

NMOGA
NEW MEXICO OIL & GAS ASSOCIATION



March 11, 2013

Public Comments Processing
Attn: FWSOR2-ES-2012-0071
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
MS 2042-PDM
Arlington, Virginia 22203

RE: American Petroleum Institute, the Independent Petroleum Association of America, International Association of Drilling Contractors, Mid-Continent Oil and Gas Association of Oklahoma, New Mexico Oil and Gas Association, Oklahoma Independent Petroleum Association, Panhandle Producers & Royalty Owners Association and Western Energy Alliance's Comments on the Proposed Rule to Listing the Lesser Prairie-Chicken as a Threatened Species (77 Fed. Reg. 73828 (Dec. 11, 2012))

Dear Sir/Madam:

The American Petroleum Institute, the Independent Petroleum Association of America, International Association of Drilling Contractors, Mid-Continent Oil and Gas Association of Oklahoma, New Mexico Oil and Gas Association, Oklahoma Independent Petroleum Association, Panhandle Producers & Royalty Owners Association, and Western Energy Alliance (collectively "the Associations") appreciate the opportunity to comment on the Fish and Wildlife Service's ("FWS" or "the Service") Proposed Rule to List the Lesser Prairie-Chicken ("LPC") as

a Threatened Species under the Endangered Species Act (“ESA”).¹ As detailed herein, the Associations believe FWS’s final determination must be that listing the LPC as “threatened” is not warranted.

The oil and natural gas industry is committed to conservation of the LPC. Companies active in Colorado, Kansas, New Mexico, Oklahoma, and Texas implement LPC avoidance, minimization, and mitigation measures, and provide funding and support for important LPC conservation efforts throughout the region.

The American Petroleum Institute (“API”) is a national trade association representing more than 500 member companies involved in all aspects of the oil and natural gas industry. Those members include producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. API member companies are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The International Association of Drilling Contractors (“IADC”) is a trade association representing the interests of drilling contractors, onshore and offshore, operating worldwide. IADC’s mission is to advance drilling and completion technology; improve industry health, safety, environmental and training practices; and champion sensible regulations and legislation which facilitate safe and efficient drilling. IADC members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Independent Petroleum Association of America (“IPAA”) represents thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, which will be significantly affected by federal action. Independent producers develop 95 percent of American oil and natural gas wells, produce 54 percent of American oil and produce 85 percent of American natural gas. IPAA members companies are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Mid-Continent Oil and Gas Association of Oklahoma is a non-profit association composed of oil and gas producers, operators, purchasers, pipelines, transporters, refiners, processors and service companies which represent a substantial sector of the oil and gas industry within the State of Oklahoma. The Mid-Continent Oil and Gas Association is the oldest energy trade organization in the U.S. The Mid-Continent Oil and Gas Association of Oklahoma is dedicated to the advancement and improvement of the oil and gas industry within the State of Oklahoma and throughout the United States. The Mid-Continent Oil and Gas Association advocates development of an environment that enables the oil and gas industry and related business to grow and prosper through responsible development of Oklahoma’s natural resources. Mid-Continent Oil and Gas Association members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

¹ 77 Fed. Reg. 73828 (Dec. 11, 2012).

The New Mexico Oil and Gas Association (“NMOGA”) is dedicated to promoting the safe and responsible development of oil and gas resources in New Mexico through advocacy, collaboration and education. NMOGA members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Oklahoma Independent Petroleum Association (“OIPA”) represents approximately 2,550 small to large independent operators that are primarily involved with the exploration and production of crude oil and natural gas in the state. In addition, OIPA represents a number of companies which provide services that support exploration and production activities. “Independent” producers are non-integrated companies which receive the majority of their revenues from production at the wellhead. They are exclusively in the exploration and production segment of the industry with no marketing or refining operations. Independent oil and gas companies range in size from large companies with thousands of employees to hundreds of smaller “mom and pop” type companies. In Oklahoma, independent producers make up the majority of the energy industry producing 96% of the state’s crude oil and 88% of the state’s natural gas. OIPA members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Panhandle Producers & Royalty Owners Association (“PPROA”) is the trade association representing independent oil and gas producers, support companies and mineral royalty owners in the Texas Panhandle, western Oklahoma and southwestern Kansas since 1929. PPROA members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

Western Energy Alliance (“WEA”) represents over 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Western Energy Alliance member companies have valid existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking.

