

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

10 July 2020

Ref: 2020 Thunder Basin Plan Amendment Final Environmental Impact Statement
and Draft Record of Decision 4W Ranch Objection #3

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 #3

The 4W Ranch is objecting to the failure of the Forest Service in the Thunder Basin
2020 Amendment Plan of the 2001 Thunder Basin National Grassland 2001 Revised
Land and Resource Management Plan to not obey and **adhere to the Land
Acquisition intent of Congress** for the Northeastern Wyoming Land Utilization and
Land Conservation Project WY - LU - 1 of what is now the Thunder Basin National
Grasslands. I submit the following:

Thunder Basin National Grasslands
Land Acquisition Facts and The Law
Researched By
Major Robert L. Harshbarger, USAF Retired
Member, 4W Ranch Family Limited Partnership LLC
30 July 2017

To whom it may concern and interested parties,

What was the original Congressional Intent in the Northeastern Wyoming Land
Utilization and Land Conservation Project WY - LU - 1 of what is now the Thunder Basin

National Grasslands? How far has the Forest Service **strayed from the original purpose** of the Congressional Laws that were initiated in the 1930's that formed the Northeastern Wyoming Land Utilization and Land Conservation Project WY - LU - 1, now the Thunder Basin National Grasslands? The 4W Ranch offers the following historical documentation prior to the Bankhead-Jones Farm Tenant Act with acquisition record language and language of the Presidential Executive Orders (attached) that withdrew lands from the public domain in the Thunder Basin that are now part of the WY - LU - 1 project.

Land Utilization Projects

In 1931 a national conference entitled Land Utilization, which called for a survey of submarginal lands. Once identified, the government began to purchase these lands under the authorization of the National Industrial Act of 1933 and Emergency Relief Appropriations Act of 1935. The aim was to **control erosion, produce more forage, and ensure economic stability for remaining rural residents**. Depleted cropland was planted with grass and the rangeland grazed on a rotating basis. In some areas newly formed grazing associations arose to ensure access to government grazing land by its members through a joint permittee system. Water and soil conservation projects were undertaken by various government programs.

The purchased lands were called Land Utilization (L-U) projects (Heintz 1989) after the title of the 1931 conference. Between 1933 and 1946, there were 250 Land Utilization Projects on 11.3 million acres in 45 states.

The lands were first administered by the Resettlement Administration, later named the Farm Security Administration. In 1937, the Bankhead-Jones Farm Tenant Act (Title III) gave custody to the Secretary of Agriculture and authorized more extensive conservation efforts. In 1938 the Soil Conservation Service was given the task of managing the L-U lands, a mission that lasted until 1953 when the Forest Service was assigned the duty.

The primary purpose and goal of the Northeastern Wyoming Land Utilization and Land Conservation Project WY - LU - 1, **was for "grassland agriculture", which is for livestock grazing and the economic stability of the local ranches**. That was the purpose and intent of the **acquisition laws** of the 1930's and **Presidential Executive Order 7616** dated 13 May 1937 that were issued for these "sub-marginal" and "public domain" lands within the Thunder Basin that were **acquired by acts of Congress or withdrawn from the "public domain" by Presidential Executive Orders** in the 1930's.

Referencing the language from acquisition records obtained from files stored at the Douglas District Ranger Office I submit the following. Each individual parcel of land record is in a folder that has both a Tract and File Number. Each folder contains many filled out forms (8 to 18 pages) that pertain to the sale of that particular parcel of land to the United States. All of the formal forms reference "Form LU-LA 2." Each forms 1st or

2nd lines has the following: Project Name and Symbol Thunder Basin Project (Coterminous) LU-WY-38-1 Tract No. 1505 (or what ever the Tract is) There is language in the files “**Subject to vested and secured rights contained in the U.S. Patent.**” Also there is reference to the Acquiring Agency which is “Land Utilization Division, Resettlement Administration, Demonstration Agriculture Project and so on.

