

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

PREDATOR CONSERVATION ALLIANCE, a non-profit corporation;
FOREST GUARDIANS, a non-profit corporation;
CENTER FOR NATIVE ECOSYSTEMS, a non-profit corporation;
CENTER FOR BIOLOGICAL DIVERSITY, a non-profit corporation;
THE HUMANE SOCIETY OF THE UNITED STATES, a non-profit corporation;
BIODIVERSITY CONSERVATION ALLIANCE, a non-profit corporation;
GREAT PLAINS RESTORATION COUNCIL, a non-profit corporation; and
PRAIRIE HILLS AUDUBON SOCIETY, a non-profit corporation;

Plaintiffs,

v.

RICHARD C. STEM, in his official capacity as
Acting Regional Forester, United States Forest Service;
UNITED STATES FOREST SERVICE, an agency of the federal government;
MIKE WORTHEN, in his official capacity as
Regional Director, Wildlife Services, Animal and Plant Health Inspection Service;
ANIMAL AND PLANT HEALTH INSPECTION SERVICE, an agency of the federal
government;
RALPH MORGENWECK, in his official capacity as
Regional Director, United States Fish and Wildlife Service; and
UNITED STATES FISH AND WILDLIFE SERVICE, an agency of the federal government;

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action seeks declaratory and injunctive relief requiring the Federal Defendants to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600 *et seq.* Absent such legal compliance, this action seeks to halt a large-scale federal prairie dog poisoning and shooting program scheduled to begin shortly across much of the Buffalo Gap National Grassland in South Dakota, largely in an area known as the Conata Basin. Inconceivably, the Federal Defendants plan to poison and shoot prairie dogs in areas where prior conservation efforts carried out by federal officials under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, established the world’s only successfully self-sustaining population of critically endangered black-footed ferrets. Black-footed ferrets are entirely dependent on large prairie dog colonies for survival. Conata Basin contains the only complex of prairie dog colonies on federal land in the Great Plains large enough to maintain a viable population of black-footed ferrets. It is also the only black-footed ferret re-introduction site on federal land free of sylvatic plague, an introduced disease fatal to prairie dogs. Numerous other declining wildlife species such as swift fox, ferruginous hawks, and burrowing owls also depend on the same prairie dog colonies for survival. Yet, Federal Defendants plan shoot and poison thousands of acres of prairie dogs in violation of this Nation’s flagship environmental protection statute, NEPA, which is general described as requiring a “hard look” at the environmental consequences of agency actions – before those actions are approved, the proverbial “look before a leap.” The Federal Defendants also plan to proceed in violation of their own management plan for the Buffalo Gap National Grassland in violation of NFMA, which requires compliance with governing land management

plans. Here the governing management plan expressly prohibits poisoning of prairie dogs in black-footed ferret management areas except under two conditions, neither of which apply here. Injunctive relief is required to prevent further impending violations of these federal laws, the imminent death of wildlife, including endangered animals, and the general destruction of this prairie ecosystem.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), and 1346(a)(2) (civil action against the United States). This Court has authority to grant the requested relief pursuant to 5 U.S.C. §§ 701-706 (Administrative Procedure Act), 2201 (declaratory judgment), and 2202 (further relief). An actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

3. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because: the individual Defendants, in their official capacities as officers of federal agencies, reside in this judicial district; the defendant federal agencies maintain regional offices in this district; a substantial part of the events or omissions giving rise to these claims occurred in this district; and several Plaintiff organizations reside within this judicial district and maintain offices in Denver.

4. Plaintiffs have exhausted their administrative remedies in this action within the meaning of the Administrative Procedure Act.

5. Plaintiffs have no adequate remedy at law.

6. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

PARTIES

7. Plaintiff PREDATOR CONSERVATION ALLIANCE (“PCA”) sues on behalf of itself and its affected individual members. PCA is a regional non-profit conservation organization founded in 1991 with offices in Bozeman, Montana and Denver, Colorado. PCA has over 1300 members across the United States. PCA works to conserve and restore ecological integrity by protecting predators and their habitats. PCA’s geographic regions of focus are the northern Great Plains and the Northern Rocky Mountains of the United States. PCA has actively participated in National Grassland management issues, especially regarding prairie dogs and associated predators such as black-footed ferrets, and will continue to do so. Some of PCA’s members have enjoyed hiking, backpacking, and observing wildlife in all of the National Grasslands of the northern Great Plains, including those in South Dakota and in the Conata Basin, and will continue to do so on a regular basis in the future. PCA and its members regularly avail themselves of the public participation opportunities available to the public under NEPA in order to better inform themselves and decision-makers of the environmental consequences of agency decisions. Defendants’ actions will adversely affect the wildlife conservation and recreational interests of PCA and its members.

8. Plaintiff FOREST GUARDIANS sues on behalf of itself and its affected individual members. Forest Guardians is a non-profit corporation based in Santa Fe, New Mexico. It maintains an office in Denver, Colorado. Forest Guardians’ mission is to restore native wildlife and ecosystems, educate citizens to support forests, deserts and grasslands in the western United States, and advocate for biological diversity throughout the region. Forest Guardian’s approximately 1,250 members are concerned with public forests, deserts and

grasslands in the western United States and the numerous imperiled species that reside there, including the black-tailed prairie dog and black-footed ferret. The members and staff of Forest Guardians regularly recreate and pursue educational and scientific pastimes in the Conata Basin, including seeking opportunities to observe and study prairie dogs and black-footed ferrets. Forest Guardians members have concrete plans to continue these pursuits. Forest Guardians employs and has as members several scientists who regularly conduct research activities on black-tailed prairie dogs and black-footed ferrets. These scientists seek to protect the habitat of these species. Forest Guardians' members seek to compel the federal agencies charged with protecting biologically imperiled species, to follow the laws designed to protect and recover those species. Forest Guardians and its members regularly avail themselves of the public participation opportunities available to the public under NEPA in order to better inform themselves and decision-makers of the environmental consequences of agency decisions. Defendants' actions will adversely affect the conservation, scientific, and recreational interests of Forest Guardians and its members.

