

# WILDEARTH GUARDIANS

February 11, 2008

Dirk Kempthorne  
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U.S. Department of the Interior  
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U.S. Fish and Wildlife Service  
1849 C. Street, N.W.  
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Via Facsimile and Certified Mail

**Re: 60-day notice of intent to sue under the Endangered Species Act for the U.S. Fish and Wildlife Service's negative 90-day finding on our Petition to reclassify the Utah prairie dog's (*Cynomys parvidens*) from threatened to endangered**

Dear Secretary Kempthorne and Director Hall:

In accordance with the 60 day notice requirement under Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians intends to bring a civil action challenging your failure to reclassify the Utah prairie dog (*Cynomys parvidens*) as an endangered species. The Secretary of the Interior and the Fish and Wildlife Service ("Service") violated section 4 of the ESA when the Service rejected our petition<sup>1</sup> and determined that the Utah prairie dog did not warrant reclassification from threatened to endangered. 72 Fed. Reg. 7843, 7843-52 (Feb. 21, 2007). The Utah prairie dog meets the standard for "endangered" as it is "endangered throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Your decision to reject our petition was arbitrary, capricious, contrary to law, and failed to use the best available science in violation of the Administrative Procedure Act ("APA") and ESA. WildEarth Guardians requests that the Service promptly issue a new finding that the Utah prairie dog may warrant reclassification as an endangered species under the ESA.

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<sup>1</sup>As of January 28, 2008 Forest Guardians, Sinapu, and the Sagebrush Sea Campaign merged to become WildEarth Guardians.

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## I. Utah Prairie Dog

The Utah prairie dog is an exceedingly rare and ecologically important species. It is one of five distinct species of prairie dog. The Utah prairie dog occupies small remote areas of southwestern Utah and is isolated from any other prairie dog species. The Utah prairie dog is very valuable to the ecosystem. Because of the important roles that prairie dogs play in their ecosystems, they are considered “keystone species.” Prairie dogs provide prey for a diversity of mammalian and avian predators, and their burrows provide refuges to a wide variety of wildlife. As populations of Utah prairie dogs decline, so too will populations of associated wildlife within the Utah prairie dog’s habitat.

The Utah prairie dog is severely imperiled and meets the ESA’s definition of an “endangered” species, as it faces extinction in the foreseeable future. As of 1971, this species occurred on only 96 sections of land, down from an historical 713 sections. 72 Fed. Reg. 7844. This equates to an 87% decline. Moreover, the Utah Division of Wildlife Resources has mapped only 43,106 total acres of potential habitat. *Id.* Only 6,977 acres are known to be occupied.<sup>2</sup> But despite the Utah prairie dog’s narrow range, its habitat continues to be leased by federal agencies for oil and gas drilling and livestock grazing. On private land, Utah prairie dogs are threatened by urban sprawl, shooting, and habitat conservation plans that allow take of individual prairie dogs and loss of habitat.

We demonstrated in our petition that the overall thrust of the Service’s Recovery Plan – to increase prairie dog populations on public land – is not succeeding. In fact, despite approximately 20,000 individual prairie dogs having been translocated from private to public land from 1972 to the date of our petition, public land populations comprise a lower portion of the overall prairie dog numbers than they did in decades prior.<sup>3</sup> In addition, while the Service has admitted publicly that its special 4(d) rule allowing shooting is biologically indefensible,<sup>4</sup> the 4(d) rule is still in place and, as we show in our petition, resulted in the deaths of 14,002 Utah prairie dogs from 1984 to 2000.<sup>5</sup>

Other problems with Service management of the Utah prairie dog include its failure to revise the 1991 recovery plan, which is broadly recognized as badly in need of revision; approval of habitat conservation plans that are harming existing Utah prairie dog populations on private lands; and failure to reduce threats to Utah prairie dogs on public land.<sup>6</sup> In addition, the Service is currently considering a safe harbor agreement that potentially could hand over management of all Utah prairie dogs on private lands for fifty years to the Panoramaland Resource Conservation and Development Council, a group over which the Service has no authority.<sup>7</sup>

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<sup>2</sup>Forest Guardians et al. 2003. Petition to the U.S. Fish & Wildlife Service to reclassify the Utah prairie dog as an Endangered species under the Endangered Species Act, at 2.

