United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

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Dear Dr. McCain:

This letter responds to your September 8, 2009, petition to reclassify the Shirley Basin, Wyoming; Conata Basin, South Dakota; and Aubrey Valley, Arizona, reintroduced black-footed ferret (ferret) (*Mustela nigripes*) populations from nonessential experimental to endangered status. This petition was submitted pursuant to Section 553 of the Administrative Procedure Act (5 U.S.C. §553) (WildEarth Guardians et al. 2009). We also address the November 25, 2009, letter that asked the U.S. Fish and Wildlife Service (Service/USFWS) to consider changing the designation at these sites to essential experimental populations if a full endangered status is not granted (McCain et al. 2009). According to your petition and follow up letter, the requested reclassification would only occur on public lands within the three sites.

Site Descriptions and the Petitioned Action

The Shirley Basin nonessential experimental area, designated in 1991, was the first ferret reintroduction site attempted and is located within white-tailed prairie dog habitat (USFWS 1991). In 2008, we estimated this site had a minimum fall population of 196 ferrets with an estimated 98 breeding adults (USFWS 2008a). This site is currently considered self-sustaining and capable of supporting other sites with translocations (USFWS 2008a).

The Shirley Basin nonessential experimental area is about 8 percent State trust land, 55 percent private land, and 37 percent Federal land (USFWS 1991). The Federal land is primarily U.S. Bureau of Land Management (BLM) property. Within this site, releases have occurred on both public and nonpublic lands. Post-reintroduction surveys have documented ferrets on both public and nonpublic lands. The petition and its supporting information specifically requested changing the nonessential experimental designation on public lands with an emphasis on BLM managed land.

The Conata Basin nonessential experimental area was designated in 1994 with ferrets released in 1996 and is located within the black-tailed prairie dog habitat (USFWS 1994). In 2008, we estimated this site had a minimum fall population of 292 ferrets with an estimated 146 breeding adults (USFWS 2008a). This site is currently considered self-sustaining and capable of supporting other sites with translocations (USFWS 2008a). Conata Basin is generally regarded as the most successful ferret reintroduction site. Although plague was discovered near the basin in 2005 and in the basin in 2008, impacts have been moderate due to actions by us and our partners to control the outbreak.

The Conata Basin nonessential experimental area is about 28 percent public land, 32 percent private land, 33 percent tribal lands, and 7 percent miscellaneous (USFWS et al. 1994). Ferret releases have occurred solely on Federal land within the Buffalo Gap National Grassland and Badlands National Park. Post-reintroduction surveys have documented the vast majority of ferret occurrences are on Federal lands, but occasionally ferrets have been located on adjacent private and tribal trust lands. The petition and its supporting information specifically requested changing the nonessential experimental designation on public lands with an emphasis on U.S. Forest Service (USFS) managed land.

The Aubrey Valley nonessential experimental area was designated in 1996 and is located within Gunnison's prairie dog habitat (USFWS 1996). In 2008, we estimated this site had a minimum fall population of 66 ferrets with an estimated 33 breeding adults (USFWS 2008a). This site is currently considered self-sustaining and capable of supporting other sites with translocations (USFWS 2008a).

The Aubrey Valley nonessential experimental area is about 20 percent State trust land, 29 percent private land owned primarily by the Navajo Nation, and 51 percent tribal trust land (Hualapai Tribe Reservation) (USFWS 1996). This area does not include any Federal lands. Within this site, releases have occurred principally on tribally owned private lands and some State lands. Post-reintroduction surveys have demonstrated that ferrets occur on tribally owned lands and State lands. The tribally owned lands are extremely important to the success of this site. This petition and its supporting information requested reclassification on State lands in Aubrey Valley.

Section 10(j) Background

Congress enacted the Endangered Species Act in 1973 (Act) to "provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction" (S. Rep. No. 93-307, at 1 (1973)). Congress amended the Act in 1982 because species reintroductions were difficult to achieve due to concerns over the rigid protection and prohibitions surrounding listed species (USFWS 1984; Walsh 2009). Although the Secretary of the U.S. Department of the Interior (Secretary) already had authority to conserve a species by introducing it in areas outside its current range, Congress enacted the provisions of section 10(j) to mitigate fears that reintroduced populations would negatively impact landowners and other private parties.