The Associations oppose the listing of the LPC as a threatened species under the ESA. As discussed in detail below, the Associations believe FWS’s final determination must be that listing the LPC as “threatened” is not warranted. If, at this time, FWS is unable to publish a finding that listing the LPC is “not warranted,” it should, at a minimum, exercise its discretion to await key soon-to-be-available surveys that will weigh impacts from recently minted conservation measures. If the Service ultimately finalizes a “threatened” listing after awaiting additional data, it should simultaneously finalize a special rule under Sec. 4(d) of the Act to remove prohibitions for takes incidental to lawfully conducted oil and gas operations.

I. SUMMARY

The Associations and their respective members strongly urge the FWS to critically examine the data before it and publish a finding that listing is “not warranted.” Any other conclusion is undermined by the best available science and a proper consideration of existing conservation measures intended to protect the LPC, as required by law and FWS’s own policies.

The Service cannot conclude that the LPC is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” when its population is increasing or, at least, stabilizing, and its range is expanding. Further, FWS failed to consider, as it must, all LPC conservation measures. These conservation measures provide significant and meaningful protection to the LPC. They cover a large portion of the historic and/or occupied range of the LPC and are designed to address identified threats in a targeted approach.

FWS fails to demonstrate how additional protections under the ESA will help the LPC. Importantly, nowhere in the listing document, or in any of the supporting documentation, does the Service indicate what protections, beyond what are in existing conservation measures, are necessary to protect the LPC. The Service further erred in concluding, without adequate support, that the oil and gas industry and climate change threaten the LPC.

Should FWS decide to move forward with listing, it should, at a minimum, exercise its discretion to await upcoming planned surveys, by exercising the option for a six month extension. If the Service ultimately finalizes a “threatened” listing after awaiting additional data, it should simultaneously finalize a special rule under Section 4(d) of the ESA to allow lawfully conducted oil and gas operations to continue notwithstanding the listing decision.

II. LISTING AS “THREATENED” IS NOT WARRANTED BECAUSE LPC POPULATIONS ARE INCREASING AND RANGE IS EXPANDING

At the core of the Service’s justification for proposing to list the LPC as “threatened” is a status review that analyzes trends in the species’ range and population.² Despite conclusions to the contrary, the data to which FWS cited and upon which it relied, even when viewed through the most pessimistic lens, clearly demonstrate that previous declines in LPC populations and range have stabilized. As explained below, these data show meaningful and measurable growth trends in both range and population. FWS must use this “best available scientific and commercial data available” when making a listing decision.³

A. Range Occupancy Trends

The Service argues that range occupation trends are key indicators in determining whether the LPC is a “threatened” species under the ESA.⁴ We agree. Significantly, the data provided, and utilized, by FWS show that between 1980 and 2007, LPC-occupied range increased 159%.⁵ The increase over the period totaled more than 16,700 square miles (m²). For perspective, the entire State of Maryland is only 12,400 m².

² *Id.* at 73845-73851.

³ 16 U.S.C. § 1533(b)(1)(A).

⁴ *Id.* at 73851.

⁵ *Id.* at 73845-73846. In 1980, occupied range was estimated at 10,541 m². *Id.* at 73845. In 2007, occupied range as estimated at 27,257 m². *Id.* Significantly, the 2007 estimate increased by over 2,100 m² in a single year because of significant LPC reoccupation in 17 Kansas counties. *Id.* at 73,848.

This increase in LPC-occupied range is documented within the preamble. For example, the Service acknowledges that never-before-known leks are being discovered, causing the Service to “expand estimated occupied ranges” in certain areas.⁶ Significantly, however, it does not include in its range analysis presently occupied areas that were newly discovered in the 2012 Range-wide Survey, which the Service identified as the best survey available on the LPC.⁷ When those data are incorporated (as well as data from the planned Spring 2013 Range-wide Survey), they may further demonstrate that range-occupation trends are increasing.

Furthermore, the Service failed to consider all range-occupancy trend data after 1980. Indeed, in evaluating whether LPC range occupation is increasing, the Service examined the period preceding European settlement of the United States to 1980.⁸ Not surprisingly, the Service found that the LPC occupied more range before non-indigenous people settled in the Great Plains. FWS, despite an obligation to do so, never explains why it chose to base its trend analysis on this period of time or why it cited to, but did not consider, substantial range occupancy trend data after 1980. The 2007 and 2012 range-wide data are the best scientific information available and cannot be ignored. At a minimum, FWS should explain its decision to base range decline estimates on the time period from pre-European settlement to 1980 when more recent (and reliable) data were available.