9. Plaintiff CENTER FOR NATIVE ECOSYSTEMS (“CNE”) sues on behalf of itself and its affected individual members. CNE is a non-profit advocacy organization dedicated to conserving and recovering native and naturally functioning ecosystems in the Greater Southern Rockies and Plains. CNE values the clean water, fresh air, healthy communities, sources of food and medicine, and recreational opportunities provided by native biological diversity. CNE uses the best available science to forward its mission through participation in administrative processes, legal action, public outreach and organizing, and education. CNE and its members consider prairie ecosystems, such as the Conata Basin, a conservation priority. CNE

members explore the Conata Basin seeking to observe prairie dogs and black-footed ferrets. CNE members derive great pleasure and satisfaction from attempting to observe these animals in their native habitat. They plan to continue these recreational and scientific activities in the future. CNE and its members regularly avail themselves of the public participation opportunities available to the public under NEPA in order to better inform themselves and decision-makers of the environmental consequences of agency decisions. Defendants' actions will adversely affect the conservation and recreational interests of CNE and its members.

10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the "Center") sues on behalf of itself and its adversely affected individual members. The Center is a non-profit conservation organization with its principle place of business in Tucson, Arizona. The Center is dedicated to the preservation of native plants and animals, communities of species, and naturally functioning ecosystems in the U.S. and throughout the world. Through research, education, and legal actions, the Center works to secure protection for disappearing species. The Center has over 10,000 members living throughout the U.S.. The Center's members and staff derive scientific, aesthetic, and spiritual benefits from the existence of the black-footed ferret and the black-tailed prairie dog in the wild and from the ecosystem of which these species are an integral part. The Center's members and staff use the habitat and potential habitat of the prairie dog and the ferret, including that of the Conata Basin in South Dakota, for observation, research, aesthetic enjoyment, and other recreational and educational activities and intend to continue to do so in the future. The Center's educational, scientific, recreational, and aesthetic interests are adversely affected and irreparably harmed by the Defendants' actions at issue here. The Center's injuries would be redressed by the relief requested.

11. Plaintiff THE HUMANE SOCIETY OF THE UNITED STATES (“HSUS”) sues on behalf of itself and its affected individual members. HSUS is a non-profit, tax-exempt corporation organized and existing under the laws of the Commonwealth of Delaware, with its headquarters in Washington, DC and regional and international offices. HSUS is the largest animal protection organization in the United States, with over 8 million members and constituents. The HSUS is committed to the goal of protecting, conserving, and enhancing the nation’s wildlife and wildlife habitats and fostering the humane treatment of all animals. The HSUS and its members have demonstrated a strong interest in the preservation, enhancement and humane treatment of all wildlife. HSUS promotes the humane treatment of wildlife, including prairie dogs, through several program initiatives. HSUS actively advocates against practices that injure, harass, abuse, poison, or otherwise kill prairie dogs. HSUS offers information regarding the humane, non-lethal resolution of human/prairie dog conflicts and organizes political initiatives to achieve its aims of increasing respect for the intrinsic value of animals, including prairie dogs. The organization has placed high priority on its objective to promote the welfare of wild animals. HSUS members study, research, photograph, and otherwise enjoy the presence of prairie dogs, including those in the Conata Basin and have concrete plans to continue these activities. HSUS members are actively involved in all aspects of preserving and enhancing the welfare of the prairie dogs and plan to continue these efforts. Those members will be directly and adversely affected by the continued indiscriminate slaughter of prairie dogs and those wildlife species that also are killed as result of the attempts to eradicate or kill prairie dogs. HSUS and its members regularly avail themselves of the public participation opportunities available to the public under NEPA in order to better inform themselves and decision-makers of

the environmental consequences of agency decisions. Defendants' actions will adversely affect the conservation and recreational interests of HSUS and its members.

12. Plaintiff BIODIVERSITY CONSERVATION ALLIANCE ("BCA") sues on behalf of itself and its affected individual members. BCA is a non-profit membership organization based in Laramie, Wyoming. BCA was founded to garner increased protection for wildlands and native wildlife and their habitats that contribute to the rich and unique natural diversity of the Rocky Mountain and Northern Great Plains region. For many years, BCA and its member have been involved in management issues affecting the Buffalo Gap National Grassland in South Dakota, particularly in relation to wildlife management. BCA was intimately involved in the development of the Land and Resource Management Plan for the Nebraska National Forest and Associated Units, which was adopted in 2002 and which now governs management of the Buffalo Gap National Grassland. BCA specifically submitted detailed, scientifically-based comments on the draft Land and Resource Management Plan regarding wildlife and met with U.S. Forest Service officials to discuss the plan and its impacts to wildlife. In 2002, BCA filed an administrative appeal of the Land and Resource Management Plan citing, among other things, concerns that black-footed ferrets and prairie dogs would receive inadequate protection. Members of BCA seek out and enjoy wildlife on the Buffalo Gap National Grassland, specifically the Conata Basin area, which supports abundant black-tailed prairie dog populations, black-footed ferrets, swift fox, and other wildlife unique to the Northern Great Plains. BCA members plan to continue these activities. Protecting the wildlife of the Buffalo Gap National Grassland, including black-tailed prairie dogs and black-footed ferrets, is a crucial part of BCA's conservation mission. The conservation, aesthetic, educational, and recreational interests of

BCA and its members will be harmed as a result of prairie dog poisoning and shooting within the Buffalo Gap National Grassland, including the Conata Basin area. BCA and its members regularly avail themselves of the public participation opportunities available to the public under NEPA in order to better inform themselves and decision-makers of the environmental consequences of agency decisions. Defendants' actions will adversely affect the conservation and recreational interests of BCA and its members.

