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EPA REGION VIII
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November 22, 2010

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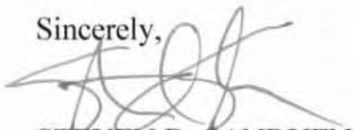
**RE: IN THE MATTER OF WENDY MEALER AND DENNIS STOKEBRAND
DOCKET NO. FIFRA-08-2010-0017**

Dear Hearing Clerk:

Please find for filing the attached Motion to Dismiss and Certificate of Service in the above-described matter.

Please contact me if there are any questions.

Sincerely,



STEVEN D. SANDVEN
Attorney for Wendy Mealer and
Dennis Stokebrand

Enclosure

Cc: Eduardo Quintana, Esq., U.S. EPA Region 8, Office of Enforcement, Compliance and Environmental Justice, 1595 Wynkoop Street (ENP-L), Denver CO 80202-1129

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File to be returned
PTVJ also returned

ATTORNEY FOR WENDY MEALER AND DENNIS STOKEBRAND

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. FIFRA-08-2010-0017

In the Matter of:

Wendy Mealer and Dennis Stokebrand,

Respondents

MOTION TO DISMISS

COMES NOW, Wendy Mealer and Dennis Stokebrand, Respondents in the above styled and numbered cause, by and through their Attorney, Steven D. Sandven, and files this Motion to Dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and in the alternative Motion for Summary Judgment as a Matter of Law and would respectfully show the Court as follows:

FACTUAL BACKGROUND

On July 17, 2002, the Rosebud Sioux Tribe authorized the Rosebud Sioux Tribe's Game, Fish, and Parks Department to "develop a Prairie Management Plan, develop a Black-Footed Ferret Reintroduction Plan, develop a Prairie Dog Management Plan and Candidate Conservation Agreement with Assurance (CCAA) for this species, develop

and submit a black-footed ferret allocation request, and pursue agreements with cooperators to attain funding for tribal involvement in these activities.” **Exhibit 1.** At this time, the Rosebud Sioux Tribal Council (hereinafter the “Tribal Council”) did not select a specific site for reintroduction of the black-footed ferret. Id. In response to the Council’s actions, the Parmelee Community expressed its reluctance to the reintroduction of the black footed ferret, because of issues involving numerous prairie dog populations within their Community. Id.

On or about December 2, 2003, the Tribal Council formally approved the implementation of the Rosebud Prairie Management Program that included reintroduction of the black footed ferret. Id. Council explicitly stated that the Plan could not be amended without its approval. Id. The Plan was the result of collaboration with enumerated federal agencies, including the United States Fish and Wildlife Services, the Bureau of Indian Affairs, the United States Forest Service and the Natural Resources Conservation Service. Id. Hence, all participating federal agencies had knowledge of the designated area for the reintroduction program and were also aware that the same could not be amended without the Tribe’s approval.

On May 16, 2003, the Department of Interior issued its final rule to reintroduce the black-footed ferret to large prairie dog complexes located in northwestern Todd County near the town of Parmelee under the management of the Rosebud Sioux Tribe. The Tribe was to receive \$3,000,000.00 to establish boundaries around the area. This funding has never been provided to the Tribe. **Exhibit 2.**

On June 20, 2003, Tribal Council enacted Resolution No. 03-163 regarding proposed prairie dog mapping effort. **Exhibit 3** On September 5, 2003, Tribal Council

implemented the Rosebud Sioux Tribe Black-Tailed Prairie Management Plan that was intended to “control and retard the growth of the black-tailed prairie dog populations while also providing for the conservation of the prairie dog and black footed ferret.

Exhibit 4. Again, no changes could be made to the Plan without the approval of the Tribal Council. Id.