In addition to the Service’s selective and unexplained choice of time period, the range-occupancy trend is also by it being the product of an improper and unsupported conflation of two different studies that estimate historical range and presently occupied range.⁹ The Johnsgard study estimated a historical range of 100,000 to 150,000 m², but did not estimate presently occupied range.¹⁰ Instead, the latest range estimate the Johnsgard study provided was the 1980 estimate of 10,541 m².¹¹ FWS also looked at the Playa Lake Joint Venture study that estimated historical range to be 176,096 m² and also provided a presently occupied range estimate of 27,259 m².¹² The Service compared the higher historical range estimate from the Playa study with very low 1980 range occupancy estimate from the Johnsgard study that exaggerates the decline trend.¹³

FWS never explains why it chose to use the higher historical estimate in the Playa study and entirely ignore the lower historical range estimate in the Johnsgard study. The unexplained selection of the higher estimate is not harmless error. To put it in context, the Playa study estimated historical range to be about the size of California and Maryland put together (176,096 m²). On the low end, the Johnsgard study estimated historical range to be about the size of Oregon (100,000 m²). That is a difference in historical ranges about the size of Nebraska (76,096 m²). FWS should explain why it based its range estimates on the two data points it selected from the studies.

⁶ *Id.* at 73850.

⁷ *Id.* at 73846 (“The aerial surveys conducted in 2012 . . . provide the best estimate of current population size”).

⁸ *Id.* at 73845.

⁹ *Id.* at 73845-73846.

¹⁰ *Id.* at 73845

¹¹ *Id.* at 73845

¹² *Id.* at 73845.

¹³ *Id.* at 73846.

Such biased use of the data, done without technical justification, presents a conclusion that is arbitrary, capricious, and not in accordance with acceptable scientific methods or the law. To the contrary, the most recent and best scientific information available demonstrates that LPC range occupancy increased by 159% between 1980 and 2007.¹⁴ As discussed later, this finding is consistent with the extensive conservation efforts underway throughout LPC range.

B. Population Trends

FWS recognizes that population trends are key considerations in determining whether to list the LPC as “threatened,” but FWS fails to recognize that the best scientific information available show significant LPC population increases.

1. Population Trend Analysis

FWS provided range-wide population estimates from “the 1960s,” 1980, 2003, and 2012.¹⁵ The range-wide population estimates for those studies are as follows:

Year	LPC Population Estimate ¹⁶
“1960s”	36,000 to 43,000
1980	44,400 to 52,900
2003	32,000
2012	45,000

An examination of the most recent and, therefore, relevant, data shows that, in the past decade, range-wide LPC population increased by over 40% - 13,000 birds. The increased population trends remain evident even when compared to the earlier range-wide survey data. The 2012 estimates are 2,000 birds higher than the uppermost estimate in the 1960s. The most recent estimates are even within the range of the 1980 estimate—the highest known range-wide LPC population estimate.¹⁷

The Range-wide Study that provided the 2012 estimate is not inconsequential. FWS considers the 2012 Range-wide Survey to be the best scientific information available for estimating LPC population—and for good reason.¹⁸ The aerial survey not only covers the entire 2011 estimated occupied range, but extends beyond the 2011 range by 50% or more.¹⁹ It is the first ever statistically valid range-wide survey for the species.²⁰ The survey provides a robust

¹⁴ *Id.* at 73845-73846.

¹⁵ *Id.* at 73846.

¹⁶ *Id.* at 73846.

¹⁷ It is curious to note that the highest estimated LPC population occurred in 1980 – the same year FWS says the LPC occupied the smallest percentage of its historical range. Such an inverse relationship requires analysis and explanation by FWS particularly because the Service holds out “range occupancy” as a determinative factor in assessing the health of the LPC.

¹⁸ *Id.* at 73846 (“The aerial surveys conducted in 2012 . . . provide the best estimate of current population size”).

¹⁹ McDonald, Lyman, *et al.*, Results of 2012 Range-wide Survey of Lesser Prairie-chickens (*Tympanuchus pallidicinctus*), p. 5. Importantly, the survey identified significant concentrations of active leks beyond what FWS understood to be the range of the LPC.

²⁰ 77 Fed. Reg. at 73846.

methodology, in which the aerial results were verified with ground surveys. The survey's parameters also were conservative: a minimum of five LPCs per lek must have been observed for the lek to be considered an "active lek" and reported in the survey results, the model used the fewest number of variables, and reported results have a 90% confidence interval.²¹

Despite providing population trend analysis that demonstrates increases, and despite the fact that those population increases are taken from the survey FWS considers the best (and most recent) scientific information available, FWS abandons its analysis of range-wide population estimates in favor of state-level estimates. The switch to state-survey data is unsupportable. The Service disputes the state survey's methodologies and notes its inability to harmonize their methodologies and results. Relying on the less-scientifically sound state surveys is arbitrary and capricious when, by FWS's own account, the 2012 Range-wide Survey is the best survey available.