Further, Congress recognized that more flexible reintroduction rules could encourage recovery partners to host such populations on their lands (H.R. Rep. No. 97-567, at 8 (1982)). Congress designed section 10(j) to provide the Secretary regulatory flexibility and discretion in managing the reintroduction of endangered species. This flexibility allows the Secretary to better conserve and recover endangered species (H.R. Rep. No. 97-567, at 33 (1982)).

Congress allowed such experimental populations to be identified as either essential or nonessential populations, but noted their expectation that most experimental populations would be nonessential (H.R. Conference Report No. 835, supra at 34; USFWS 1984)). As noted in our 1984 implementing regulations, an essential experimental population would be a special case, not the general rule (H.R. Conference Report No. 835, supra at 34; USFWS 1984)).

All determinations on essentiality are made prior to any reintroduction action being taken. It is instructive that Congress did not put requirements in section 10(j) to reevaluate the classification after a reintroduction has occurred. While our regulations require a "periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species" (50 CFR 17.81(c)(4)), this has not been interpreted as requiring reevaluation and reconsideration of sites' nonessential experimental status (USFWS 1991, 1994, and 1996). We believe congressional intent was to ensure that our partners could rely upon the original rules promulgated for the reintroduction effort.

Basis for "Nonessential" Experimental Population Designations

Reintroduction efforts outside of the current range but within the historical range of the species can use the experimental designation if, at the time of the designation, the population is wholly geographically separate from nonexperimental populations of the same species and the release will further the conservation of the species. Separation at the time of introduction and clear articulation of the boundaries ensure experimental designations do not reduce protections for existing populations. The three reintroduction sites addressed in your petition satisfied the wholly geographically separate criteria at the time that they were designated.

Reintroductions are, by their nature, experiments whose fate is uncertain. However, it is always our goal for reintroductions to be successful and contribute to recovery. This is consistent with the Act's requirements for 10(j) experimental populations. Specifically, the Act requires experimental populations to further the conservation of the species. Conservation is defined by the Act as the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. In short, experimental populations must further the species' recovery.

The three petitioned sites meet this standard. Specifically, the recovery plan calls for 1,500 free-ranging adults in 10 or more populations with no fewer than 30 breeding adults per population (USFWS 1988). The free-ranging adult standard (i.e., 1,500 individuals) is approximately 47 percent achieved if ferret survey data are extrapolated across Shirley Basin. Furthermore, establishment of 10 populations with no fewer than 30 breeding adults is 40 percent achieved (i.e., we have 4 populations that meet this criterion). Therefore, the three

petitioned ferret populations have furthered the conservation of the species and contributed to the overall conservation goals for the species. Given the above, these populations satisfy the requirements of an experimental population.

The importance of these sites to recovery does not mean these populations are "essential" under section 10(j) of the Act. All reintroduction efforts are undertaken to move a species toward recovery. If importance to recovery was equated with essentiality, no reintroductions would qualify for nonessential status. This interpretation would conflict with Congress' expectation that "in most cases, experimental populations will not be essential" (H.R. Conference Report No. 835, supra at 34; USFWS 1984) and our 1984 implementing regulations which indicated an essential population will be a special case and not the general rule (USFWS 1984).

In addressing essentiality, the Act instructs us to determine whether a population is essential to the continued existence of a threatened or endangered species. Our regulations define essential experimental populations are those "whose loss would be likely to appreciably reduce the likelihood of survival of the species in the wild" (50 CFR 17.80 (b)). The Service defines "survival" as the condition in which a species continues to exist in the future while retaining the potential for recovery (USFWS and National Marine Fisheries Service 1998). Inherent in our regulatory definition of essential is the impact the potential loss of the experimental population would have on the species as a whole (USFWS 1984). All experimental populations not meeting this bar are considered nonessential (50 CFR 17.80 (b)). Given these standards, the petitioned sites were deemed nonessential (USFWS 1991, 1994, and 1996).