<sup>3</sup>Forest Guardians et al. 2003 at 166-70.

<sup>4</sup>See Attachment 1: Cady, Meg. 2007. Service examines special rule. The Spectrum, dated April 2, 2007.

<sup>5</sup>Forest Guardians et al. 2003 at 162, 186.

<sup>6</sup>See Attachment 2: Forest Guardians et al. 2007a. Comments on the Utah prairie dog five year review. Submitted April 22, 2007.

<sup>7</sup>See Attachment 3: Forest Guardians et al. 2007b. Comments to U.S. Fish and Wildlife Service on Panoramaland safe harbor agreement proposal. Dated October 9, 2007.

The Service is behaving as if this species is abundant and a nuisance when, in fact, it is facing extinction. Reclassification to endangered status would terminate the special 4(d) rule; provide the Utah prairie dog full coverage under the ESA section 9 taking provisions, 16 U.S.C. § 1538(a)(1)(B); decrease the likelihood of the Service granting incidental take permits for the Utah prairie dog; and provide other substantive and procedural protections. *See* 16 U.S.C. § 1533(d). In addition, listing decisions are supposed to be based solely on biology, and biologically the Utah prairie dog faces extinction. It therefore warrants reclassification to endangered status.

## **II. The Petition to Reclassify the Utah Prairie Dog as Endangered**

On February 3, 2003, WildEarth Guardians (then Forest Guardians), Center for Native Ecosystems, Escalante Wilderness Project, Boulder Regional Group, Southern Utah Wilderness Alliance, and Terry Tempest Williams (“Petitioners”) petitioned the Service to reclassify the Utah prairie dog from threatened to endangered. On February 2, 2006, after three years had passed since the petition was filed, Petitioners filed a complaint for injunctive and declaratory relief against the Service to compel them to make a 90-day finding on the petition in the United States District Court for the District of Columbia. The parties reached a settlement agreement on June 2, 2006. The settlement agreement required the Service to make a 90-day finding on or before February 17, 2007. On February 21, 2007, the Service issued a negative finding on the petition. *See generally* 72 Fed. Reg. at 7843-52.