On December 2, 2003, the Rosebud Sioux Tribal Council requested the RST Fish and Wildlife to complete the “nonessential experimental population” designation for the Rosebud Sioux Tribe black footed ferret reintroduction effort and cooperate with the RST Game, Fish and Parks Department on the implementation of the Rosebud Prairie Management Plan, including the black footed ferret reintroduction to the ***Iron Shell Flats area...***” Emphasis added. **Exhibit 5.** Here, the Tribal Council approved the Iron Shell Flats area as the reintroduction area and specifically stated that no changes could be made without their approval. On January 20, 2004, the black footed ferrets were released in the Iron Shell Flats area. **Exhibit 6.**

On August 18, 2004, Tribal Council enacted Resolution No. 2004-224 that provides: “[t]he Rosebud Sioux tribe Prairie Management Program has reintroduced the Black-footed Ferret onto prairie dog colonies within the designated approximate 10,000 acres ... the Prairie Management Program will make a lump sum payment to Tribal Land Enterprise of \$25,000.00 to ensure that the prairie dog colonies in areas where the black-footed ferret was reintroduced remain free of prairie dog poisoning effort ... the acreage of prairie dog towns will be verified by Prairie Management Program Personnel prior to payment by TLE ... the Rosebud Sioux Tribal Land & Natural Resource concurs with

recommendation of the Prairie Management Program and authorizes a payment of \$25,000 to be made to TLE.” **Exhibit 7.**

On May 11, 2006, Tribal Council enacted Resolution No. 2006-127 that provides: “[t]he Rosebud Sioux Tribe has enacted the Game, Fish and Parks code, Title V, Chapter 35, Rosebud Sioux Tribe Law and Order Code, to provide for an orderly system on the Rosebud Indian Reservation for the management and control of wildlife, fishery, forestry and outdoor recreation resources of the Rosebud Sioux Tribe ... The Rosebud Sioux Tribal Council has approved a black-footed ferret reintroduction on effort on Tribal lands pursuant to Rosebud Prairie Management Plan conducted by the Rosebud Department of Game, fish and Parks via its Prairie Management Program ... the Rosebud Sioux Tribe desires that potential conflicts between the management objectives of its Tribal Land Enterprise Organization and its Department of Game, Fish and Parks be resolved before any miscommunication and/or inappropriate actions might occur in the future ... The Rosebud Sioux Tribe directs its Tribal Land Enterprise Organization and its Department of Game, Fish, and Parks to develop a written agreement between the two parties that will ensure adequate communication to provide for a designated area for black-footed ferret conservation (map and description attached) where no prairie dog control or prairie dog shooting will occur unless approved by RST Game, Fish & Parks. The two parties to the aforementioned agreement shall maintain a written record of communication, meet at least once annually, and report immediately thereafter to the Tribal Council via the Land and Natural Committee.” **Exhibit 8**

On April 9, 2007, the RST Tribal Secretary executed a memorandum that provides “the Rosebud Sioux Tribal Secretary’s office did research our records regarding

the Black Footed Ferret reintroduction and maps. Resolution 03-81, which adopts and approves the request to implement the Rosebud Prairie Management Plan, is the only resolution that was submitted with an attached map. According to Tribal records, this is the only approved resolution on record with an attached map." **Exhibit 9.** In other words, Exhibit 5 attached hereto is the only area approved by the Tribal Council for the reintroduction of the black-footed ferret.

On February 22, 2008, the Tribal Council, in acknowledgement of the lack of promised funding, directed the United States Department of Fish and Wildlife and the Department of the Interior to relocate the ferrets outside the boundaries of the reservation. **Exhibit 10.** Upon information and belief, this has not been undertaken by either federal agency.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides that the Court may dismiss a cause of action for "failure to state a claim upon which relief may be granted." Fed. R.Civ.P. 12(b)(6). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formalistic recitation of the elements of a cause of action will not do. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007)(citations omitted). In other words, "the factual allegations in a complaint must 'possess enough heft' to set forth 'a plausible entitlement to relief.'" Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282 (11th Cir. 2007)(*quoting* Twombly, 127 S.Ct. at 1966-67). That is, while detailed factual allegations are not required, the courts have now held the rule "does call for sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1940 (2009). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id.

The standard for reviewing the sufficiency of the allegations in the complaint, pursuant to Twombly, was explained by the United States Supreme Court as follows:

“Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (internal citations omitted)... Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘shown’ – ‘that the pleader is entitled to relief.’