The language in the Presidential Executive Order No. 7616 is very specific:

Executive Order [No. 7616] May 13, 1937

Withdrawal of Public Lands for the use of the Department of Agriculture

Wyoming

By virtue of and pursuant to authority vested in me by the act of June 25, 1910, it is ordered as follows:

Section 1. Executive Order No. 6910 of November 20, 1934, as amended, temporarily withdrawing certain lands for classification and other purposes, is hereby revoked in so far as it affects any public lands within the following described area in Wyoming.

[Description of Public Domain Lands to be withdrawn including lands within the 4W Ranch Unit]

*Section 2. Subject to the conditions expressed in the above mentioned Acts **and to all valid existing rights**, all vacant, unappropriated, and unreserved public lands within the above described area are hereby temporarily withdrawn from settlement, location, sale, or entry, **and reserved and set apart for use and development by the Department of Agriculture for soil erosion control and other land utilization activities in connection with the Thunder Basin Project LU - WY - 1: [Emphasis Added]***

Section 3. This order shall be applicable to all lands within the area described in Section 1. hereof the cancellation, termination, or release of prior entries, selections, rights, appropriations, or claims, or upon the revocation of prior withdrawals, unless expressly otherwise provided in the order of revocation.

Section 4. The reservation made by section 2. of this order shall remain in force until revoked by the President or by act of Congress.

Franklin D. Roosevelt

The 4W Ranch Unit or any other ranch units within the Thunder Basin Area were never a part of any forest preserve or grazing district prior to 1934. The 4W Ranch Unit was operating long before the public domain lands within the ranch unit were ever managed under the U.S. Department of Agriculture or the Forest Service. While some parcels of lands were homesteaded during the 1920's and 1930's within the 4W Ranch Unit, the lands that were not homesteaded or patented were part of the “public domain”

lands of the United States and were open to livestock grazing, which was the custom in Wyoming. Only when Congress passed laws in the early 1930's did the submarginal homesteaded lands that were purchased and reacquired by the United States were put under the management of the U.S. Department of Agriculture for Land Utilization Projects. The project that the 4W Ranch Unit is part of is the Northeastern Wyoming Land Utilization and Land Conservation Project WY - LU - 1 that was initiated in 1934. ¹

The purpose of the Northeastern Wyoming Land Utilization and Land Conservation Project WY - LU - 1, **was for "grassland agriculture", which is for livestock grazing and the economic stability of the local ranches.**

The 4W Ranch Unit, as with most of the historic "Ranch Units" within the Thunder Basin along the Cheyenne River have "**pre-existing rights**" dating back to 1880, of which these rights are protected by Federal and State Law. **These "Property Rights" are to be recognized, protected and not to be tampered with.**

***** Livestock grazing on the federal lands within the Thunder Basin is essential to our economic viability and is recognized by the U.S. Supreme Court as a "Lawful Business." ² *****

The Land Utilization lands were not intended to be permanent natural areas; instead the goal was to transform marginal farmland into productive rangeland (Wooten 1965:53). Other resources were to be managed on the Land Utilization lands but the restoration of the local economy through ranching was the critical goal during the depression and afterwards.

USDA Forest Service and the National Grasslands

By Secretary of Agriculture Administrative Order dated 24 December 1953 (effective 2 January 1954), USDA Reorganization Act, administration of the L-U lands was transferred from the SCS to the Forest Service. **"The original intent was for the Forest Service to act as interim manager pending final disposal of these acquired lands"**

A Secretary of Agriculture Administrative Order on 20 June 1960 designated 3,804,000 acres of the land into 19 National Grasslands. The USDA Forest Service was now responsible for the permanent retention and management of the grasslands.

¹ WY - LU - 21, Douglas, Wyoming, May 25, 1943, copy located in the Douglas Ranger District office.