2. Much of the State Data Relies On Survey Methods With Which FWS Disagrees

As acknowledged by the Service, evidence of expanding LPC populations is demonstrated by "increases in the number of active leks rather than by increases in the number of males displaying per lek."²² In the absence of more reliable estimators of bird density, total counts of active leks over large areas are "the most reliable trend index for prairie grouse populations such as the [LPC]."²³ The 2012 Range-wide Survey used this "most reliable" survey methodology.²⁴

FWS, however, fails to consider the 2012 Range-wide Survey and the very scientific standard it identifies as the best tool for analyzing population trends. Instead, the Service relies on state-level data that do not even mention the number of active leks or the increase/decrease in the number of active leks over time, and concludes:

[T]he numbers of LPCs reported per lek are considerably less than the numbers of birds reported during the 1970s. Population indices appear to have exhibited a steeper decline during these earlier periods than is apparent in recent years. Observed lek attendance at many leks is low, likely due to reduced population sizes. Where lek attendance is low, it is unlikely that populations will recover to historical levels. . . . the loss and alteration, including fragmentation, of lesser prairie-chicken habitat throughout its historical range over the past several decades is apparent and likely is more indicative of the status of the lesser prairie-chicken.²⁵

²¹ Other studies consider leks to be "active" with much fewer birds displaying. For example, in Verquer and Smith, 2011, p. 1-2, leks were considered active if three males are displaying on the lek. *See* 77 Fed. Reg. at 73847-48.

²² 77 Fed. Reg. at 73839 (*citing* Hoffman 1963, p. 731; Snyder 1967, p. 124; Cannon and Knopf 1981, p. 777; Merchant 1982, p. 54; Locke 1992, p. 43).

²³ *Id.* at 73847 (*citing* Cannon and Knopf 1981, p. 777; Hagen *et al.* 2004, p. 79).

²⁴ 77 Fed. Reg. at 73846.

²⁵ *Id.* at 73851.

At a minimum, FWS needs to support and explain its inconstant conclusion that a causal relationship exists between population levels and lek attendance. Similarly, FWS bases its conclusion that LPCs are threatened on loss, alteration, and fragmentation of LPC habitat—each of which have been suggested to be unreliable trend indicators in key studies to which FWS cites.²⁶ FWS, likewise, has an obligation to explain why it discounted these studies' findings.

FWS acted arbitrarily and capriciously when it identified active lek counts as the best scientific evidence of species health and abundance – and then failed to base its conclusions on the 2012 Range-wide Survey that used that methodology, in favor of state-level surveys.²⁷ FWS further erred when it drew threat correlations to habitat loss, fragmentation, and alteration that are questioned by studies on which the Service relied. If FWS consistently relied on the methodologies and studies it considered superior, the Service may well have found that listing the LPC as “threatened” is not warranted.

3. FWS Compiled the State-level Survey Data Despite Acknowledging That the Differing Methodologies Prohibit Accurate Compilation And Fails to Consider A Study That Harmonizes the Discord

FWS recognizes that the main hindrance in accurately determining the abundance of LPCs using multijurisdictional data is that relevant data has been collected using different methodologies and sampling intensities among states over time.²⁸ As FWS acknowledges, varying survey methods and sampling intensities “complicate interpretation of population indices for the [LPC] and may not reliably represent actual populations.”²⁹ However, when presented with a study that accounts for inconsistent population survey data, FWS improperly dismissed it.

The Interim Assessment of Lesser Prairie-Chicken Trends since 1997 (Hagen 2012) standardizes inconsistencies among previous survey studies and calculates the population trend of the species from the standardized survey data. The Hagen study, therefore, provides a solution to a problem that plagues all existing LPC data because it standardizes the data so that a proper apples-to-apples comparison can be made. The study, like the range-wide surveys that FWS mentioned, but did not consider, concludes that current LPC population trends are increasing, not decreasing.³⁰

²⁶ Compare Woodward, A. J., S.D. Fuhlendorf, D.M. Leslie Jr., and J. Shackford, 2001, Influence of Landscape Composition and Change on Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) Populations, American Midland Naturalist, Vol. 145, 2:261-274, available at http://www.fws.gov/southwest/es/documents/R2ES/LitCited/LPC_2012/Woodward_et_al._2001.pdf (“There were no well-defined relationships between population trends of lesser prairie chickens and cultivation or native vegetation as suggested by previous studies (Crawford and Bolen, 1976; Taylor and Guthery, 1980)”) with Crawford, J. A. and E. G. Bolen. 1976, Effects of land use on lesser prairie chickens in Texas, J. Wildl. Manage., 40:96–104; Taylor, M. S. and F. S. Guthery, 1980, Status, ecology, and management of the lesser prairie-chicken, U.S. For. Serv. Gen. Tech. Rep. RM-77, p. 15.