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”

Ashcroft, 129 S.Ct. at 1949-50. “[The] requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claims against them.” Robbins v. Oklahoma, 519 F.3d 1242, 1248 (10th Cir. 2008). “Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the

requirement of providing not only ‘fair notice’ of the nature of the claim, but also the grounds on which the claim rests.” *Id.* “At some point, the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.” *Airborne Beepers & Video, Inc. v. AT&T Mobility, LLC*, 499 F.3d 663, 667 (7th Cir. 2007).

In the alternative, a Rule 12(c) motion for judgment on the pleadings is justified if “there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). “[W]hen, under applicable law, the Court concludes that a particular claim is not viable, it must be dismissed, without regard to whether it is based on an outlandish legal theory or a close but ultimately unavailing one.” *Parker v. Brush Wellman, Inc.*, 377 F.Supp.2d 1290, 1296 (N.D.Ga. 2005).

SUMMARY ARGUMENT

A Court has the authority to dismiss a suit for failure to state a claim upon which relief can be granted if the complaint clearly demonstrates that plaintiff cannot prove any set of facts that would entitle it to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231-32 (11th Cir. 2000). As the Supreme Court has stated, a plaintiff’s obligation in filing a complaint, “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 1965 (2007). Instead, “factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* A plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129

S. Ct. 1937, 1949 (2009). When considering a complaint, “[a] court may consider only the complaint itself and any documents referred to in the complaint which are central to the claims.” Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949, 959 (11th Cir. 2009). “Dismissal is therefore permitted ‘when on the bases of a dispositive issue of law, no construction of the factual allegations will support the cause of action.’” Glover v. Liggett Group, Inc., 459 F.3d 1304, 1308 (11th Cir. 2006)(quoting Marshall County Bd. of Educ. V. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993). It is clear from the EPA’s complaint that their claims have not been sufficiently alleged under the heightened pleading standards set forth by the United States Supreme court in Bell Atlantic Corp v. Twombly and its progeny. Accordingly, the ALJ would be acting properly in dismissing the claims at this stage in the proceeding.

ARGUMENT

EPA’s Complaint Provides a Formulaic Recitation of Elements, and Based Thereon, Dismissal is Appropriate.

The EPA’s complaint merely provides a “formulaic recitation of elements” of the claims supported by conclusory factual material. The Federal Insecticide, Fungicide and Rodenticide Act, Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G) (hereinafter “FIFRA”), prohibits the use of registered pesticides in a manner inconsistent with its labeling. The Zinc Phosphide label states: “Do not apply in areas known to be inhabited by black-footed ferrets.” Accordingly, to successfully plead a cause of action pursuant to the FIFRA, the EPA would have to provide plausible facts demonstrating that Respondents were in an area “known” to be inhabited by the ferrets.

Unfortunately, the EPA has failed to complete their homework on what area of the Reservation includes the black footed ferret reintroduction area. In fact, the federal

government appears to have relocated the boundaries of the ferret reintroduction zone without the Tribe's approval and in direct violation of agreements with the Rosebud Sioux Tribe thereby clouding the exact boundaries of the area. For example, Map #1 was approved via Tribal Council Resolution No. 03-81 where the boundaries of reintroduction area are not identified. **Exhibit 11.** This is the only area that has been approved for the area. *See Exhibit 9.* As part of the Prairie Dog Management Program, Respondents were engaged by the Rosebud Sioux Tribal Land Enterprise (hereinafter "TLE"), a subordinate organization of the Rosebud Sioux Tribe, as certified commercial pesticide applicators to control the prairie dog population within the boundaries of the Tribe's reservation. The Prairie Dog Plan (which had been drafted by various federal agencies in conjunction with the Tribe) allowed baiting in the areas designated by Map No. 2 according to RANGE UNIT designations as follows:

- Yellow: Iron Shell Flats is where the ferrets were released - January 20, 2004. *See Todd County Tribune Volume 84 – Edition 19*
- Green: Range Unit 57. *See Prairie Management Program Standards III Range Improvements . The ferret reintroduction is 10,000 acres. Range Unit 57 is 3,999.22 acres. The total acreage for range units 73, 77, 57 and 62 is 14,703.67 acres.*
- Blue: Range 62 is 3,839.03 acres
- Pink: Range Unit 77 is 3,722.72 acres
- Brown: Range 73 is 1,862.70 acres. **Exhibit 12**

Map No. 3 was created for the RST Game, Fish and Parks to evidence the black footed ferret reintroduction area. However, part of Iron Shell Flats (the area selected by the Tribal Council for the reintroduction program) is not included in the highlighted area.