² **Red Canyon Sheep Company vs Ickes:** In Red Canyon Sheep Company v. Ickes the court held that the purpose of the Taylor Grazing Act was to provide for the most beneficial use possible of the public range in the interest of graziers and the public at large, and to define grazing rights and to protect those rights by regulation against interference. **The court further held that a lawful business was property and that grazing on the federal lands is a lawful business. [Emphasis Added]**

*Direction for management of the National Grasslands was expanded in 1963 when the 1960 Order was amended. The additions served to reinforce the original L-U mission of **promoting grassland agriculture and sustained-yield management**; while **demonstrating sound land use practices** to adjacent public and private landholders.*

The Forest Service statutory duties to be a steward of the soil resource and to abate depredations are specific and clear. As the United States Supreme Court recently found in determining that the Endangered Species Act did not trump the Clean Water Act's mandatory duties on the EPA: "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 467 (2007). See also, *Rounds v. United States Forest Service*, 301 F.Supp2d 1287 (D. Wyo. 2004).

Quoting from **43 U.S. Code 1732** - Management of use, occupancy, and development of Public Lands. (FLPMA)

(a) Multiple use and sustained yield requirements applicable; **exception -----, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.** [Emphasis Added]

The U.S. Supreme Court declared in *United States v. New Mexico*, 438 U.S. 696, 714 (1978) (**federal lands must be managed for the purposes for which they were originally reserved or acquired and any subsequently designated uses are secondary.**) [Emphasis Added]

Furthermore the Court stated: "*The House Report accompanying the 1960 legislation, however, indicates that recreation, range and fish purposes are **to be supplemental to, but not in derogation of, the purposes for which the national forests were established**" in the Organic Administration Act of 1897."* 438 US 696, 714. [Emphasis Added]

Thus, the Northeastern Wyoming Land Utilization Project WY - LU - 1 lands do qualify as lands dedicated and prescribed for specific uses and are **to be administered and managed separably** from the National Forest or National Forest System Lands. The National Grasslands are a separate and a different entity from these two and **must recognized as such.**

NEPA and NFMA are both supplemental to the Organic Act, which sets out the mandatory duty of the Secretary of Agriculture and the Forest Service **to prevent destruction by fire or depredation.**

NEPA imposes an **"affirmative obligation"** on the Forest Service to acquire information concerning the consequences of their actions. *State of Alaska v. Andrus*, 580 F.2d 465, 473-74 (D.C. Cir. 1978).

The **inability** of the Forest Service to seriously consider the causal nature of the **environmental damages caused by the prairie dog proliferation is a violation** of its affirmative duties to monitor and study erosion damages and the degradation of the environment from the improper use of soil resources. 7 U.S.C. 1010a.

Not only has the Forest Service **bypassed the legislative charters or organic acts** of the Forest Service and the Land Utilization Projects (National Grasslands) by segmenting the evaluation areas, but it has not taken a hard look at the causation of overgrazing by prairie dogs of the de facto Black-footed Ferret Introduction Area (MA-3.63) which is part of the 2001 Thunder Basin Land and Resource Management Plan (LRMP).

All provisions of the Forest Service policies, regulations and **land use plans** which assert authority **to not use the acquired lands for livestock grazing** or to impose other management uses and to reduce or restrict livestock grazing **are inconsistent with the original purposes of WY - LU - 1**. The fact remains that the Northeastern Wyoming Land Utilization and Land Conservation Project WY - LU - 1 (Thunder Basin National Grasslands) were acquired for **livestock grazing purposes** and are thus **dedicated**. **Land uses which are inconsistent with livestock grazing or which are deemed to require the removal of livestock grazing or a reduction harming the viability of local ranch operations are unlawful and contradict the terms of acquisition and dedication and are not authorized**³.