The ferrets used to establish the petitioned sites were considered surplus individuals from the captive population. Through the captive population of ferrets, we retain the ability to produce additional ferrets that can replace any that might be lost through reintroduction efforts. As noted in the final rules for the three petitioned reintroduction areas, the species' continued survival in the wild is assured through maintenance and protection of a large and secure captive population (USFWS 1991, 1994, and 1996).

The captive population of ferrets has been responsible for establishment of every wild ferret population in existence today, either wholly or primarily. We expect this trend will continue for the foreseeable future. Furthermore, should any occupied reintroduction sites be lost (with plague being the most likely culprit for such a loss), the captive population provides a mechanism to reestablish the lost site.

The captive program maintains a core breeding population of at least 240 adults (90 males, 150 females) (Marinari and Kreeger 2006). Captive breeding populations are currently housed in 6 locations across the United States and Canada and currently number approximately 290 animals (Marinari and Kreeger 2006). Through the implementation of the Black-footed Ferret Species Survival Plan, captive propagation has been able to maintain 87 percent of the genetic diversity of the founding animals (Garelle et al. 2006). Since 1987, more than 6,500 ferret kits have been produced in captivity (Marinari pers. comm. 2008) and over 2,300 kits have been released into the wild (Bunnell pers. comm. 2008; Larson pers. comm. 2008). No reintroduction sites are expected to attain this level of production anytime in the foreseeable future.

The availability of future reintroduction sites, combined with the recovery program's proven ability to repopulate these areas, further demonstrates that the species' continued survival in the wild is not at risk. Recent estimates suggest an additional 181 sites could be available this decade for ferret reintroduction, including 3 to 5 large sites (Lockhart et al. 2006; Luce 2006). We have a demonstrated ability to develop such new reintroduction sites. All five of the first ferret reintroductions (from 1991 to 1996) continue to be occupied by ferrets. Half of all reintroductions sites are considered "successful" (i.e., self-sustaining with 30 or more breeding adults capable of supporting other sites with translocations) or "improving" (i.e., increasing population) (33 percent and 17 percent, respectively).[1, 2] Successful reproduction has been documented by ferrets at every reintroduction site (USFWS 2008a).

As noted in our 1984 experimental population implementing regulation, the essentiality of each reintroduced population is reduced as each additional population is established (USFWS 1984). In the case of ferrets, the species now exists at 17 reintroduction sites across 8 States, Canada, and Mexico (2 of the 19 reintroduction sites no longer have a ferret population). Each of these sites provides additional refugia should one or more sites be lost.

All three of the petitioned sites met the statutory and regulatory standards for nonessential experimental populations at the time of their designation. Although reintroduction sites are only required to satisfy these standards at the time of their reintroduction, we believe all three sites continue to meet the statutory and regulatory standards for nonessential experimental populations. This conclusion does not downplay the importance of these sites to recovery. On the contrary, importance to recovery is required for all experimental populations. Given the above, we find no legal mandate to withdraw the nonessential experimental designation in all or part of any of the petitioned sites. Below, we consider whether there are other compelling reasons to change these sites' nonessential experimental status.

Endangered Species Act Protective Regulations

One of the benefits of a nonessential experimental designation is that it provides flexibility in the regulatory requirements in the area where the reintroduction occurs. This regulatory relief is important because, prior to reintroduction, these sites had no regulation related to the subject species because the species was not present. Thus, State, tribal, and private landowners typically resist endangered species reintroductions that bring with them new Federal regulation. This resistance can be nearly insurmountable. In the case of ferrets, we do not believe any of the three petitioned populations would exist today if not for their nonessential experimental designations and the resulting reduced regulatory burden.

The 1982 experimental population amendments were authorized because Congress recognized this burden was precluding species' reintroductions. The primary regulatory differences in nonessential experimental designations center on the section 7 consultation process, designation of critical habitat, and the take prohibitions in section 9 of the Act. Each of these is described below.

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[1] These calculations exclude the seven reintroduction sites initiated in the last several years where it is too early to gauge success.