²⁷ 77 Fed. Reg. at 73851.

²⁸ See, e.g., *id.* at 73850-51.

²⁹ *Id.*

³⁰ *Id.* at 73850.

FWS arbitrarily dismisses the Hagen study. FWS's reasons for the dismissing the study (*e.g.*, the study is a preliminary product, concerns about lek counts, and time period of information assessed) are not in compliance with the Service's own policies.

FWS must use the best scientific information available, whether it is preliminary or not. By FWS's own admission, the data on which FWS actually relied came "directly from agency reports, memos, and other status documents," which fall short of being peer-reviewed scientific papers.³¹ FWS must use consistent and technically sound standards for information quality control. The Service cannot dismiss a study that undermines its conclusion because it is not peer-reviewed and then rely on studies that suffer the same infirmity but support the Service's conclusion.

Further, the very purpose of the study was to account scientifically for variations and standardize data across all studies, so any problems with lek counting are inherent to, and remain in, all underlying data. FWS incorrectly points to the effects of inconsistent data, methods, and effort levels in existing survey and trend data and then dismiss a study that scientifically addresses these flaws. At a minimum, FWS should explain why it dismissed the Hagan study, but not the underlying studies it harmonized.

Furthermore, the study's focus on the time period 1997 forward is scientifically sound. This time period coincides with a general regional shift in management of hunting seasons. Past population declines coincide with historical hunting pressure; modern increases of the species positively correlate with decreased hunting pressure, season closures, and reduced bag limits.³² The time period from 1997 forward, therefore, is appropriate for determining current population trends as influenced by current conservation measures.

If the Service considers disparate multijurisdictional data to validate the results of the range-wide surveys, then it must use the best scientific information available to harmonize those multijurisdictional surveys. When FWS does so, it surely will find that the range-wide surveys demonstrate increasing LPC populations, and the properly harmonized state data support that finding. FWS has provided no credible evidence demonstrating the LPC to be "threatened." Its findings are therefore viewed to be arbitrary, capricious, and otherwise not in accordance with the law.

III. IF FWS REQUIRES FURTHER VALIDATION OF INCREASES IN LPC POPULATION AND RANGE OCCUPANCY, IT SHOULD AWAIT IMMINENT FUTURE STUDIES

As detailed above, data indicate that LPC populations are increasing and occupied range is expanding. If, however, FWS is not convinced, FWS should, at a minimum, provide a six-

³¹ *Id.* at 73847.

³² Hagen, Christian A., *et al.*, Guidelines for Managing Lesser Prairie-Chicken Populations and Their Habitats, Wildlife Society Bulletin 2004, 32(1): 69-82, available at <http://www.ksre.ksu.edu/doc13876.ashx>.

month postponement of its determination until another credible range-wide survey examines the abundance/range growth.³³

While it is an important demonstration of the healthy abundance of the species and previously underestimated range, the 2012 survey results are most useful if they can be compared to an analogous survey to derive a population trend. For this reason, a 2013 Range-wide Survey is scheduled to be conducted, using the same methodology and covering the same spatial extent as the 2012 Range-wide Survey.³⁴

The importance of the consistent, range-wide data these two surveys provide cannot be overstated. The results of the 2013 survey, when compared to the 2012 survey, will allow the first direct and accurate population trend analysis to be conducted for the LPC across all of its known range (including new range recently discovered). Such intentional standardization ensures that population data is appropriately collected at multiple points in time so that an accurate population trend analysis can be conducted. Indeed, the comparison of the range-wide 2012 and 2013 surveys will be the first consistent range-wide time series made for the LPC—a comparison FWS acknowledges is critical. Such standardization also could serve as an important validation of the Hagan 2012 standardization methodology. Moreover, the 2013 Range-wide Survey, like the 2012 Range-wide Survey, will utilize the robust “lek activity” methodology that the Service considers the best survey method available.³⁵

FWS acknowledges that the best population study is the 2012 Range-wide Survey,³⁶ while other studies do not lend themselves to accurate comparisons because they rely on varying survey methodologies and effort levels. Nonetheless, and as explained further later, the substantial disagreement in survey data alone is sufficient to justify, under the ESA, an extension of the time for a final listing.³⁷

To be clear, if the FWS remains unconvinced of the upwards trends demonstrated by the data presently before it, it cannot remedy this “data gap” by suggesting that it may consider the 2013 results in the final rule.³⁸ The abundance and range estimates are the entire foundation for the Service’s proposal to list the LPC as “threatened.” FWS must take public comment on its consideration of the study results or its ultimate decision not to consider the results.