13. Plaintiff GREAT PLAINS RESTORATION COUNCIL ("GPRC") sues on behalf of itself and its affected individual members. GPRC is a non-profit, multiracial, multicultural, environmental, health, organization building the Buffalo Commons step-by-step by bringing the wild buffalo prairies back and restoring healthy, sustainable communities to the Great Plains. From the Indian reservation to the prairie outback to the inner city and beyond, GPRC organizes specifically where the areas of environmental, human rights and human health, and animal protection interact in social change. GPRC's South Dakota program is based out of Wounded Knee, South Dakota, on the Pine Ridge Indian Reservation, and is entirely run by Oglala Lakota people. In Lakota language, the black-footed ferret is referred to as *pispiza eptopta sapa*, the "black-faced prairie dog." GPRC's Oglala team is working to protect and restore Reservation lands south of Buffalo Gap National Grasslands, so the prairie dog ecosystem can connect. The survival and thriving of the world's only successful black-footed ferret recovery area is critical to the Traditional culture of the Oglala Lakota people, and Oglalas are sick of being told that native animals need to be killed off, due to some imagined problem whose real root is cattle overgrazing. Oglalas see a similarity between the way the government agencies, ranchers, and others treat native wildlife; it sounds very familiar to the way native people are and were treated.

Poisoning and shooting the prairie dogs towns within a one-mile “buffer” of the boundary of the Buffalo Gap National Grassland and other lands would severely compromise the grassroots educational programs now in place led by Indigenous people interested in rebuilding their cultures. Without a healthy natural landscape, there are no healthy communities. The proposed poisoning will also destroy a big chunk of critical habitat linkage for GPRC’s larger Million Acre Project which many parties, both government, private, Tribal, and individual Indigenous people are working toward. GPRC members regularly recreate and observe wildlife such as prairie dogs in the Conata Basin and will continue to do so. GPRC and its members regularly avail themselves of the public participation opportunities available to the public under NEPA in order to better inform themselves and decision-makers of the environmental consequences of agency decisions. Defendants’ actions will adversely affect the conservation and recreational interests of GPRC and its members.

14. Plaintiff PRAIRIE HILLS AUDUBON SOCIETY OF WESTERN SOUTH DAKOTA (“PHAS”) is a South Dakota non-profit corporation with approximately 172 members in Western South Dakota. PHAS is a chapter of the National Audubon Society. Its mission is to engage in educational, scientific, literary, historical, and charitable pursuits that will educate about, protect and restore this Nation’s environment and natural heritage. PHAS conducts much of its work through education, advocacy, promotion of public participation in government decision-making, communication with agencies, and litigation. PHAS and its members regularly avail themselves of the public participation opportunities available to the public under NEPA in order to better inform themselves and decision-makers of the environmental consequences of agency decisions. Members of PHAS use the federal lands of the Conata Basin for wildlife

observation, hiking, photograph, aesthetic appreciation, and other recreational purposes. They will continue to use these lands for these purposes in the future. In western South Dakota at least 134 vertebrate wildlife species and 36 families of invertebrates are associated with prairie dog colonies, drawn by habitat and food availability. Prairie dog colonies provide excellent opportunities for wildlife watching. Prairie dog poisoning will reduce the acres available for wildlife watching and shooting makes the prairie dogs very scared of people and difficult to watch. When shooting happens, the prairie dogs become trained to stay out of the range of rifles with scopes and are consequently more difficult to observe. Lifting the ban on shooting in Conata Basin will damage wildlife watching within the Basin. PHAS adopted its first by-laws in 1994. The protection of the prairie dog ecosystem has been a key campaign of PHAS since its inception. PHAS has sponsored public meetings on the prairie dog ecosystem, ferret reintroduction, and about the management of the National Grasslands. PHAS has produced and distributed educational material with information on the Grasslands and on the prairie dog ecosystem and ferrets. PHAS has solicited its members to help with night-spotting and inventorying of ferrets in Conata Basin. PHAS members have volunteered and helped with these efforts. PHAS has commented on the Grassland Land and Resource Management Plan Revision and sought to get others to do so. PHAS joined with others in an appeal of the Northern Plains Grasslands Management Plan Revisions, including the revision of the Nebraska National Forest Land and Resource Management Plan. PHAS has commented on the South Dakota Game Fish and Parks attempts to create a statewide Black-tailed prairie dog management plan for South Dakota several times and sought to get others to comment. PHAS commented on the draft Multi-State Conservation Plan for the Black-tailed Prairie Dog. PHAS members have attended

meetings about prairie dog and grasslands management, sponsored by various government entities. PHAS maintains an ongoing commitment to protect the prairie dog ecosystem and all the elements of grassland biodiversity that are associated or dependent on it. Defendants' actions will adversely affect the conservation and recreational interests of PHAS and its members.

15. Plaintiffs and their respective members have been, are being, and, unless the requested relief is granted, will continue to be adversely affected by the failure or the Defendants to comply with NEPA, NFMA, and the APA.

16. Defendant RICHARD C. STEM is sued in his official capacity as the Acting Regional Forester of the United States Forest Service's Rocky Mountain Region. He is responsible for the challenged actions of the United States Forest Service. In his official capacity, he resides in this judicial district.

17. Defendant UNITED STATES FOREST SERVICE ("USFS") is a federal agency within the United States Department of Agriculture and is charged with managing the Buffalo Gap National Grassland. USFS has legal responsibility for complying with NFMA and NEPA. USFS is headquartered in Washington, D.C. and maintains a regional office in Lakewood, Colorado, which oversees the Buffalo Gap National Grassland.