## **III. ESA Violations**

### **A. The Utah prairie dog meets the factors for listing as endangered.**

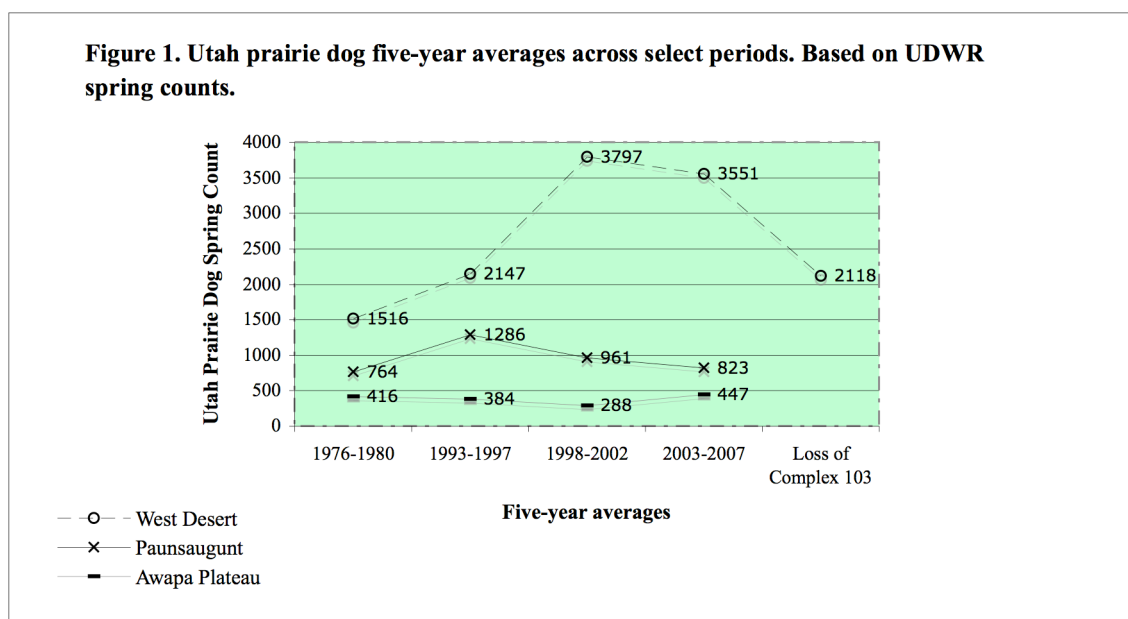
Section 4 of the ESA sets forth the five factors the Service must consider when making a determination to reclassify a species. *See* 16 U.S.C. § 1533(a)(1), (b)(1)(A). A species warrants listing if it meets any one of these five factors. The petition provides substantial scientific and biological information explaining how the Utah prairie dog continues to meet these factors despite its threatened status.

Utah prairie dog count data indicate that this species is facing extinction. As we demonstrated in our 2003 petition, sylvatic plague, the 4(d) rule allowing shooting, illegal shooting and poisoning, massive translocation, and habitat degradation all account for shrinking and disappearing populations. Climate change and drought pose additional threats. Despite this bleak picture, the Service writes in its finding that,

Utah prairie dogs counted in the spring of 2005 (5,381 animals) (UDWR 2005), continues to be within the range of variation seen since counts began in 1976. 72 Fed. Reg. 7848.

Primarily on this basis, the Service concludes the Utah prairie dog is not endangered. However, the Utah prairie dog was listed as endangered from 1976-1984, and counts are

approaching the same level as when the species was listed as endangered. Analysis of five-year averages from 1976-1980, contrasted with five-year averages from 1993-2007,<sup>8</sup> indicate that one of the recovery areas, the Awapa Plateau, is near 1976-1980 levels: its average count in the early period was 416, while its most recent five-year average was 447. The five-year average for 1998-2002, just before we filed our petition, was 288, far below the 1976-1980 five-year average. Another recovery area, the Paunsaugunt, is rapidly trending downward, having declined by 36% since 1993. Its current level is 823 animals. If trends continue, it will quickly fall below its 1976-1980 average of 764 animals. Finally, while the West Desert's numbers currently far exceed its 1976-1980 numbers, if Complex #103 disappears, it would start approaching its 1976-1980 count (Figure 1).<sup>9</sup>



The Utah prairie dog is threatened across a significant portion of its historic range, given its decline by approximately 87% over the past century. Moreover, the Utah prairie dog faces severe threats across its entire current range. There are few (if any) secure Utah prairie dog populations. The vast majority of populations are very small: approximately 70% of all existing complexes have spring counts of fewer than 30 individuals, which equates to approximately 60 adults.<sup>10</sup>

While the Service did not discuss the timeframe it is using to conclude that the Utah prairie dog is not endangered, the Service recently defined the “foreseeable future” as 35 years in analyzing our petition to list the Gunnison’s prairie dog (*Cynomys gunnisoni*). 73 Fed. Reg. 6660, 6675. The Service has approved habitat conservation plans, which allow take of Utah prairie dogs and their habitats, with terms of 20 years, and is

<sup>8</sup>See Attachment 4: WildEarth Guardians. 2008. Utah prairie dog February 2008 biological status update. Dated February 11, 2008. This attachment explains why these periods were selected for analysis.

