse habitat, outlining goals for canopy cover provided by sagebrush, grasses, and forbs.<sup>31</sup> This coverage is important to the sage-grouse population because it provides shelter for the birds during critical stages in their lives.<sup>32</sup> Areas capable of producing greater canopies are ideal for breeding and nesting; they are deemed “priority-core habitat management areas.”<sup>33</sup> The proposed Area 3.67 overlaps this key sage-grouse area and others.<sup>34</sup>

The overlap of these areas creates a dysfunctional dynamic between management strategies. While the Draft ROD claims desired conditions for sage grouse habitat will be given priority, past failures of the Forest Service make

<sup>30</sup> UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE, GREATER SAGE-GROUSE RECORD OF DECISION FOR NORTHWEST COLORADO AND WYOMING, 6, 39, 42 (2015) [hereinafter SAGE-GROUSE ROD].

<sup>31</sup> *Id.* at 95–97.

<sup>32</sup> *Id.* at 30.

<sup>33</sup> *Id.* at 19.

<sup>34</sup> Compare *Id.* at 126, Map 4, and PRAIRIE DOG DRAFT ROD, Figure 1, *supra* note 1, at 4.

this unlikely. In fact, past Forest Service management has even intentionally destroyed sage grouse habitat in favor of prairie dog habitat through conducting prescribed burns, translocating prairie dogs into sage grouse habitat areas, and requesting the removal of 6,904 acres from the proposed sage grouse core area habitat.<sup>35</sup> Furthermore, prairie dogs have proven detrimental to the sage grouse habitat, decimating the sagebrush and grass that provides such an essential habitat to these birds.<sup>36</sup> This is evident by the barren lands in the Grassland that were previously covered in sagebrush and home to numerous sage-grouse.<sup>37</sup> The Forest Service continually mentions the “short-stature vegetation” it wants in Area 3.67, but short stature plants are exactly opposite of those ideal for sage-grouse habitat.<sup>38</sup> This shows not only the incompatibility of the species, but also of the two corresponding plans. Because the *Greater Sage-grouse Record of Decision for Northwest Colorado and Wyoming* is a region wide land management plan, it holds priority over this species-specific plan amendment and should preclude the encroachment of prairie dog colonies into “priority-core” sage-grouse habitat.<sup>39</sup> The National Forest Management Act (NFMA) requires that “[r]esource plans...be consistent with the land management plans,” but the Draft ROD fails to meet this standard.<sup>40</sup> If the Grassland is managed in accordance with the Draft ROD it will cause additional loss of vital sage-grouse habitat, further harming a species that has been previously considered for the endangered species list.<sup>41</sup> It is this type of habitat destruction that caused the sage-grouse to be a candidate for the endangered species list in the first place.<sup>42</sup>

The infringement of prairie dog colonies into “priority-core” sage-grouse habitat violates the regulatory requirement to “maintain the ecological integrity” and “diversity of plant and animal communities.”<sup>43</sup> As discussed above, prairie dogs destroy the habitat of sage-grouse and cause erosion of the top soil necessary to grow plants essential to the birds’ survival. The decimation of this habitat ruins the integrity of the TBNG and causes a great loss of diversity by forcing animals dependent upon the sagebrush steppe ecosystem to leave the grassland in search of new homes. Even worse, the

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<sup>35</sup> See Tim Byer, Thunder Basin NG Core Area Adjustment Recommendations (2015); see also Core Area Boundary Revisions – Northeast LWG Mtg (March 16, 2015). See also *Petition for Rulemaking*, *supra* note 12, at 33, 34, 35.

<sup>36</sup> HYGSTROM & VIRCHOW, *supra* note 7, at B-87.

<sup>37</sup> See *Petition for Rulemaking*, *supra* note 12, at 31, 32.

<sup>38</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 2, 13, 64. See also SAGE-GROUSE ROD, *supra* note 309, at 30.

<sup>39</sup> 16 U.S.C. § 1604(i).

<sup>40</sup> *Id.*

<sup>41</sup> SAGE-GROUSE ROD, *supra* note 309, at 12.

<sup>42</sup> *Id.*

<sup>43</sup> 36 C.F.R § 219.9.



currently proposed plan could even cause the extermination of other diverse animals in the area due to predation and starvation caused directly by prairie dog decimation of those animals' habitat.

This management of the prairie dogs to the detriment of other species is also contrary to the Multiple-Use Sustained-Yield Act (MUSY), which requires the Forest Service to “provide for multiple uses and sustained yield of the products and services obtained [from the National Forest System].”<sup>44</sup> Destruction of ecological integrity of the TBNG at large while managing for a single species does not support multiple uses or sustained yield for the many other life forms inhabiting the grassland.