18. Defendant MIKE WORTHEN is sued in his official capacity as Regional Director of the Western Region of Wildlife Services within the Animal and Plant Health Inspection Service. He is responsible for the challenged actions of the Animal and Plant Health Inspection Service. In his official capacity, he resides in this judicial district.

19. Defendant ANIMAL AND PLANT HEALTH INSPECTION SERVICE ("APHIS") is a federal agency within the United States Department of Agriculture, which is

charged with promoting agricultural health and carrying out wildlife damage management activities. Specifically, Wildlife Services, a unit within APHIS acts in cooperation with individuals and other federal agencies to control wildlife allegedly harming agricultural interests. It has legal responsibility for complying with NEPA. APHIS is headquartered in Washington, D.C. and maintains a regional office in this judicial district.

20. Defendant RALPH MORGENWECK is sued in his official capacity as the Regional Director of the Mountain-Prairie Region of the United States Fish and Wildlife Service. He is responsible for the challenged actions of the United States Fish and Wildlife Service. In his official capacity, he resides in this judicial district.

21. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”) is a federal agency within the United States Department of Interior, which is charged with administering the ESA and other federal programs in order to protect the viability of all wildlife species. FWS has legal responsibility for carrying out and complying with NEPA. FWS is headquartered in Washington, D.C. and maintains a regional office within this judicial district.

LEGAL BACKGROUND

I. The National Environmental Policy Act.

22. The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, is our nation’s basic charter for the protection of our environment. It “contains ‘action forcing’ provisions to make sure that federal agencies act according to the letter and spirit of the Act.” 40 C.F.R. § 1500.1.

23. The Council on Environmental Quality (“CEQ”) was created under NEPA to promulgate regulations “to tell federal agencies what they must do to comply with the procedures and achieve the goals” of NEPA. Id.

24. The fundamental purpose of NEPA is to improve the decision making of federal agencies by requiring an analysis of the environmental impacts of a proposed action and an exploration of alternatives to that action that would reduce or eliminate such impacts. The primary vehicle for such an analysis is an Environmental Impact Statement (“EIS”) prepared by the acting agency. 42 U.S.C. § 4332(2)(c).

25. An EIS is required for all federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c). An EIS must be prepared and circulated for public review and comment *prior* to any major federal action that may have a significant effect on the environment. Id. 40 C.F.R. §§ 1502.5, 1508.3. Federal actions include the adoption of “formal documents establishing an agency’s policies which will result in or substantially alter agency programs,” the adoption of “formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources,” and the adoption “of programs, such as a group of concerted actions to implement a specific policy or plan.” 40 C.F.R. §§ 1508.18(b)(1), (2), (3). There are several indicators of a significant action; one such indicator is whether the action “may adversely affect an endangered or threatened species or its habitat that has been determined to be critical” under the ESA. 40 C.F.R. § 1508.27(b)(9).

26. When a federal agency is not certain whether an EIS is required, it must prepare an Environmental Assessment (EA). 40 C.F.R. §§ 1501.3, 1501.4, 1508.9. If the EA concludes that the proposed project will have no significant impact on the human environment, the agency

may issue a Finding of No Significant Impact (FONSI), and proceed with the proposed action. If the agency concludes that there may be a significant effect, then it must prepare an EIS. 40 C.F.R. § 1501.4. By requiring agencies to prepare NEPA documents, Congress intended to help prevent or eliminate damage to the environment by focusing government and public attention on the environmental effects of proposed agency action.

A. Disclosure of the Project’s Purpose and Need, Affected Environment and Impacts.

27. A key component of NEPA is the requirement to disclose the underlying purpose and need for the proposed action. 40 C.F.R. §§ 1502.10(d); 1502.13.

28. Once defined, the agency must also describe the “affected environment” of the proposed action. 40 C.F.R. § 1502.15.

29. Furthermore, NEPA and its implementing regulations require that when preparing an EA, agencies must take a hard look at the potential impacts of a project, and ensure that when a FONSI is made, the EA convincingly concludes that no significant impacts will occur in order to forego an EIS. An agency must supply a convincing statement of reasons why potential effects are insignificant. The agency's statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project.

30. CEQ regulations implementing NEPA recognize that intelligent decisionmaking can only derive from high quality information. EAs must provide "evidence and analysis" to support a conclusion that a FONSI is appropriate or whether a full EIS is required. 40 C.F.R. § 1508.9. Information included in NEPA documents "must be of high quality. Accurate scientific analysis ... [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). Where an agency has

outdated, insufficient, or no information on potential impacts, it must develop the information as part of the NEPA process.

B. Consideration of Alternatives to the Proposed Action.

31. In preparing an EIS, a federal agency must consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(c)(iii). The identification and consideration of these alternatives is the “heart” of the NEPA process. Federal regulations require federal agencies to “rigorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a).

C. Assessment of Mitigation Measures.

32. NEPA and its implementing regulations require that federal agencies take a "hard look" at measures to mitigate environmental impacts. Agencies are required to develop, discuss in detail, and identify the likely environmental consequences of proposed mitigation measures. 40 C.F.R. § 1508.25(b); 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h); 40 C.F.R. § 1505.2(c).

33. Furthermore, a decision to proceed with a project must not be based on arbitrary assumptions about the success of mitigation measures or promises of proposed future action. Federal case law has made abundantly clear that a perfunctory description or mere listing of mitigation measures is insufficient to support a FONSI. Rather, mitigation measures must be sufficiently evaluated in order to enable the agency and the public to properly evaluate the severity of the adverse effects of a proposed project before making a final decision.