<sup>9</sup>*Id.* This attachment explains why Complex #103 may disappear.

<sup>10</sup>*Id.*

contemplating approval of a safe harbor agreement with a term of 50 years. We suggest that the Service define the foreseeable future, at minimum, as 50 years for the Utah prairie dog.

The Service recognizes that most Utah prairie dog populations are small (numbering fewer than 200 individuals). 72 Fed. Reg. 7848. As noted above, our analysis indicates that 70% of all populations number fewer than 60 adult individuals.<sup>11</sup> However, the proportion of small populations may be even higher under the Service's definition, which would result in only 9 complexes classified as not small.<sup>12</sup> The Utah prairie dog's small populations have a very low chance of surviving the next 50 years, given their vulnerability to extirpation from a variety of threats, including shooting (both legal and illegal), poisoning (illegal), habitat degradation and loss, climate change and drought, sylvatic plague, excessive predation, and inadequacy of regulatory mechanisms. The Service, however, has arbitrarily concluded that small colony size is not endangering the species. 72 Fed. Reg. 7848. This is contrary to the best available science on the threat posed to Utah prairie dogs (and most species) from small population size.

Of the 18 complexes that are relatively large (spring counts of 50 or more Utah prairie dogs), all could go extinct in the foreseeable future. Four of these complexes suffered declines of more than 50% between 2006-2007.<sup>13</sup> On another complex, a massive translocation effort is currently underway.<sup>14</sup> Of the remaining 13 complexes, 4 are located entirely on private land and therefore subject to removal through shooting under the special 4(d) rule or translocation, and 4 are located on mixed private and public land and also subject to shooting or translocation. Those populations entirely on public land (5 complexes) are subject to livestock grazing, off-road vehicle use, oil and gas drilling, and other harmful land uses threatening their survival.<sup>15</sup> Moreover, all of these 18 complexes face extirpation from plague, climate change, and drought in the foreseeable future. Moreover, under the Service's definition of small, there are only 9 relatively large populations. One of these is being removed through translocation, and five others are either partly or entirely on private land and therefore face increased risk of elimination from shooting, translocation, and habitat conservation plans.<sup>16</sup>

**1. The Utah prairie dog's habitat or range is presently and threatens to be destroyed, modified, or curtailed.**

The Utah prairie dog's habitat is currently, and threatens to be further destroyed, modified, and curtailed by municipal development, brush encroachment, livestock grazing, off-road vehicle use and recreation, oil gas and mineral development, and the conversion of agricultural lands to croplands. These threats occur on both public and

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

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>See Attachment 5: Forest Guardians comments on Cedar Ridge golf course and Paiute tribal lands habitat conservation plan.

<sup>15</sup>Forest Guardians et al. 2003 and WildEarth Guardians 2008.

<sup>16</sup>WildEarth Guardians 2008.

private lands. For instance, as we show in our petition, the human population growth in the range of the Utah prairie dog acutely endangers the future of this species. From 1990-2000, census data for Iron County indicate a staggering human population growth rate of 62.5%.<sup>17</sup> However, the Service dismisses these threats as being “small, localized impacts on specific Utah prairie dog colonies.” 72 Fed. Reg. at 7848. This decision was arbitrary because the petition presented the best available science, including credible peer reviewed articles and government documents, that demonstrated that these threats singly and cumulatively threaten the Utah prairie dog with extinction.<sup>18</sup> The most effective way to fully mitigate these threats is to upgrade the Utah prairie dog’s status to endangered.