[2] Furthermore, it should be noted that the marginally successful and the unsuccessful sites are largely the result of plague and not management or regulatory oversight authorized under nonessential experimental regulations.

Section 7 Consultation Process - Your petition asserts that section 7(a)(1) of the Act requires Federal agencies to agree to releases on biologically suitable habitat because the Act requires Federal agencies to "…utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species…" *(16* U.S.C. § 1536(a)(1)). Contrary to the claims in your petition, section 7(a)(1) has not been interpreted by Federal agencies or courts as a requirement to release listed species on Federal lands based solely on the existence of biologically suitable habitat. Federal agencies have discretion on how to fulfill their section 7(a)(1) obligations (*Pyramid Lake Paiute Tribe* v. *United States Department of the Navy*, 898 F.2d 1410, 1418 (9th Cir.1990); *Strahan* v *Linnon*, 967 F. Supp. 581, 596 Aff'd 187 F. 3d 623 (1st Cir. 1998); *Center for Marine Conservation* v *Brown*, 917 F. Supp 1128 (S.D. Tex 1996); *Coalition for Sustainable Resources, Inc.* v. *U.S. Forest Service*, 48 F. Supp. 2nd 1303 (D. Wyo. 1999); *WaterWatch of Oregon* v. *U.S. Army Corps of Engineers*, 2000 U.S. Dist Lexis 17650, 2000 WL 1100059 (D. Or. 2000); *Defenders of Wildlife* v. *Babbit*, 130 F. Supp. 2d 121 (D. DC 2001)).

Under section 7(a)(2) of the Act, Federal agencies consult with the Service when they authorize, fund or carry out an activity that may affect a listed species or its designated critical habitat. Formal consultation is required for projects likely to adversely affect a listed species or critical habitat. Formal consultation results in a biological opinion documenting whether the Federal action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. An associated incidental take statement specifies the extent of take allowed, the reasonable and prudent measures necessary to minimize impacts from the Federal action, and the terms and conditions with which the action agency must comply. Consultation is required for threatened, endangered, essential experimental populations, and nonessential experimental populations within the National Wildlife Refuge System or the National Park System.

Formal consultation is not required for nonessential experimental populations except where it occurs on National Wildlife or National Park System lands. Instead, section 7(a)(4) requires Federal agencies to "conference" with the Service on agency actions that are likely to jeopardize the continued existence of the species. A conference may involve informal discussions between the Service, the action agency, and the applicant. Following the conference, the Service may issue a conference report containing recommendations for reducing adverse effects. These recommendations are discretionary. We believe that the section 7 streamlining achieved through the promulgated rules for the ferret reintroductions provide adequate protections for the long-term conservation of the populations.

Critical Habitat - Section 4(a)(3) of the Act requires that we designate critical habitat for threatened and endangered species including occupied and unoccupied areas essential to the conservation of the species. Critical habitat is considered in the consultation process whereby Federal agencies ensure actions with a Federal nexus are not likely to result in the destruction or adverse modification of critical habitat. Although a critical habitat designation does not necessarily preclude habitat modification, such designations are often viewed as undesirable by landowners. The 1982 experimental population amendments excluded nonessential designations from critical habitat designations recognizing such controversy could impede the ability to

accomplish species' reintroductions. Because ferrets were listed prior to the 1978 amendments requiring critical habitat, ferrets were exempt from the requirement to designate critical habitat. This exemption exists irrespective of the nonessential experimental designations.

Take Provisions - Section 9 of the Act restricts take of threatened and endangered species. The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The Act prohibits take of species listed as endangered unless permitted under section 10 or exempted by an incidental take statement through section 7 consultation. At reintroduction sites designated as nonessential experimental, the Secretary has the discretion to issue special rules that determine those measures and prohibitions that are necessary and advisable for the species' conservation.