D. Analysis of Cumulative Impacts.

34. The CEQ’s implementing regulations provide that federal agencies must consider cumulative impacts in determining the scope of an environmental impact statement. 40 C.F.R. § 1508.25(c)(3).

35. Cumulative impacts are impacts on the environment which result from a combination of the incremental impact of the proposed action, and other past, present, and reasonably foreseeable future actions whether taken by the federal government or others. 40 C.F.R. § 1508.7.

36. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Id.

37. In determining the scope of an environmental impact statement, agencies shall consider cumulative actions that have cumulatively significant impacts when viewed with other proposed actions. See 40 C.F.R. § 1508.25(c)(3).

II. The National Forest Management Act.

38. Pursuant to the National Forest Management Act instruments for the use of National Forest System Lands must be consistent with the corresponding land management plans. 16 U.S.C. § 1604(i).

39. Pursuant to 36 C.F.R. § 219.10, the USFS must conform all site-specific decisions to the applicable management plan.

40. The Nebraska National Forest Land and Resource Management Plan (“LRMP”), which governs prairie dog management on the Buffalo Gap National Grassland and, thus, Conata Basin, provides:

(A) certain standards for managing prairie dog colonies as reintroduction habitat for black-footed ferrets: (1) “Authorize only those uses and activities that do not reduce the suitability of the area as black-footed ferret reintroduction habitat” and (2) “Manage all prairie

dog colonies within this Management Area as though they were occupied by black-footed ferrets, and apply all standards and guidelines as though black-footed ferrets occupy all colonies.”

(B) the following as a “Management Standard” for the USFS: “Any net loss of suitable black-footed ferret habitat as a result of prairie dog poisoning or development of new facilities within colonies shall be replaced within the year. This is based on the amount of suitable habitat available prior to prairie dog dispersal in the year of the poisoning or development.”

(C) certain standards and guidelines for prairie dog poisoning as follows:

- i. Limit the use of rodenticides (grain baits) for reducing prairie dog populations to the following situations:
 1. Public health and safety risks occur in the immediate area,
 2. Damage to private and public facilities, such as cemeteries and residences.
- ii. Consult U.S. Fish and Wildlife Service-approved, state-wide prairie dog conservation strategies for additional guidance on the appropriate response to complaints of unwanted prairie dog colonization on adjoining agricultural lands (private, state, and tribal).
- iii. Reduce conflicts with adjacent landowners over prairie dog management through an active landownership adjustment program.
- iv. Prohibit use of rodenticides (above-ground grain baits) for reducing prairie dog populations outside the period October 1 to December 31 to reduce risks to migratory birds. To reduce risks to other wildlife, do not use burrow fumigants in prairie dog colonies.

FACTS GIVING RISE TO PLAINTIFFS CAUSES OF ACTION

I. The Black-tailed Prairie Dog.

41. The largely misunderstood, black-tailed prairie dog, *Cynomys ludovidicanus*, is actually a ground squirrel. It is a gregarious creature and lives in a complex social community called a prairie dog town or colony.

42. Contrary to the prevailing view of the livestock industry and many governmental agencies, it is not a destructive pest. Indeed, many scientists have concluded that prairie dogs have little, if any, detrimental effect on rangelands. The emerging scientific consensus is that prairie dogs help to maintain the maximum productivity of prairie grasslands and do not present a significant economic threat to livestock ranching.

43. Prairie dogs also support an incredible diversity of other wildlife species. Recent studies have documented over one hundred species that are associated with the prairie dog. Some, like the endangered black-footed ferret, are almost exclusively dependent upon prairie dogs for food and on prairie dog burrows for shelter. The swift fox, mountain plover, and ferruginous hawk, all declining species associated with prairie dog colonies, are closely tied to the survival of the prairie dog. The burrowing owl, dependent on prairie dog towns for nesting habitat and feeding grounds, is also in decline throughout its range.

44. Scientifically, the black-tailed prairie dog is described as a “keystone species.” In short, this means that if the black-tailed prairie dog vanishes a lot of other dependent species will also vanish or decline.

45. Historically, the black-tailed prairie dog thrived across the desert, short-grass and mixed-grass grasslands of Arizona, Colorado, Kansas, Montana, Nebraska, New Mexico, North

Dakota, Oklahoma, South Dakota, Texas, and Wyoming. The first official U.S. government explorers of this territory, Lewis and Clark, reported “infinite numbers” of prairie dogs in the early 1800s. Other 19th century naturalists supported this observation. One historic prairie dog town in the Texas Panhandle was reported to be 250 miles long and 100 miles wide. Another colony in Montana was estimated, in 1872, to be 30 or 40 miles long.

46. Modern researchers estimate that the total extent of the land area once covered with prairie dogs was approximately 100 million acres. Multiple sources place the historic prairie dog population in the hundreds of millions to billions.

47. Today things are much different. Government sponsored poisoning programs began around 1915 and continue to the present. In some years, as many as 125,000 men worked to poison prairie dogs and the poisoning covered as many as 20 million acres. Strychnine and Compound 1080 were used in prairie dog eradication programs across the Great Plains and American Southwest. When these poisons were banned because of their secondary poisoning effects, the government approved zinc phosphide and aluminum phosphide to poison prairie dogs on both public and private land.

48. These eradication efforts, combined with the onset of sylvatic plague, a disease introduced to North America by humans around 1899 and to which prairie dogs are extremely susceptible, have drastically reduced prairie dog populations. Indeed, many scientists believe that sylvatic plague alone might have caused the immediate extinction of the species, but for the prairie dog’s originally large and dispersed population. Prairie dogs have no immunity to this disease. Sylvatic plague is now present in every state within the prairie dog’s range except South Dakota.

49. Currently, prairie dogs occupy about 1% to 2% of their historically occupied acreage. Black-tailed prairie dogs have been extirpated from Arizona. In many local areas of Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, and Texas, prairie dogs have similarly vanished.