## **2. Commercial, recreational, scientific, or education purposes overutilize the Utah prairie dog.**

A special 4(d) rule allows up to 6,000 Utah prairie dogs to be shot annually. At the time of our petition, it had resulted in the take of 14,002 Utah prairie dogs since 1984.<sup>19</sup> In addition, there may be additional killing from illegal shooting as well as under-reporting of prairie dogs shot under the special rule. This rule is only possible because of the Threatened status of the Utah prairie dog. Moreover, illegal shooting of Utah prairie dogs still occurs. Shooting not only reduces the prairie dog’s population but it also alters their behavior. The Service’s negative 90-day finding concluded that shooting does not cause a significant threat to the Utah prairie dog. However, as the petition explained, not only has the government previously acknowledged the severity of this threat, the threat has been well documented.<sup>20</sup>

## **3. Disease and Predation threatens the Utah prairie dog.**

Sylvatic plague continues to be a serious threat to the Utah prairie dog’s survival. The Utah prairie dog has almost no immunity to plague, plague occurs throughout the entirety of its range, and there are few feasible mechanisms to prevent plague. Despite the Service’s recognition that plague is a major factor in Utah prairie dog mortality, the Service says the effect of the plague is unclear. As the petition demonstrates, the effect of the plague on prairie dogs is catastrophic and cyclical enough to be a serious threat to the Utah prairie dog’s survival.<sup>21</sup>

The 90-day finding says the Service would not discuss predators because the petition did not state that predators are a threat to the Utah prairie dog. While acknowledging that predation is natural and prairie dogs provide prey as part of the keystone role, the petition discusses the impact that predators can have on the Utah prairie dogs given its extreme diminishment from historic population sizes and small occupied area. The petition lists the predators, discusses how the Service recognizes that badgers account for 80-90% of translocated Utah prairie dog deaths, and mentions the habitat needs to protect the prairie

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<sup>17</sup>Forest Guardians et al. 2003 at 55-56.

<sup>18</sup>*Id.* at 54-94.

<sup>19</sup>*Id.* at 162, 186.

<sup>20</sup>*Id.* at 94-108.

<sup>21</sup>*Id.* at 98-100.

dogs from predators.<sup>22</sup> The petition also mentions studies that show how entire prairie dog populations may go extinct from plague or predation.<sup>23</sup> In addition, the petition discusses the need for larger colonies for purposes of predator detection.<sup>24</sup> Therefore, the petition asserts the threats predators have on the Utah prairie dogs. The Service's refusal to acknowledge this threat was arbitrary and capricious.

#### **4. The regulatory mechanisms inadequately protect the Utah prairie dog.**

The Utah prairie dog lacks adequate regulatory mechanisms to ensure its survival or recovery. In 1984, the Service wrongly decided to reclassify the Utah prairie dog to threatened status. Down-listing has caused drastic effects on the Utah prairie dog's population, as is evident from the low population levels reported above. The Service did not base the decision to down-list on the best available science. The Service stated that one of the reasons for down-listing was to provide flexibility for farmers. This is a political objective, not a scientific basis.

In 1984, when the Service decided to down-list the Utah prairie dog, they promulgated a special 4(d) rule. The 1984 special rule permitted shooting of the Utah prairie dog by allowing for the annual take of 5,000 Utah prairie dogs between June 1 and December 31 in the Parowan and Cedar Valleys of Utah. At the time, the Service estimated that the Utah prairie dog numbered around 10,000 and could survive a 50% annual eradication. However, as the petition shows, scientists have proven these numbers were in error. The Service based these numbers on an inflated estimate of the prairie dog's litter size and reproduction rates. In addition, the Service unreasonably believed that by instituting the 4(d) rule they would be replacing natural deaths and not adding to them.<sup>25</sup>

Even worse, in 1991, the Service replaced the 1984 special 4(d) with a more permissive rule, allowing for the annual killing of 6,000 Utah prairie dogs across their entire range. The 1991 rule only required annual reports while the 1984 rule required quarterly reports. As the petition explains, the Service's 1984 and 1991 decisions lacked scientific backing and were purely motivated by political reasons. Since ESA only permits special 4(d) rules for threatened species, if the Service reinstates the Utah prairie dog as an endangered species, the 1984 and 1991 special rules could no longer harm the Utah prairie dog.