The ferret's special rules prohibit take except under the following specific situations. First, any person with a valid permit may take ferrets in the experimental population areas. Second, any employee or agent of the Service or appropriate State wildlife agency designated for such purposes, acting in the course of official duties, may take a ferret in the wild in the experimental population areas if such action is necessary: for scientific purposes; to relocate a ferret to avoid conflict with human activities; to relocate a ferret that has moved when removal is necessary to protect the ferret, or is requested by an affected landowner or land manager; to relocate ferrets within the experimental population area to improve ferret survival and recovery prospects; to relocate ferrets from the experimental population areas into other ferret reintroduction areas or captivity; to aid a sick, injured, or orphaned animal; or to salvage a dead specimen for scientific purposes. Third, a person may take a ferret in the wild within the experimental population areas, provided such take is incidental to and not the purpose of, the carrying out of an otherwise lawful activity and if such ferret injury or mortality was unavoidable, unintentional, and did not result from negligent conduct. Fourth, take may occur during the course of monitoring the reintroduced populations (USFWS 1991, 1994, and 1996).

These take allowances serve two primary purposes. First, the take allowances provide for management of the site. Such authorization has played an important role in maintenance of reintroduction sites. Second, the take allowances provide stakeholders that are likely to be impacted by the reintroduction with assurance that the reintroduced species will result in minimal new regulatory burden.

When the specific rules were promulgated for each of the petitioned reintroduction sites, it was required that the necessary protective regulations for the conservation of the transplanted population were included. The development of these regulations included a rigorous and deliberative process, including notice and comment, in compliance with all legal requirements. Given the success of these sites to date (i.e., all three are self-sustaining with 30 or more breeding adults capable of supporting other sites with translocations), it appears that an appropriate level of regulation was achieved. In these cases, we believe the regulations outlined above tailored specifically for the reintroduction sites provided appropriate protection to the reintroduced ferrets at the same time that they met landowner needs and resulted in ferrets being reintroduced and successfully reestablished into the wild. Without these types of assurances, landowner opposition would likely have prevented the establishment of ferrets within the areas of petition's focus (Emmerich 2009; Vonk 2009; Voyles 2009).

Impacts of a Potential Change from Nonessential to Endangered or Essential

The petition asserts the three petitioned sites would be better-off with additional regulatory oversight. To support this claim, the petition describes activities that they believe threaten ferret recovery at each site.

In Shirley Basin, the petition identified recreational prairie dog shooting, prairie dog control, oil and gas development, wind power, electrical transmission projects, and uranium mines as human-caused threats that are impacting ferret recovery (WildEarth Guardians et al. 2009). The petition did not put forth any data to indicate any of these activities, either individually or in combination, are occurring at a level to impact ferret recovery at Shirley Basin. Further, the Service also has no data indicating ferrets are threatened by these activities at Shirley Basin (USFWS 2008a). To the contrary, this site appears to be doing well.[3]

In Conata Basin, the petition identified prairie dog poisoning as the primary human-caused threat to ferrets (WildEarth Guardians et al. 2009). When ferrets were released in Conata Basin in 1996, approximately 10,000 acres were occupied by prairie dogs (USFS 2005). By 2004, that number had increased to 23,000 acres (Griebel 2010). That expansion, caused largely by drought conditions, also created prairie dog encroachment issues from Federal land onto private land. The USFS made the decision to address the prairie dog encroachment by allowing toxicant use on the perimeter of their lands. The Service provided recommendations which were implemented to minimize impacts to ferrets (USFWS 2004). Even with the toxicant use in the encroachment areas, Conata Basin's prairie dog acreage increased by 8,000 acres from 2004 to 2007 (Griebel 2010, 2009). The arrival of plague to Conata Basin in 2008 eliminated approximately half of the prairie dog acreage present in 2007 prior to the plague epizootic. As a result, toxicant use in 2009 was reduced 94 percent from the peak year of 2006 (Griebel 2010). We do not believe the existing or likely future toxicant use at Conata Basin is or will compromise ferret recovery at this reintroduction site.

The petition identified shooting of Gunnison's prairie dogs as the primary human-caused threat to ferrets at Aubrey Valley. The petition asserted that prairie dog hunting, trapping, and control can threaten ferrets at this site (WildEarth Guardians et al. 2009). The petition did not put forth any data to indicate prairie dog shooting, hunting, trapping, or control is impacting ferret recovery at Aubrey Valley. Further, the Service has no data indicating impacts to ferrets from these activities at Aubrey Valley (USFWS 2008a). In fact, the available data indicates both prairie dogs[4] and ferrets[5] are doing well at this site (USFWS 2008a, 2008b).