It is the view of the 4W Ranch, that the Forest Service at all levels have discarded the **land acquisition purposes** of the Northeast Wyoming Land Utilization and Land Conservation Project of the 1930's by implementing the 2001 Thunder Basin National Grassland Land and Resource Management Plan (LRMP) that expired 31 July 2017. **The Forest Service should be managing the Thunder Basin National Grasslands for a sustainable grassland agriculture economy for which it was dedicated**. They have failed to do so by declaring some 50,000 federal acres of WY - LU - 1 Project as a de facto Black-footed Ferret Introduction Management Area 3.63 (MA 3.63) of the 2001 Thunder Basin LRMP. **The MA 3.63 is illegal as attested to by the Court decision of Rawson v. U.S.**

The Court is very specific as to the status of **"reacquired"** lands for Land Utilization Projects by the federal government and the **withdrawal** of "Public Domain" lands for Land Utilization Projects as attested to in *Rawson v. U.S.* 1956. The Court states:

"The facts are undisputed. In 1915 the Department of the Interior issued to one Stoller a homestead patent to 160 acres of land. ----- **In 1937, the United States had purchased from**

³ *Rawson v. U.S.*

the grantee of Stoller the 160-acre tract. The government's purchases apparently included also other privately owned lands in the same sections, in other sections of the Township, and in adjoining Townships. **The purpose of the acquisitions was to retire submarginal lands from agricultural use, to prevent soil erosion, to protect watersheds, to conserve wildlife, and other allied purposes.** The purchases were made with funds appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115. In 1938 these acquired lands were by executive order^[1] designated for administration by the Secretary of Agriculture under the Bankhead-Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525, as amended by the Act of July 28, 1942, 56 Stat. 725, 7 U.S.C.A. § 1000 et seq. [Emphasis Added]

The essential thing to note is that in the caption and throughout the Order the withdrawal related solely to the "public lands." As stated in Section 1 thereof, it affects "any public lands" within the described area. Section 2⁴ withdraws "all vacant, unappropriated, and unreserved public lands within the above-described area."

The Stoller tract, purchased by the government for prescribed uses, does not fall within the category of public land. It may be stated as a universal proposition that patented lands 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 — areas which it could not rationally be argued remain open to location and exploitation under the mineral laws. Certainly, an intent can not be imputed to the President to throw open to mineral entry acquired land in the area which would not be subject to such entry in the absence of the withdrawal order. Authority in the executive to do that would be absent even if the result were intended. [Emphasis Added]

Traditionally the public lands of the United States have been administered by the Department of the Interior, whereas here, as already noted, the acquired land involved had been authoritatively transferred to the Department of Agriculture for administration by that agency. The placing of these lands under the jurisdiction of the latter Department in itself refutes any notion that such lands were subject to the general land or mining laws. By the Bankhead-Jones Act, supra, Sec. 32, Title III, the Secretary of Agriculture had been given broad powers with respect to the disposition of acquired lands. He could "sell, exchange, lease, or otherwise dispose of" them, but only to public authorities for public purposes." [Emphasis Added]

The 4W Ranch believes that the construction of the language ; "**they remain in the class of lands acquired for special uses, such as parks, national monuments, and the like**" that "**and the like**" would include the prescribed use lands such as the Thunder Basin Project LU - WY - 1 of 1934.

⁴ "Section 2. Subject to the conditions expressed in the above-mentioned acts and **to all valid existing rights**, *all vacant, unappropriated, and unreserved public lands within the above-described area* are hereby temporarily withdrawn from settlement, location, sale, or entry, and reserved and set apart for use and development by the Department of Agriculture for soil erosion control and other land utilization activities in connection with the Central Oregon Land Project, LA-OR 2: *Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws.* **[Emphasis Added]**

As the Supreme Court explained some 60 years ago in [District of Columbia v. John R. Thompson, Co.](#), “[t]he failure of the executive branch to enforce a law does not result in its modification or repeal. . . The repeal of laws is as much a legislative function as their enactment,” and the modification or repeal of a law must comply with the same Article I Bicameralism and Presentment requirements necessary for it to have been enacted in the first place. (See [Clinton v. New York.](#))

STATUTORY DUTIES THAT HAVE BEEN VIOLATED BY THE FOREST SERVICE

- a. The Forest Service Organic Act, 16 U.S.C. Section 551, requires that “[t]he Secretary of Agriculture shall make provisions for the protections against destruction by fire and **depredations**⁵ upon the public forests and national forests[.]” **[Emphasis Added]**
- b. The Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010, is the original Organic Act of the National Grasslands and requires that “[t]he Secretary is authorized and directed to develop a program of land conservation and land utilization in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, -----
- c. The very next section of the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010a directs that “[i]n recognition of the increasing need for soil, water, and related resource data for land conservation, use, **and development for a balanced rural-urban growth, [Emphasis Added]**
- e. The Forest Service is also required to **“[i]n the administration of the National Grasslands 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.”** 36 C.F.R. Section 213.1d.