In addition, the Utah prairie dog's Recovery Plan is failing to achieve recovery, and the Service recognizes it needs to be revised. The Recovery Plan is more concerned with achieving economic objectives than the actual recovery of the species. Further, the Service has based the Recovery Plan, like the special 4(d) rule, on false population estimates, false litter sizes, and false reproductive rates.<sup>26</sup> The Recovery Plan's main mechanism for recovery was to transplant the prairie dogs from private to public lands.

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<sup>22</sup>*Id.* at 21-24, 58.

<sup>23</sup>*Id.* at 26.

<sup>24</sup>*Id.* at 93.

<sup>25</sup>*Id.* at 105, 107-08.

<sup>26</sup>*Id.* at 108-12.

Over the years, this practice has turned out to have a deleterious affect on the species. In addition, as the petition thoroughly explains, the Recovery Plan's goals are set too low and the Recovery Plan does not protect the Utah prairie dog on private lands, which is where the Utah prairie dog is the most prevalent.<sup>27</sup>

The petition also discusses the inadequacy of the Interim Conservation Strategy to consider the effects of certain threats on the Utah prairie dog;<sup>28</sup> the government agencies failure to take steps to reduce their harm to the prairie dogs;<sup>29</sup> and the aggregate harm caused by several habitat conservation plans.<sup>30</sup> However, in the 90-day finding, the Service responded to this overwhelming evidence by saying that recovery has been "slow." 72 Fed. Reg. at 7850. This is a highly inaccurate understatement.

The Service states that a "revision to the recovery plan to include the conservation of prairie dogs habitat on private lands, will improve the status of the prairie dogs in the long term." 72 Fed. Reg. at 7850. This analysis is in error because the courts have continually held that the Service cannot consider future conservation actions when it reviews a petition. See Center for Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004).

### **5. Other natural or manmade factors threaten the Utah prairie dog.**

The Utah prairie dog's translocation program, rodent control efforts, drought, legal takes, illegal poisoning, illegal shootings, and noxious weeds continue to threaten the Utah prairie dog.<sup>31</sup> However, the Service fails to recognize the severity of these threats both individually and cumulatively on the Utah prairie dog.

The translocation program in particular has resulted in enormous take of the Utah prairie dog. Over 21,600 UPDs have been translocated from private to public lands from 1972-2005, but Service cannot show consequent increases in UPD public lands populations.<sup>32</sup> The Service admit that translocation survival rates are often only 10%; additional government sources disclose that the survival rate may be even lower.<sup>33</sup>

Climate change will increasingly factor in the fate of the Utah prairie dog. The Service acknowledges throughout its finding that drought historically and currently factors in the decline of the Utah prairie dog. 72 Fed. Reg. 7844-7851. We discussed the threat to the Utah prairie dog from drought throughout our petition, but particularly the harm that occurs when livestock grazing occurs amidst drought.<sup>34</sup> Climate change scenarios in the

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<sup>27</sup>*Id.* at 109, 147-50.

<sup>28</sup>*Id.* at 115-19.

<sup>29</sup>*Id.* at 119-45.

<sup>30</sup>*Id.* at 150-61.

<sup>31</sup>*Id.* at 161-87.

<sup>32</sup>Forest Guardians et al. 2007a and Attachment 6: Forest Guardians et al. 2005. Administrative Procedure Act (APA) petition to eliminate the shooting rule and restrict translocation. Submitted February 2, 2005.

<sup>33</sup>*Id.* and Attachment 7: U.S. Fish and Wildlife Service. 2006. Biological opinion on the Cedar Ridge golf course and Paiute tribal lands habitat conservation plan. Dated December 8, 2006.