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[3] As noted above, Shirley Basin is estimated to have a minimum fall population of 196 ferrets with an estimated 98 breeding adults, is currently considered self sustaining and is capable of supporting other sites with translocations (USFWS 2008a).

[4] The Aubrey Valley Gunnison prairie dog population has been stable since at least 1974 despite the presence of plague. Recently, the population has increased from 30,000 acres in 1997, to 40,000 acres in 2005, to 47,785 acres in 2007 (Underwood 2007, Van Pelt 2005, and Van Pelt 2007 as cited in USFWS 2008b).

[5] As noted above, Aubrey Valley is estimated to have a minimum fall population of 66 ferrets with an estimated 33 breeding adults, is currently considered self sustaining and is capable of supporting other sites with translocations (USFWS 2008a).

The petition also asserts our use of nonessential experimental populations deliberately isolate ferret populations, prevent migration, hinder population expansion, and may cause adverse genetic impacts. These assertions are not well founded. Although the protective regulations allow us to recapture ferrets and return them to the reintroduction site, there are very few instances where this has been requested. In most cases, ferrets are allowed to freely disperse.

One of the ferret recovery program's objectives is to reestablish ferret populations in the wild (Conservation Breeding Specialist Group 1992; USFWS 1988). The use of nonessential experimental designations has allowed ferrets to be reestablished on landscapes where they no longer existed. Rather than causing isolation, section 10(j) has established ferret populations that have been shown to rapidly expand and occupy suitable habitat after reintroductions (Grenier et al. 2007). We have no information to indicate the regulatory designation of any population has negatively impacted its genetic make-up. To the contrary, there is a benefit of using 10(j) in that it assists in establishing more populations than could otherwise be established. It is the general feeling of the recovery program that the species' genetic fitness is benefited by exposure to natural selection pressures. Thus, the available data do not support the assertions that the use of nonessential experimental designations meaningfully negatively impact migration, population expansion or genetic makeup.

Overall, we believe the factors cited in the petition as potential threats are minor issues that lack supporting documentation and are unlikely to have population-level impacts to ferrets. The success of these sites provides strong evidence that the existing regulations provide a framework that can and is supporting successful management at these sites. We do not believe these theoretical issues provide evidence in support of the need to revoke or modify existing nonessential experimental regulations.

While the available evidence suggests, at best, negligible benefits of retracting the nonessential experimental designation, the ramifications of such an action would be extremely detrimental to ferrets at these sites and the partnerships that sustain them. Furthermore, such an alteration of the regulatory framework post-reintroduction would undermine future reintroduction efforts.

Typically, endangered species recovery efforts, including those for ferrets, depend on a myriad of partners working together to accomplish a common goal. In most cases, and particularly for ferrets, recovery would not be possible without substantial partner efforts. In looking back on ferret recovery over the last 20 years, we have gone from no ferret populations known in the wild to having 19 ferret reintroduction sites in the wild, with 17 of those sites still having ferrets through 2009. Hundreds of partners have made this possible. We believe these are not trivial accomplishments.

At nearly all the 19 ferret reintroduction sites, it is our partners, not the Service, who accomplish the actual on-the-ground ferret reintroduction and management work. Absent those partnerships, there would be far fewer reintroductions and likely no ferrets at the three sites addressed in your petition. Accordingly, the Service highly values those local partnerships that accomplish ferret recovery and is understandably cautious about undertaking actions that disrupt those partnerships.

Recent experience reinforced the importance of such partnerships. When plague erupted in Conata Basin in 2008, Federal and non-Federal partners undertook active management to purchase and apply insecticides and administer vaccines. These efforts prevented plague from destroying the Conata Basin ferret recovery area. In all, about 11,000 acres of ferret-occupied prairie dog habitat were saved and a high number of ferrets were vaccinated. These actions could not have been accomplished without the partners.