³³ The ESA gives flexibility in circumstances where “substantial disagreement” exists regarding the accuracy of available information and data to extend by six months the one-year period for making a determination.

³⁴ 77 Fed. Reg. at 73847.

³⁵ A comparison of the 2012 and 2013 range-wide population survey results will provide important, current population trend data, but even if the results show a species decline over the span of two years, such a potential result by itself does not indicate that the species is vulnerable and threatened. In such a scenario, FWS must weigh the results against other available information that indicates the species’ population levels are stabilizing/increasing and its current range is expanding. *See supra*, at § II.

³⁶ 77 Fed. Reg. at 73846 (“The aerial surveys conducted in 2012 . . . provide the best estimate of current population size”).

³⁷ ESA, § 4(a)(6)(B)(i); 50 C.F.R. § 424.17(iv).

³⁸ *Id.* at 73850-51 (varying survey methods and effort levels “complicate interpretation of population indices for the lesser prairie-chicken and may not reliably represent actual populations”).

A final listing of the LPC as “threatened” has real on-the-ground impacts on landowners, land use industries, agriculture, and local and state governments. Such a listing would trigger “take” prohibitions under §9, consultation requirements under §7, and a requirement that FWS designate critical habitat under §4. Landowners and industries would be subject to land use and access restrictions, permitting requirements, and increased operational costs. Even if subsequent studies evince clear improvements in the health and abundance of the LPC, these costs and constraints will not quickly recede. Delisting of species under §4 is rare to begin with, and involves a protracted multistep process when it does happen.³⁹ FWS should consider these real impacts and not rush a listing that is not warranted.

IV. THE SERVICE’S FAILURE TO PROPERLY CONSIDER CONSERVATION MEASURES IS INCONSISTENT WITH THE ACT

The Service has failed to consider existing measures⁴⁰ that already protect the continued viability and expansion of the LPC.

A. Impacts of all existing conservation must be comprehensively assessed in evaluating whether to list

Under the ESA, FWS must account for all conservation measures and must explain why these measures are inadequate to protect the species. A listing determination under the ESA may be made only “after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction.”⁴¹ Additionally, the Secretary must consider the “inadequacy of existing regulatory mechanisms.”⁴²

Since 2003, FWS has interpreted and employed these requirements under its binding *Policy for Evaluation of Conservation Efforts When Making Listing Decisions* (“PECE”) as meaning that, “The [ESA] requires us to take into account *all* conservation efforts being made to protect a species.”⁴³ FWS therefore must account for any and all State or local laws, regulations,

³⁹ <http://library.fws.gov/pubs9/delisting.pdf>

⁴⁰ The Associations submitting these comments consist of hundreds of individual member companies. As is expected, members have varying opinions as to the propriety, necessity, and efficacy of the many LPC conservation measures discussed herein. However, all members agree that FWS had a duty to evaluate and consider these measures in proposing this listing. As such, none of the discussion herein of the various LPC conservation measures should be construed as endorsing of the measures by the Associations or their members. The sole purpose of this section is to note the existence of these measures and the Service’s duty to consider them.

⁴¹ 16 U.S.C. § 1533(b)(1)(A).

⁴² *Id.* § 1533(a)(1).

⁴³ 68 Fed. Reg. 15100, 15100 (Mar. 28, 2003) (hereinafter “PECE”) (emphasis added). Courts have upheld FWS employing its PECE and considering voluntary conservation strategies. *See, e.g., Colorado River Cutthroat Trout v. Salazar*, 2012 WL 4890100 (D.D.C. 2012) (consideration of voluntary conservation strategy undertaken by several states in conjunction with FWS was appropriate in its finding that trout species was not endangered under the ESA). *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011) (FWS reasonably could conclude that National Forest Plans provide adequate regulatory mechanisms to protect Yellowstone grizzly bear as recovered species since it is legally binding on 98% of critical primary conservation area). *In re Polar Bear Endangered*

ordinances, programs, or other specific conservation measures that either positively or negatively affect a species status.⁴⁴

1. Duty to Consider All Conservation Measures Includes Draft and Recently Implemented Measures

Under the PECE, FWS must consider both current actions that affect a species' status *as well as* sufficiently certain future actions that affect a species' status.⁴⁵ Conservation efforts that are planned but have not been implemented, or have been implemented but not yet demonstrated as effective, are subject to the PECE.