50. Despite the large numbers of individual prairie dogs remaining, the species' long-term survival is direly threatened. Few, if any species, have suffered such catastrophic declines from historic levels and not been afforded the protection of the ESA.

51. In 1998, environmental organizations, including groups that have been incorporated into some of the present Plaintiff organizations, petitioned FWS to list the black-tailed prairie dog as a threatened species under the ESA. In 2000, after a lawsuit to force a ruling on the petition which also included some of the present Plaintiff organizations or their forerunners, FWS determined that the prairie dog warranted the protection of the ESA, but that such immediate action was precluded by the need to list other, highly imperiled species. 65 Fed. Reg. 5476, 5487-88 (Feb. 4, 2000). The warranted, but precluded status of the prairie dog under the ESA prompted a prohibition against poisoning prairie dogs on all USFS lands. In 1998 the Forest Service implemented a moratorium on prairie dog shooting in the 73,000-acre Conata Basin ferret recovery area. This area was the only area where shooting was prohibited year-round on the entire 550,000-acre Buffalo Gap National Grassland. USFS concluded the shooting ban was necessary to protect ferrets and enhance prairie dog populations after shooters wiped out over half of the prairie dogs in Conata Basin that single year.

II. The Black-footed Ferret.

52. The black-footed ferret, *Mustela nigripes*, is an endangered carnivore with a black face mask, black legs, and a black-tipped tail. It is the only ferret native to North America. It can be up to two feet long and weigh two and a half pounds.

53. Black-footed ferrets depend almost exclusively on prairie dogs for food and use prairie dog burrows for dens and shelter. Accordingly, the black-footed ferret's historic range was coincident with the prairie dog's historic range.

54. The severe decline of prairie dogs resulted in a concomitant and near-fatal decline in black-footed ferrets. The ferret's decline may also be partially attributable to secondary poisoning from prairie dog toxicants and its high susceptibility to canine distemper. The black-footed ferret was listed as an endangered species on March 11, 1967, under a statute that preceded the ESA. The current ESA preserves this status.

55. In 1964, a wild population of ferrets was discovered in South Dakota and studied extensively for several years. This population disappeared from the wild by 1974. Its last member died in captivity in 1979. After the disappearance of the South Dakota population, many believed the species was extinct until a wild population was discovered near Meeteetse, Wyoming in 1981. The Meeteetse population underwent a severe decline in 1985 and 1986 due to canine distemper, which is fatal to infected black-footed ferrets, and also because local prairie dog populations crashed due to sylvatic plague. Eighteen survivors were taken into captivity between 1986 and 1987 to prevent extinction and to serve as founder animals in a captive breeding program aimed at eventually re-introducing the species into the wild.

56. The goal of the Black-footed Ferret Recovery Plan, a required plan under the ESA, adopted in 1988, is to establish 10 or more widely separated, self-sustaining, wild, black-footed ferret populations in order to consider downlisting the species from endangered to threatened status under the ESA. The Plan recognized that to be viable over the long-term, all wild populations needed a minimum of 100 ferrets, and that prairie dog complexes of at least 10,000 acres are necessary to sustain ferret populations of this size. Because prairie dog habitat has been so fragmented by plague, crop conversion, and poisoning, finding suitable locations for reintroducing ferrets has been very difficult.

57. To date, ferrets have been reintroduced to 11 sites, but the greatest success has come in the Conata Basin on the Buffalo Gap National Grassland. In the Conata Basin there are more than 20,000 acres of prairie dog colonies, plus 5,000 additional acres in the contiguous Badlands National Park. Ferret populations in the Conata Basin have grown to an estimated population of 260. The Conata Basin population is secure enough that FWS takes surplus ferrets from it to stock other ferret recovery sites.

58. Because black-footed ferrets are so dependant on prairie dogs, USFS designated prairie dogs as a management indicator species (“MIS”) and a sensitive species for the Nebraska National Forest and Buffalo Gap National Grassland. These designations require USFS to carefully monitor prairie dog populations and habitat, to avoid actions that could negatively affect the species, and to ensure the long-term viability of prairie dog populations on national forest lands.

III. Defendants' Action Plan.

59. During the last year, a manufactured crisis has developed in South Dakota over prairie dog management on the national grasslands. The State of South Dakota has continued to suffer through a long drought. Prairie dogs often expand the area of their colonies in times of low precipitation in order to obtain sufficient forage, resulting in a mistaken perception by some that prairie dog populations are also expanding. The conditions caused by this drought have triggered private landowners to increase pressure on both federal and state agencies to reduce prairie dog populations in a miss-guided attempt to benefit domestic livestock. The landowners and agencies have strenuously resisted reducing livestock numbers to reduce grazing pressure. In 2004, the agricultural lobby of South Dakota demanded the poisoning of prairie dogs. This demand, combined with the current political atmosphere within the state due to the upcoming election, has lead to an expedited campaign against prairie dogs in western South Dakota.

60. Between February 2000 and August 2004, FWS maintained the status of the black-tailed prairie dog as a species considered warranted for listing under the ESA but precluded by other higher priority listing actions. However, on August 12, 2004, FWS issued a decision that removed the prairie dog's warranted but precluded status, finding a listing action to be "not-warranted." 69 Fed. Reg. 51217, 51226 (August 12, 2004).