The map also contains the following errors:

- Green: (Lower green) All of Range Unit 57 is not included
- Brown: All of Range Unit 73 is not included
- Blue: All of Range Unit 62 is not included

- Purple: Range Unit 136 should not be part of the reintroduction area - lessees Anna and Sammy Waln were never contacted. Allotted lands owned by Elsie Pacer.
- Red: Range Unit 54 should not be part of the reintroduction area – lessees Anna and Sammy Waln were never contacted
- Green: (Upper green) Range Unit 52 should not be part of the reintroduction area – lessee Dick Halligan was never contacted. **Exhibit 13**

Map No. 4 Map delineates the known prairie dog towns that reside within the reintroduction area. **Exhibit 14.** Map No. 5 was retrieved from the former TLE Executive Director’s computer where an unknown author recreated the reintroduction area via LEASE designations. **Exhibit 15.** Map No. 6 is titled “Black-Footed Ferret Reintroduction Zone”. **Exhibit 16.** Map No. 7 was created by Chance Wooden Knife, former director of RST Game, Fish and Parks in 2002 – 3 years before the ferrets were introduced into the area. This map was never approved by the Council but was used by the Prairie Management Program to distinguish the ferret reintroduction area. **Exhibit 17.** Map No. 8 has an unknown author and was found in the lease department of the Tribal Land Enterprise. **Exhibit 18.** Based upon the foregoing myriad of purported ferret reintroduction zones, it is impossible to determine from the EPA’s complaint whether the Respondents were in fact baiting in forbidden areas. Specifically, the complaint does not address any of the following:

- Where did the alleged misconduct occur?
- Did the alleged misconduct occur in an area that was *designated by the Tribal Council* as the ferret reintroduction area?
- The complaint alleges that the ranger only witnessed “Respondents operat[ing] four-wheel vehicles to apply oats? Did they actually witness Respondents

applying the oats? Or did the Ranger simply make the assumption that Respondents had used poisoned oats within the area?

- Where were the signs posted? Upon information and belief, the signs are dilapidated, difficult to read, and in many cases, no longer upright.

As the foregoing illustrates, the EPA's pleading is exactly what the United States Supreme Court has rejected. In fact, the allegations do not come close to plausibly stating a claim against the Respondents. This type of pleading is impossible to defend against, and based thereon, must be dismissed.

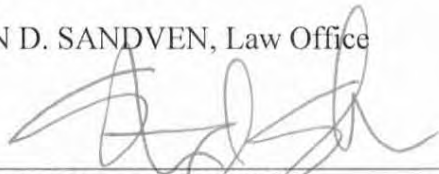
CONCLUSION

The EPA's complete failure to provide any substantive facts or support for their alleged causes of action must be fatal to their claims. As stated and based on the foregoing, the EPA's complaint should be dismissed with prejudice pursuant to Fed.R.Civ. P. 12(b)(6) on the ground that the agency fails to state a claim upon which relief can be granted.

Dated this 22nd day of November, 2010.

STEVEN D. SANDVEN, Law Office

By:



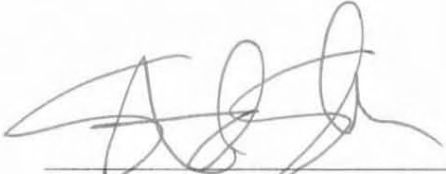
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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2010, I caused a true and correct copy of the foregoing Motion to Dismiss to be served by first class mail, addressed to the following counsel:

Eduardo Quintana, Esq.
United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice
1595 Wynkoop Street (ENP-L)
Denver, CO 80202-1129

November 22, 2010



Steven D. Sandven