<sup>34</sup>Forest Guardians et al. 2003 throughout, but see especially 184-185.



southwest predict long-term drought, which would adversely impact the Utah prairie dog. In addition, we discussed in comments to the Service on the 5-year review for the Utah prairie dog that climate change may cause increases in sylvatic plague epizootics.<sup>35</sup> The Service has failed to consider the threat posed to the survival of the Utah prairie dog from drought and climate change.

### **B. Best Science Available**

After the Service receives a petition from an interested party, Section 4 of the ESA requires the agency to make a finding within 90 days “as to whether the petition presents substantial scientific or commercial information indicating that the petition action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). “Substantial information” is “the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b). Therefore, the Service can only look at the information within the petition and other information they have readily available. In making this decision, the Service must base its decision solely on the best available science. 16 U.S.C. § 1533(b)(1)(A). As the previous sections explained, the petition provided the Service with the best available science, and the best available science contains substantial information that would cause a reasonable person to believe that the Utah prairie dog warrants reclassification from “threatened” to “endangered.”

### **IV. APA Violations**

Under the Administrative Procedures Act (“APA”), any person who is “adversely affected or aggrieved” by agency action has the ability to seek judicial review. 5 U.S.C. § 702. A Court may “hold unlawful and set aside agency actions, findings, and conclusions” if it finds these decisions are arbitrary or capricious. 5 U.S.C. § 706(2). An agency decision is arbitrary or capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Inc., 463 U.S. 29, 43 (1983). The Service’s decision not to reclassify the Utah prairie dog from “threatened” to “endangered” runs counter to the evidence presented in the petition. Additionally, the Service acted arbitrarily when it failed to consider information presented in the petition such as the information on the threat of predation to the Utah prairie dog. While predation is natural, its impact can be compounded by anthropogenic threats such as shooting, poisoning, and habitat destruction. Predation can have a particularly disproportionate impact on small or newly translocated populations. Thus, the Service’s 90-day finding violated the APA in numerous respects.

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<sup>35</sup>Forest Guardians et al. 2007a.

## **V. Conclusion**

The Utah prairie dog is facing death by a thousand paper cuts, most of them very painful. Unless, you promptly remedy the violations of law detailed above by reconsidering the denial of our petition, WildEarth Guardians will seek declaratory or injunctive relief in U.S. District Court to force you to do so. Such a suit will be filed no sooner than 60 days after the date of this notice letter. In addition to seeking declaratory and injunctive relief, WildEarth Guardians will seek the recovery of costs and legal fees to the full extent allowed by law pursuant to the ESA and the Equal Access to Justice Act. If you have any questions, comments, or concerns regarding this letter, or believe any of the above information is incorrect please contact me at 505-988-9126 x1156 or [nrosmarino@wildearthguardians.org](mailto:nrosmarino@wildearthguardians.org).

Sincerely,

Nicole J. Rosmarino, Ph.D.  
Wildlife Program Director  
WildEarth Guardians

List of Attachments (provided on CD)

Attachment 1: Cady, Meg. 2007. Service examines special rule. The Spectrum, dated April 2, 2007.

Attachment 2: Forest Guardians et al. 2007a. Comments on the Utah prairie dog five year review. Submitted April 22, 2007.

Attachment 3: Forest Guardians et al. 2007b. Comments to U.S. Fish and Wildlife Service on Panoramaland safe harbor agreement proposal. Dated October 9, 2007.

See Attachment 4: WildEarth Guardians. 2008. Utah prairie dog February 2008 biological status update. Dated February 11, 2008. This attachment explains why these periods were selected for analysis.

Attachment 5: Forest Guardians comments on Cedar Ridge golf course and Paiute tribal lands habitat conservation plan.

Attachment 6: Forest Guardians et al. 2005. Administrative Procedure Act (APA) petition to eliminate the shooting rule and restrict translocation. Submitted February 2, 2005.

Attachment 7: U.S. Fish and Wildlife Service. 2006. Biological opinion on the Cedar Ridge golf course and Paiute tribal lands habitat conservation plan. Dated December 8, 2006.