61. On August 12, 2004, simultaneously with the release of the FWS' "not-warranted" finding, Defendant Stem on behalf of USFS, Defendant Worthen on behalf of APHIS, and Defendant Morgenweck on behalf of FWS forwarded a document called the "South Dakota Prairie Dog Management 2004-05 Inter-Agency Action-Plan" (hereinafter the "Action Plan") to Governor Rounds of South Dakota. The cover letter from Stem, Worthen, and

Morgenweck indicated the Action Plan “coordinates control efforts among affected Federal and state agencies ...” and it calls “for an integrated set of activities including mapping, trapping, shooting, and chemical control actions on both public and private land.” Under the express terms of this plan, “APHIS will proceed with short-term control on USFS lands” starting on October 1, 2004, and the “Forest Service will develop a forest plan amendment to provide longer term flexibility for prairie dog management” and “modify the Forest Supervisor’s order regarding prairie dog shooting in Conata Basin by November 15, 2004.” In this Plan, the federal agencies commit themselves to beginning a poisoning campaign on public land that will cover a one-mile buffer zone along the borders of private lands. Additionally, the Action Plan commits USFS to eliminating the restrictions on recreational shooting in the Conata Basin. To do this, USFS must rescind the Forest Supervisor’s order limiting the shooting of prairie dogs on USFS lands.

62. The combined effects of poisoning and increased shooting pressure will eliminate prairie dogs on 5,000 to 8,000 acres, approximately a third of the area occupied by prairie dogs on the Buffalo Gap National Grassland. These actions, if taken, will almost certainly result in black-footed ferrets being killed by the destruction of their suitable habitat and prey base. The reduction of the prairie dog population and occupied acreage will most certainly result in a corresponding reduction in the number of ferrets.

63. Defendants issued the Action Plan without any environmental analysis or opportunity for public review and comment. It includes only actions harmful to prairie dogs and, therefore ultimately, to black-footed ferrets. The agencies failed to consider other reasonable alternatives such as providing incentives to landowners, or inhibiting prairie dog movements by

leaving a strip of ungrazed, higher vegetation as a barrier in buffer areas. Indeed, livestock grazing persisted on federal land in Conata Basin until September 10th of this year, to the detriment of rangeland health. There is no evidence that the Defendants considered any alternatives other than poisoning and shooting prairie dogs on USFS land.

64. The Action Plan violates the Grasslands Plan that USFS adopted in 2002. Although the Plan for the Buffalo Gap National Grassland prohibits both poisoning and shooting prairie dogs in black-footed ferret reintroduction areas, the Action Plan ignores these prohibitions.

65. The dire consequences of the Action Plan on black footed-ferret recovery and survival is best captured by a statement made in an internal FWS e-mail by Mr. Mike Lockhart, the FWS Black-footed Recovery Coordinator, the very federal official tasked with attempting to keep the ferret from going extinct. On August 19, 2004 Mr. Lockhart wrote:

I must also inform you folks of a troubling situation, the effects of which will not only impact our final allocation and “wild born” translocation process this year, but has potentially long-range implications for BFF recovery. In a top-down decision late last week, FWS, FS, and APHIS have developed an “action plan” in response to agricultural and political complaints over prairie dog expansion in Conata Basin, South Dakota. In effect, this plan sweep aside the BFF protection/enhancement standards established in the latest Northern Plains Forest Plan revision and will open both poisoning and shooting on a National Grasslands buffer area extending up to one mile within the boundary of the National Grasslands. In a worst-case scenario where poisoning/shooting could occur around inholdings within Conata Basin, approximately 1/3 of the core ferret habitat could

be lost. However, it is my understanding that the Forest Supervisor and Conata Basin staff are working to refine complaint-driven actions to only those acreages around the outside boundary of the Grassland and are authorizing control measures only where pdog colonies actually extend from FS onto adjoining private property. It remains to be seen how much elevated political pressure will be brought to bear on the Conata Basin recovery area and whether common sense will prevail, but suffice it to say that we will ultimately lose some carrying capacity for ferrets. In times where drought and plague continue to take a toll on national recovery efforts, such an unexpected impact to our best and most stable recovery site is indeed very bad news. In this is an indication of how flimsy endangered species management standards/agreements really are, particularly on federal public lands, there seems to be little realistic hope for future downlisting or recovery. Instead of cutting back into such a vital ferret recovery area, it would appear that private land conflicts could be effectively addressed through incentive or compensation plans, and/or other potential management strategies. I'm not sure if any other options were seriously addressed.

66. The Plaintiffs could not have written a better conclusion themselves. The Defendants' Action Plan is a response to "top-down" political pressure. It violates the applicable Forest Plan in violation of NFMA. It threatens serious environmental harm. One-third of the best black-footed ferret recovery site could be destroyed. The entire black-footed ferret recovery program will be set back. FWS may not be able to recover the ferret from its endangered status. Yet, the Defendants performed no NEPA analysis on these significant environmental impacts. Additionally, the Defendants considered no reasonable alternatives, such as those suggested by

Mr. Lockhart, to their plan “seriously.” A clearer violation of NFMA and NEPA could hardly be found.

CLAIMS FOR RELIEF

First Claim for Relief (Violation of NEPA, its Implement Regulations and the APA) (Against all Defendants)

67. Each and every allegation set forth in this Complaint is incorporated herein by reference.

68. The Defendants’ Action Plan, described above, is a major federal action within the meaning of NEPA, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations. 40 C.F.R. §§ 1500 *et seq.*. Defendants’ Action Plan is a formal document establishing their policies and will substantially alter agency programs. The Action Plan is a formal plan which will guide the use of federal resources. The Action Plan encompasses a potential group of concerted federal actions to implement a specific policy and plan. 40 C.F.R. §§ 1508.18(b)(1), (2), and (3).

69. Defendants’ Action Plan will significantly affect the quality of the human environment within the meaning of NEPA and its implementing regulations. Defendants’ Action Plan will result in the death of thousands of individual prairie dogs across thousands of acres. The deaths of these prairie dogs will result in the death of additional wildlife of many species, including endangered black-footed ferrets. Defendants’ Action Plan will adversely affect the endangered black-footed ferret and damage black-footed ferret recovery efforts. 40 C.F.R. § 1508.27(b)(9).