The Forest Service's decision to grow the prairie dog population in “priority-core” sage-grouse habitat is a reckless decision that fails to meet the arbitrary and capricious standard of the Administrative Procedure Act (APA).<sup>45</sup> Under this standard, an agency decision will be held arbitrary and capricious if it “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>46</sup> As discussed above, the two species are not compatible; one destroys the very habitat the other depends on for survival. To attempt to manage an area where both species are expected to flourish is irrational and any interpretation of available data shows that it is not possible. It is arbitrary and capricious to overlap Area 3.67 with some of the most important sage-grouse habitat in the TBNG.

In order to meet the APA standards and comply with Forest Service regulations, the agency should first change the boundaries of Area 3.67 so it does not overlap with “priority-core” sage-grouse habitat or other essential habitat outlined in the *Greater Sage-grouse Record of Decision for Northwest Colorado and Wyoming*. This will allow the agency to follow the Sage-grouse ROD more closely and manage the TBNG in a way that allows both species to co-exist. This will also allow the Forest Service to comply with the MUSY by encouraging multiple uses in the grassland. In changing the boundaries of Area 3.67, the Forest Service should also implement a buffer zone, similar to those along other boundaries. This buffer should be at least three miles from any sage-grouse core habitat to ensure that the area remain viable for sage grouse. The agency should also seek to remove all prairie dog colonies from within sage-grouse “primary core” habitat because the two species cannot be successfully managed together due to their conflicting habitat requirements.

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<sup>44</sup> 16 U.S.C. § 1604(e)(1).

<sup>45</sup> 5 U.S.C. § 706(2)(A).

<sup>46</sup> *Motor Vehicle Mfrs. Assoc. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

**IV. Population control mechanisms prescribed in the Draft ROD are inadequate to properly manage the Black-Tailed Prairie Dog population.**

Anticoagulants have proven to be very effective in the management of prairie dogs, but the Draft ROD prevents any use of them, even in boundary management zones.<sup>47</sup> Not only are anticoagulants banned, but fumigants are only available as a last resort, effectively tying the hands of ranchers seeking to mitigate the harm caused by prairie dogs.<sup>48</sup> Even the approved rodenticides are hampered by greater restrictions than prescribed by label. The Forest Service is limiting the time of year applications can be made, further reducing the potential effectiveness of the products.<sup>49</sup> Because of the restrictions on fumigants and the ban on anticoagulants, it is clear the only pesticide the Forest Service intends to allow is zinc phosphide, which can become ineffective when the prairie dogs grow bait shy and is only effective on a two to three year basis.<sup>50</sup> This is problematic because zinc phosphide is not only poisonous to prairie dogs, it is also lethal to livestock and other wildlife in the TBNG. Zinc phosphide is especially dangerous to birds such as sage-grouse because of the suggested application method. The best methods for application include “pre-baiting” the prairie dogs with grain before scattering the poison on the surface.<sup>51</sup> This is unlike the application of Rozol or other anticoagulants, which must be placed six inches inside the burrows, reducing the possibility of exposure to granivorous birds.<sup>52</sup> When the prairie dogs stop consuming the poison, it is left on the surface for other animals to eat. This method attracts sage-grouse and other species for the same reason it attracts prairie dogs and it only takes a miniscule amount to kill a bird of their size.<sup>53</sup>

Zinc phosphide costs much more to apply than Rozol and other anticoagulants, which is apparent in the *Final Environmental Impact Statement*.<sup>54</sup> Zinc phosphide comes in oat form. Each burrow must be pre-baited with (untreated rolled) oats. If the pre-bait is eaten within three days after application, the treated oats will then be placed on the mound or near the

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<sup>47</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 3.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 9.

<sup>50</sup> UNITED STATES FOREST SERVICE, BLACK-TAILED PRAIRIE DOG CONSERVATION ASSESSMENT AND MANAGEMENT STRATEGY FOR THE THUNDER BASIN NATIONAL GRASSLAND, 34 (2015).

<sup>51</sup> HYGSTROM & VIRCHOW, *supra* note 7, at B-89.

<sup>52</sup> Rozol Prairie Dog Bait Safety Label.

<sup>53</sup> *Id.*

<sup>54</sup> UNITED STATES FOREST SERVICE, THUNDER BASIN NATIONAL GRASSLAND 2020 PLAN AMENDMENT: FINAL ENVIRONMENTAL IMPACT STATEMENT, 118, Table 26 (2020).

opening of each burrow. Both treated and non-treated oats cost \$15 for a 50-pound bag. A teaspoon of both types of oats is used per placement. One 50-pound bag will treat approximately 113 acres of prairie dog mounds, depending upon the density of prairie dogs. For calculations, the figure of 113 acres per bag was used. Labor is \$60/hr. x 2, to account for the labor cost of pre-baiting. Because the placement of the poison is not as precise (near the mound or burrow opening, not down the burrow) it was calculated one person could do 12 acres/hr. In contrast, Rozol is a small wheat pellet that is placed 6 inches down the burrow opening. The application rate for Rozol is 2 oz. per mound. Each bucket of Rozol costs \$ 13.50 (to the landowner) with a cost share program implemented by Converse County Weed and Pest. One bucket treats 3.67 acres. Calculations used the figures of 50 prairie dog mounds per acre and 3.67 acres per bucket of Rozol. Labor costs are estimated at \$60.00 per hour. It was estimated one person could do 9.5 acres per hour due to the precise placement of the poison. As can be shown by the charts below, zinc phosphide costs more than Rozol to apply per acre.