MORE STATUTORY DUTIES VIOLATED.

- a. The Administrative Procedure Act, 5 U.S.C. 706(2), requires that reviewing courts must set aside agency actions and conclusions that are “arbitrary, capricious, an abuse of discretion, **or otherwise not in accordance with law.**”
- f. The National Environmental Policy Act, 42 U.S.C. 4321 et seq., requires federal agencies to take “a ‘hard look’ at the “salient problems” and genuinely engage in reasoned decision-making.

⁵ **depredation-** to plunder: to lay waste: to ravage

Quoting excerpts from Attorney Elizabeth Howard's Paper titled:

'MANAGEMENT OF THE NATIONAL GRASSLANDS'

PART IV (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. 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. This principle prohibits Forest Service management practices that deviate from the original purposes for acquiring the national grasslands.**"*

*"Once the Secretary of Agriculture acquired the new lands and adapted them to their most beneficial use, **the Bankhead-Jones Farm Tenant Act (BJFTA) did not provide authority for the Secretary to modify them to another use so long as the lands remained under his control.**"*

*"Any attempt to rely on the Multiple Use Sustained Yield Act (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**".*

*"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 (PRIA), which supplemented FLPMA. 43 U.S.C. §§ 1751-1753 (2000)."*

*"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 National Forest Management Act (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.

“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). 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.”

“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.”

“Although the Forest Service may espouse eloquent and lofty reasons for its management plans, the stark reality is that with the implementation of the 2001 Thunder Basin National Grasslands Land and Resource Management Plan (LRMP), this plan is a clear violation of federal law. The Forest Service must manage the Thunder Basin National Grassland for the purposes it was originally acquired. The law simply allows no other alternative.”

What the 4W Ranch has laid out in the above paper are some of the laws and court decisions that the Forest Service shall obey and abide by. Throughout the years since the Record of Decision was published for the 2001 Revised Thunder Basin Land and Resource Management Plan the 4W Ranch has attempted to have a discussions with all of the Forest Supervisors about the ‘Law and Court Decisions’ regarding the Grasslands. Every time I have been rebuked by each individual supervisor stating “Bob, I do not wish to talk about the law”. This leaves me to wonder: Why is the Forest Service and its upper echelon personnel afraid of discussing the law even though we are not in a court room? What is the Forest Service afraid of about the Congressional Laws as written? I wish I knew.

Therefore in this 2020 Amendment Plan Objection #3, the 4W Ranch is objecting to the fact that Alternative 5 of the FEIS on the 2020 Thunder Basin Plan Amendment or the Draft Record of Decision does not recognize the primary purpose and intent of of the acquisition laws or the many court decisions regarding the dedication of these federal lands to grassland agriculture, i.e. livestock grazing and production with all other uses being secondary as noted on page 5 of this document. [Quoting from **43 U.S. Code 1732, exception** and The U.S. Supreme Court declared in United States v. New

Mexico, 438 U.S. 696, 714 (1978) (**federal lands must be managed for the purposes for which they were originally reserved or acquired and any subsequently designated uses are secondary**).]

There can be no doubt about the precise and clear language in both the Federal Law or the U.S. Supreme Court Decision. Therefore, the Forest Service shall follow and obey these two laws without exception. Livestock grazing of the forage on these federal lands within the Thunder Basin is the primary use of the surface of these lands and the raising of prairie dogs and other uses are secondary as long as they do not interfere with the primary prescribed purpose.

This concludes the 4W Ranch Objection #3 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