70. The Defendants did not prepare an EIS before adopting their Action Plan in violation of NEPA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.5, 1508.3.

71. In the alternative, the Defendants did not prepare an EA and issue a FONSI before failing to prepare an EIS for their Action Plan in violation of NEPA. 40 C.F.R. §§ 1501.3, 1501.4, 1508.9.

72. The Defendants failed to identify the purpose and need for their Action Plan, failed to describe the affected environment, and the impacts of their proposed action in a public EA or EIS before adopting their Action Plan in violation of NEPA. 40 C.F.R. §§ 1502.10(d); 1502.13, 1502.15.

73. Defendants failed to consider any reasonable alternatives to their proposed action before preparing their Action Plan in violation of NEPA. 42 U.S.C. § 4332(2)(c)(iii); 40 C.F.R. § 1502.14(a).

74. Defendants failed to look at any mitigation measures that would reduce the environmental consequences of their proposed action and thereby support an EA and FONSI before adopting their Action Plan in violation of NEPA. 40 C.F.R. §§ 1508.25(b); 1502.14(f); 1502.6(h); 1505.2(c).

75. Defendants failed to perform any analysis of the cumulative effects of their Action Plan and evaluate the environmental consequences of these cumulative actions, including the effects of the separate actions contemplated under the Action Plan before adopting the Action Plan in violation of NEPA. 40 C.F.R. §§ 1508.25(c)(3); 1508.7.

76. Defendants' actions in failing to comply with NEPA and its implementing regulations are arbitrary, capricious, an abuse of discretion and contrary to law in violation of the APA, 5 U.S.C. §§ 511 *et seq.*, and are subject to judicial review thereunder.

**Second Claim for Relief
(Violation of NFMA, Forest Plan, and the APA)
(Against Defendants Stem and USFS)**

77. Each and every allegation set forth in this Complaint is incorporated herein, by reference.

78. All actions on National Forest System Lands such as the Buffalo Gap National Grassland must be consistent with the corresponding land management plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10.

79. The Defendants' Action Plan violates the Nebraska National Forest Land and Resource Management Plan ("LRMP") covering the Buffalo Gap National Grassland and thus the Conata Basin because the USFS took no steps to consider the impacts of the Action Plan on black-footed ferrets. Instead, USFS authorized action that will reduce the suitability of the Conata Basin as black-footed ferret re-introduction habitat in violation of the LRMP.

80. Defendants' Action Plan violates the LRMP because it has no provision requiring the replacement of black-footed ferret habitat poisoned or destroyed.

81. Defendants' Action Plan violates the LRMP because it allows the use of rodenticides to prevent encroachment by prairie dogs onto adjacent private lands which is not identified as a proper use of rodenticides by the LRMP. Further FWS has not approved any state-wide prairie dog conservation strategy that the USFS could have consulted when responding to landowner complaints in violation of the LRMP.

82. Defendants' actions in failing to comply with NFMA and its implementing regulations and the LRMP are arbitrary, capricious, an abuse of discretion and contrary to law in violation of the APA, 5 U.S.C. §§ 511 *et seq.*, and are subject to judicial review thereunder.

**Third Claim for Relief
(Violation of the APA)
(Against All Defendants)**

83. Each and every allegation set forth in this Complaint is incorporated herein, by reference.

84. Pursuant to 5 U.S.C. § 706(2)(A), agency action that is arbitrary, capricious, or contrary to law is unlawful. The Defendants' Action Plan represents a final agency action and is an end to their decision-making process; within the Action Plan the Defendants commit themselves to a poisoning and shooting campaign against prairie dogs in the Conata Basin.

85. In developing the Action Plan the Defendants failed to consider negative impacts to the black-footed ferret population and the overall effort to conserve prairie dogs. Further, the Defendants failed to provide any sound scientific rationale, reasoned or substantial basis, or other explanation for their Action Plan.

86. Because the Defendants failed to consider all of the relevant factors, the Action Plan is arbitrary and capricious and, therefore, unlawful under the APA, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

1. Order, declare, and adjudge that the Defendants' Action Plan was issued in violation of NEPA, and is arbitrary and capricious and not in accordance with law and that all Defendants are in violation of NEPA and the APA;

2. Order, declare, and adjudge that Defendants Stem and USFS issued their Action Plan in violation of NFMA and that it is arbitrary and capricious and not in accordance with law and that Defendants Stem and USFS are in violation of NFMA and the APA;

3. Order, declare, and adjudge that the Defendants Action Plan was issued in violation of the APA, and is arbitrary and capricious and not in accordance with law and that all Defendants are in violation of the APA;

4. Enjoin all Defendants from implementing the Action Plan until such time as they comply with all requirements of NEPA, NFMA, the APA, and all other requirements of law;

5. Issue as necessary and as specifically requested by Plaintiffs such temporary restraining orders and preliminary and permanent injunctions as may be appropriate and necessary, until such time as Defendants comply with law.

6. Award Plaintiffs their reasonable attorneys' fees, costs, expenses and disbursements associated with this action under the Equal Access to Justice Act, 28 U.S.C. § 2412, and all other provisions of law.

7. Grant Plaintiffs such additional and further relief as the Court may deem just and proper.

Respectfully submitted this _____ day of September, 2004

James Jay Tutchton, CO Bar No. 21138
Robin Leah Cooley, CO Bar No. 31168
Environmental Law Clinical Partnership
University of Denver, School of Law
2255 E. Evans Ave.
Denver, CO 80208
(303) 871-6034 (phone)
(303) 871-6991 (fax)
E-mail: jtutchton@law.du.edu

Attorneys for Plaintiffs