Cost per acre:

Rozol: \$3.16	Zinc phosphide - Pre-bait & treated oats: \$0.26
Labor: \$6.31	Labor: \$10.00
Total: \$9.47	Total: \$10.26

The language in the Draft ROD prohibiting “[t]he use of anticoagulant rodenticides,” did not exist in the 2009 Plan.<sup>55</sup> The Forest Service explanation for this change includes only a brief comment on the “potential for secondary poisoning of non-target wildlife species.”<sup>56</sup> However, it is clear that zinc phosphide also exposes other wildlife to poisoning risks due to the fact that other animals will also find the oats desirable.<sup>57</sup> The APA prohibits agency actions that are considered “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>58</sup> The arbitrary and capricious standard has been determined to require an “agency [to] examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>59</sup> The Draft ROD does not provide this required connection for its decision to prohibit anticoagulants while allowing a surface poison like zinc phosphide. The Draft

<sup>55</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 40.

<sup>56</sup> *Id.* at 9.

<sup>57</sup> Andelt & Hopper, *supra* note 23, at 3, 4.

<sup>58</sup> 5 U.S.C. § 706(2)(A).

<sup>59</sup> *Motor Vehicle Mfrs. Assoc. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ROD mainly compared the secondary exposure of anticoagulants and zinc phosphide when justifying its decision to not allow the application of anticoagulants but allow for the use of zinc phosphide. The science indicates that surface poison can be just as dangerous to other animals in the TBNG, but there is no evidence that the Forest Service compared whether an anticoagulant's reduced primary exposure to other wildlife by being buried in prairie dog mounds would compensate for the increased secondary exposure. Further, the agency failed to consider, when factoring both primary and secondary exposure, whether anticoagulants posed a higher risk to other animals compared to zinc phosphide. "Normally, an agency rule would be arbitrary and capricious if the agency has...entirely failed to consider an important aspect of the problem..."<sup>60</sup> Here, the agency acknowledged the fact that zinc phosphide is applied on the surface and creates a danger to birds, but it did not actually compare the risk of primary poisoning from each category of rodenticide.<sup>61</sup> The agency focused only on secondary poisoning.<sup>62</sup> The Forest Service also failed to discuss the affordability of each rodenticide, and the actual effectiveness of them. Without an actual good-faith comparison of rodenticides, any decision to prohibit the application of one rodenticide in favor of another appears arbitrary and capricious.

The only other means of pest control permitted in the Draft ROD is shooting, but the Draft does not even consider shooting a means of control.<sup>63</sup> The plan deems shooting as recreational and restricts it within Area 3.67 from February 1 to August 15, only leaving open the months when prairie dogs are much less active.<sup>64</sup> The Draft ROD does not even permit shooting within the quarter mile buffer zone during this restricted period.<sup>65</sup> Furthermore, the boundaries around Area 3.67 are not along established fence lines or other well-defined areas or landmarks; many of the boundary lines are simply out in the middle of several grazing allotments. This makes it difficult for hunters and landowners to identify the boundaries and will likely cause them to leave an even larger area un-hunted in order to ensure that they do not accidentally hunt or apply rodenticides illegally.

The Forest Service again chose to ignore suggestions in the Petition for Rulemaking when it created the Draft ROD. The agency must consider anti-

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<sup>60</sup> *Id.*

<sup>61</sup> TIFFANY YOUNG, THUNDER BASIN 2020 PLAN AMENDMENT: BIOLOGICAL EVALUATION OF THREATENED, ENDANGERED, AND REGIONAL FORESTER SENSITIVE ANIMAL SPECIES AND PRELIMINARY LIST OF POTENTIAL SPECIES OF CONSERVATION CONCERN REPORT, E-31 (2020).

<sup>62</sup> *Id.*

<sup>63</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 75.

<sup>64</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 3.

<sup>65</sup> *Id.* at 16.

coagulates, and the benefits they offer, in order to comply with the APA. Anticoagulants should be seriously considered for use within buffer zones because they offer great advantages over the other population control mechanisms and lack some of the disadvantages inherent in other control methods. The agency should also alter the borders of Area 3.67 so they are more recognizable to those within the TBNG. This will enable people to properly hunt on the grassland and enable the Forest Service to better manage the buffer zones it plans to enforce. Furthermore, shooting of prairie dogs must be allowed year-round in the buffer zone. If the agency is truly planning to maintain a buffer zone free of prairie dogs, then they should allow it to be controlled like other portions of the grassland in terms of population control.