The Rang-wide Conservation Plan ("Range-wide Plan" or "the Plan") is one of many examples of draft measures subject to the PECE. Despite being in draft form, the beneficial impact of the Range-wide Plan must be considered pursuant to FWS's binding PECE.⁴⁶ FWS failed to do so. Instead, FWS only mentions the Plan. FWS does not account for impacts (good or bad) to the LPC, assess the sufficiency of the Plan, or propose anything not contained in the Plan as a means of conserving the LPC species.

The Service's reopening of the Range-wide Plan's comment period in another docket does not remedy the Service's failure to consider it in this listing determination.⁴⁷ FWS must account for the Plan in its Proposed Rule to list the species, accept public comment on the Service's conclusions about the Plan in this docket, evaluate the Plan in the context of the other conservation measures, and incorporate its findings in its final listing determination. The public currently is unable to comment on FWS's interpretation of the Plan for purposes of this docket because the Service failed to explain its views of the Plan as they relate to the listing of the LPC. Nor is it sufficient to evaluate the Range-wide Plan in a vacuum. As explained above, FWS has a duty to evaluate in a comprehensive manner the cumulative impact of all conservation measures.

FWS further failed to consider the beneficial impacts of best management practices used by the oil and gas industry in Oklahoma. The Oklahoma Wildlife Conservation Commission ("ODWC") voted to approve a Memorandum of Understanding with the Oklahoma Independent Petroleum Association ("OIPA") in February 2012 to establish a collaborative working relationship for lesser prairie-chicken conservation. FWS mistakenly indicates that voluntary

Species Act Listing and § 4(d) Rule Litigation, 794 F.Supp.2d 65 (D.D.C. 2011) (FWS properly took into account foreign conservation efforts to protect bears).

⁴⁴ PECE, 68 Fed. Reg. at 15113. *See also*, 50 C.F.R. § 424.11(f).

⁴⁵ PECE, 68 Fed. Reg. at 15114.

⁴⁶ Ecosystem Management Research Institute, DRAFT Range-wide Conservation Plan for the Lesser Prairie-Chicken (2012), p. 58-59, *available at* <http://www.wafwa.org/documents/DRAFTLEPCplan01192013.pdf> (comment period reopened and ongoing).

⁴⁷ *Western Members Respond to FWS Re-Opening Public Comment Period for Lesser Prairie Chicken ESA Listing*, The Grant County Beat, (Feb. 28, 2013) *available at* <http://www.grantcountybeat.com/index.php/news/news-releases/9332-western-members-respond-to-fws-re-opening-public-comment-period-for-lesser-prairie-chicken-esa-listing> (last visited Mar. 1, 2013). Despite the misleading headline, FWS did not "reopen" or extend the comment period in the LPC ESA listing, as requested by 15 members of Congress, but instead reopened the comment period in the 2012 Range-wide Plan, whose comment period had closed on February 1, 2013.

best management practices are to be developed and finalized in the future,⁴⁸ however, ODWC and OIPA already have finalized the list of voluntary best management practices.⁴⁹ FWS must consider the effects these will have on the LPC in Oklahoma.

FWS also failed to consider the State of Oklahoma’s Candidate Conservation Agreement with Assurances (“CCAA”) that became effective after FWS published its proposed rule.⁵⁰ The CCAA requires that the Oklahoma Department of Wildlife Conservation (“ODWC”) enroll non-federal lands by issuing certificates of inclusion only with an ODWC-approved wildlife management plan. Under its PECE, FWS had a duty to consider the CCAA when it was in draft form because it was likely to be implemented and be effective. Now that it is fully executed, FWS’s obligation to consider the CCAA is unequivocal.

2. Conservation Measures That Must Be Considered Include CCAs/CCAAs

Throughout the proposed rule, FWS makes unsupportable conclusions that “most occupied lesser prairie-chicken habitat throughout its current range occurs on private land,⁵¹ where State conservation agencies have little authority to protect or direct management of the species’ habitat;”⁵² and “no laws or regulations currently protect lesser prairie-chicken habitat on private land, aside from State harvest restrictions.”⁵³ FWS further alleges, “most occupied lesser prairie-chicken habitat occurs on private land, where State conservation agencies have little authority to protect lesser prairie-chicken or facilitate and monitor management of lesser prairie-chicken habitat beyond regulating recreational harvest.”⁵⁴

This is simply not the case. The LPC is covered by a CCA with the Bureau of Land Management (“BLM”) for federal lands and “umbrella” CCAAs for private lands—one each in New Mexico, Oklahoma, and Texas. CCAAs may not be regulations *per se*, but they do create a binding contractual relationship between the sovereign and private landowners and result in legally binding permits held by landowners who enroll their lands.