Only Federal agencies have an affirmative responsibility to use their authorities to further the purposes of the Act. At the Aubrey Valley site, the public land identified in the petition for reclassification is State land and no Federal land exists at this site. At both the Aubrey Valley and Shirley Basin sites, the State Game and Fish Departments and their volunteers do the vast majority of the reintroduction and management work through cooperation with private landowners. If these partners pulled back their efforts or partners ceased participation, we believe this would seriously compromise these sites.

We view all experimental population regulations as an agreement between the Service, the affected State and Federal agencies, and persons holding interest in land which may be affected by the establishment of the experimental population (50 CFR 17.81(d)). If we alter the nonessential experimental status for any of these sites and it resulted in a substantial modification to ferret management on non-Federal lands, any private, State or tribal landowners who consented to the introduction of ferrets on their lands would be permitted to terminate their consent and request that the ferrets be relocated (USFWS 1991, 1994, 1996). If we granted your petition, we believe requests for removal of ferrets would be forthcoming at these reintroduction sites. Further, we believe partners at other sites may preemptively request similar actions or choose not to undertake future ferret reintroductions. Such removal would be devastating to the Aubrey Valley and Shirley Basin sites and could severely impact the Conata Basin site.

The potential for reclassification of populations from nonessential to either essential or endangered after reintroduction has been a concern since the advent of the 1982 amendments to the Act. In development of our 1984 experimental population regulations, the Service received comments expressing the view that reclassification of a species (nonessential to essential or endangered) post-reintroduction should not be permitted (USFWS 1984). At the time, we indicated that we could not categorically state that such reclassification would never occur, but that such a reclassification would be highly unlikely to proceed without full cooperation with affected parties.

Numerous unsolicited comments from partners expressed great concern about the ramifications to ferret recovery from rule changes that might occur post-reintroduction (Emmerich 2009; Lanka 2009; Lloyd 2010; Mann 2009; Vonk 2009; Voyles 2009). Partners believed such rule changes would undermine these cooperative ferret recovery efforts and influence future endeavors.

We also heard from tribal biologists involved in ferret reintroductions on their respective Reservations (Boyd 2009; Claymore 2009). These biologists indicated considerable concern with your petition because it targeted the Aubrey Valley site in Arizona, which is predominantly tribally-owned and tribal trust land. They expressed concern that petitioners would soon pursue

other tribal ferret reintroduction sites or that tribal councils would become apprehensive about possible reclassification and in a preemptive measure, would request ferret removal in order to avoid reclassification of ferrets at their sites.

Your petition already has had immediate and potentially long-lasting negative impacts to ferret recovery. For example, last fall we were planning a new reintroduction on private land in southeastern Wyoming. This 40,000-acre site would have been one of the largest ferret reintroduction sites ever. Partners had worked closely with landowners for years and cultivated a relationship to facilitate this release. The ferret program, recognizing the high value and large size of the new site in Wyoming, allocated a minimum of 60 ferret kits for release (one of the largest allocations ever made by the program). The alignment of a high quality site, good ferret production, and willing landowners is a rare opportunity. The receipt of your petition in September 2009 prompted landowners to withdraw support for that reintroduction (Emmerich 2009; Lanka 2009). News of the petition also prompted curtailment of monitoring in Shirley Basin where landowners would not grant access due to the publicity surrounding your petition (Emmerich 2009; Lanka 2009).

We know of no entities that are likely to allow ferret reintroduction on their land as long as they believe the governing rules for their land are likely to change. By advocating this position, your petition has already harmed ferret recovery and put doubt in many landowners' minds about regulatory changes post-reintroduction. This has harmed ferret recovery efforts tremendously and could hinder other species' recovery efforts (Campbell 2010).

Your petition targets only successful sites. The Wildlife Society (a professional association of wildlife experts dedicated to excellence in wildlife stewardship through science and education) and many of our partners noted that such an approach would appear to punish success and, thus, dissuade partners from working toward such a goal (Emmerich 2009; Lanka 2009; Lloyd 2010; Mann 2009; Vonk 2009; Voyles 2009). We agree with this opinion and believe that since these sites are performing as intended, reclassification would set a problematic precedent with ramifications for many recovery programs.