**V. The Draft ROD improperly manages the TBNG for the purpose of reintroducing the Black-footed Ferret.**

The Draft ROD continues to manage the TBNG for reintroduction of the black-footed ferret.<sup>66</sup> Despite renaming the focus area of the management plan from “Black-Footed Ferret Reintroduction Habitat” to “Short-Stature Vegetation Emphasis,” it is clear that the Forest Service plans to maintain a large prairie dog population primarily for reintroduction purposes.<sup>67</sup> It has been established that the TBNG is not fit for reintroduction of the species due to the abundance of plague issues within the prairie dog colonies.<sup>68</sup> To manage the prairie dog population, and the TBNG in general, with the sole purpose of reintroducing the black-footed ferret is reckless and contrary to the NFMA. Under the NFMA, the Forest Service is required to develop land and resource management plans for lands like the TBNG. These management plans are to “provide for multiple uses and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960.”<sup>69</sup> Multiple uses in the TBNG include grazing, natural resources, wildlife, and more; to manage the grassland for one species does not support the multiple use goal.

Furthermore, the Forest Service’s own regulations state that the lands are to be “administered under sound and progressive principles of land conservation and multiple use, and to promote development of grassland agriculture and sustained-yield management of the forage...”<sup>70</sup> Emphasizing prairie dogs for the benefit of the black-footed ferret does not promote

<sup>66</sup> PRAIRIE DOG DRAFT ROD, *supra* note 1, at 6, 11.

<sup>67</sup> *Id.*

<sup>68</sup> David Markman, *Plague Bacteria May be Hiding in Common Soil or Water Microbes, Waiting to Emerge*, COLO. ST. U. (Feb. 26, 2018), <https://source.colostate.edu/plague-bacteria-may-hiding-common-soil-water-microbes-waiting-emerge/>.

<sup>69</sup> 16 U.S.C. § 1604(e)(1).

<sup>70</sup> 36 C.F.R. § 213.1(c).

development of grassland agriculture because it destroys the very thing this practice depends upon – grass. Similarly, a sustained yield is almost non-existent where prairie dog colonies are present. Instead of the “achievement and maintenance in perpetuity of a high-level annual or regular periodic output... without impairment of the productivity of the land,” impairment of the land is almost all that is accomplished.<sup>71</sup> Prairie dog populations eliminate plant life around their colonies, reducing forage available to livestock and wildlife and creating opportunities for erosion. The Draft ROD seeks to sacrifice thousands of acres of productive grasslands with the hope of one day reintroducing the black-footed ferret, all at the expense of other multiple uses and range health of the TBNG.

No official plan has been approved for reintroduction of the black-footed ferret in the TBNG. The counties in the area are to approve such a plan and they have not voiced a desire to implement anything of the sort at this time. Until such a plan is agreed to, management for the black-footed ferret should not be a key consideration for the management of this diverse ecosystem. The Forest Service must abide by the statutes and regulations governing the grassland and continue to manage for multiple uses instead of just the prairie dog as it serves the black-footed ferret. To do otherwise is contrary to the purposes discussed above and harms the grassland agriculture of the TBNG.

## **VI. Conclusion.**

RCOWS and its members stand to lose a great deal if the Draft ROD is put into effect. The ranchers that make up this organization earn their livelihoods in the Thunder Basin National Grassland and the Draft ROD seeks to greatly diminish this livelihood by prioritizing prairie dogs and the black-footed ferret above grazing – the very purpose for which the grassland was created. The Draft ROD will also be detrimental to sage-grouse and other wildlife inhabiting the area. Failure to properly manage the TBNG for grazing, wildlife, and other multiple uses violates the Bankhead-Jones Farm Tenant Act, Administrative Procedure Act, Multiple-Use Sustained-Yield Act, National Forest Management Act, and multiple Forest Service regulations. The management plan set forward in the Draft ROD promises to cause great ecological harm to the TBNG and all that inhabit it; for this reason alone, the plan should not go forward without serious alterations. The solutions set forth in this objection would greatly improve the plan and help it to become compliant with the statutes and regulations governing such actions.

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<sup>71</sup> Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 531(b).



Please feel free to reach out to my office if you have any questions about this objection or the solutions presented within it. If necessary, RCOWS is willing to meet to discuss any of the issues raised in the objection and any potential resolutions to those issues.

Sincerely,

A handwritten signature in blue ink, appearing to read "Conner Nicklas", with a long horizontal flourish extending to the right.

Conner Nicklas  
*Falen Law Offices, LLC*

*Attorney for RCOWS*