Thus, while we were unable to identify any tangible benefits to reclassification of the three petitioned sites, there were immediate negative impacts to the ferret recovery program that we believe would be compounded if reclassification were pursued. We heard from our key partners at each of the reintroduction sites and there was no support for reclassification of these sites, which are performing as intended when each of the reintroduction rules was promulgated.

Secondary Actions Requested in the Petition

Your petition also requested a number of additional administrative steps if the Service chooses not to reclassify the three ferret populations at Shirley Basin, Conata Basin, and Aubrey Valley. The requested actions include:

1. Re-designating more than the recommended three nonessential populations as endangered;

2. Re-designating more than the recommended three nonessential populations as essential;

3. Re-designating all nonessential populations as endangered;

4. Re-designating all nonessential populations as essential;

5. Re-designating the ferrets at Badlands National Park, UL Bend National Wildlife Refuge, and Wind Cave National Park as endangered and designating future reintroduced ferrets at national parks and refuges as endangered;

6. Re-issuing 10(j) incidental take rules to disallow the direct take of ferret habitat via prairie dog poisoning, shooting, oil and gas development, and other actions that harm prairie dogs and their colonies;

7. Designating critical habitat for one or more ferret population;

8. Protecting future reintroduced ferret populations as fully endangered;

9. Listing the black-tailed, Gunnison's, and white-tailed prairie dog species as threatened or endangered under the Act; and

10. Allocating additional funding to enable listing of the currently warranted but precluded Gunnison's prairie dog population.

We will not revisit those existing section 10(j) final rule designations as requested in items 1, 2, 3, 4, 6, and part of 5. The petition did not present any data to indicate these sites fail the statutory nonessential experimental population designation definition or that such an action would yield any meaningful conservation gains. Further, we have no data indicating such a change is warranted or would benefit the species. Instead, such an action would cause significant disruption to existing partnerships and harm ongoing and future recovery efforts.

Item 8 and part of item 5 references future actions. Because these actions have not yet been undertaken, any commitment with regard to outcome would be predecisional on our part. Such future actions are likely to include opportunities for public comment.
Item 7 will not be pursued. As noted above, species listed prior to the 1978 amendments to the Act are exempt from requirements to designate critical habitat.

Items 9 and 10 are listing actions that require evaluation separate from this petition. All of these potential issues were either recently reviewed, are currently being reviewed, or are currently under litigation. As such, these issues are being evaluated by the Service or the courts. Further review here is not necessary or appropriate.

Conclusion

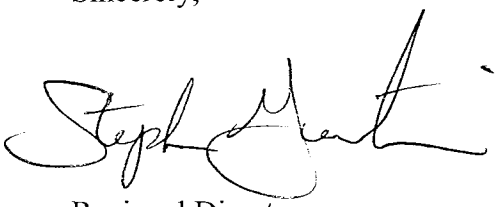
Congress amended the Act to include section 10(j) to assist with reintroduction and recovery of listed species. All three of the petitioned sites have furthered the conservation of the species. This success would likely not have been achieved without the assurances of the 10(j) designations.

Section 10(j) nonessential experimental designations require promulgation of regulations appropriate for each site. Based on the success of these sites, the rules have achieved the congressional intent of section 10(j) by establishing ferret populations in the wild with an appropriate level of regulatory protection. These sites satisfied the requirements for nonessential experimental population designations, thus, there is no legal mandate to revisit these designations. Furthermore, the available evidence suggests negligible benefits of retracting the nonessential experimental designation and instead there would be extremely detrimental effects to ferrets at these sites and the partnerships that sustain them.

After careful review and consideration, the Service denies your petition to reclassify the nonessential experimental population designation at Shirley Basin, Wyoming; Conata Basin, South Dakota; and Aubrey Valley, Arizona. No further consideration will be given to your petition at this time.

If you need further assistance, please do not hesitate to contact me at the above address or the Black-footed Ferret Recovery Coordinator, Pete Gober, at (970) 897-2730.

Sincerely,



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cc: See Distribution List

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