Nonetheless, FWS treats CCA/CCAA as unenforceable voluntary programs and ignores the fact that its own regulations contain an adequacy determination regarding the benefits afforded a species under a CCA/CCAA and enhancement survival permits. FWS may only issue an enhancement survival permit to a private landowner if:

- (1) the “take” of the species subject to the CCA/CCAA will be incidental to an otherwise lawful activity and will be in accordance with the terms of the CCAA;
- (2) the CCAA complies with the requirements of the CCAA policy;

⁴⁸ See 77 Fed. Reg. at 73834.

⁴⁹ Lesser Prairie Chicken: Crude Oil and Natural Gas Development Voluntary Best Practices for Oklahoma, available at http://www.oipa.com/page_images/1336665235-regulatory.pdf (last visited Mar. 1, 2013).

⁵⁰ The accompanying Oklahoma CCAA Permit was signed by the Regional director on January 25, 2013.

⁵¹ Taylor and Guthery 1980b, p. 6

⁵² 77 Fed. Reg. at 73880.

⁵³ *Id.* at 73883.

⁵⁴ *Id.*

- (3) the probable direct and indirect effects of any authorized “take” will not appreciably reduce the likelihood of survival and recovery in the wild of any species;
- (4) implementation of the terms of the CCAA is consistent with applicable Federal, State, and Tribal laws and regulations;
- (5) implementation of the terms of the CCAA will not be in conflict with any ongoing conservation programs for species covered by the permit; and,
- (6) the applicant has shown capability for, and commitment to, implementing all of the terms of the CCAA.⁵⁵

The same issuance criteria apply to permits under CCAs.⁵⁶ By the very issuance of CCAs/CCAAs and enhancement survival permits, FWS acknowledges that they offer binding protection to the LPC. This acknowledgement must carry over into the Service’s listing decision and weigh against listing the LPC as “threatened.”⁵⁷

Not only does FWS misconstrue the binding nature of CCA/CCAAs, it also impermissibly understates their scope. Upon reaching targeted goals, more than 25% of the LPC’s range will be covered by a CCA or CCAA, including 2,564,000 acres currently enrolled in New Mexico alone.⁵⁸

FWS has an obligation under the ESA to consider final CCA/CCAAs, and a duty under the *PECE* to consider draft CCA/CCAAs.⁵⁹ It cannot evade its obligations by mischaracterizing the binding nature of these programs, the protections they impose, or the breadth of their implementation. CCA/CCAAs are binding and widely implemented. The Service’s failure to consider them is therefore viewed as arbitrary, capricious, and not in accordance with the law.

B. FWS Did Not Consider Or Quantify Conservation Measures, But Merely Inventoried Them

In the proposed rule’s preamble, FWS summarized 43 existing conservation measures and categorized them either as being associated with multi-party and/or individual state efforts.⁶⁰ But the ESA requires more than that. The ESA requires the Service to account for “those efforts

⁵⁵ 50 CFR 17.32(d)(2).

⁵⁶ *Id.* at 17.22(d)(2).

⁵⁷ Additionally, any allegation that CCAs/CCAAs do not afford adequate protection to LPCs because they are “temporary” is unfounded. CCAs and CCAAs only are issued for time periods FWS deems sufficient to protect the species. *Id.* 17.22(d)(8); 17.32(d)(8). Built into the duration of every CCA or CCAA, therefore, is the Service’s determination that the length is sufficient to realize conservation benefits. *See* U.S. Fish and Wildlife, Candidate Conservation Agreements with Assurances Handbook (June 2003), 19-20 (“ . . . the duration must be sufficient to allow the Service to determine that the benefits of the CCAA’s conservation measures would meet the CCAA standard.”)

⁵⁸ Statistics from the FWS Proposed Rule’s sections on individual CCA/CCAAs, and FWS Q&A Document for the Proposed Rule (Nov. 30, 2012).

⁵⁹ Apart from our argument that even private land currently has adequate conservation protections, the Association’s point out that the goal is to encourage, not discourage voluntary conservation efforts on private lands. Regulating on top of conservation management and voluntary efforts discourages future voluntary efforts. *See infra* § V(A).

⁶⁰ *See* Appendix A for list of conservation measures.

. . . to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction.”⁶¹ The ESA further requires an analysis of the adequacy of the existing measures.⁶² Additionally, under the Service’s own regulations, FWS is legally obligated in a proposed listing determination to include “a summary of the data on which the rule is based . . . , and . . . show the relationship of such data to the rule proposed.”⁶³

FWS failed to conduct the mandated analyses. FWS limited its review to summarizations of selected aspects of certain programs. For example, it noted the acreage enrolled in individual programs. Yet nowhere does FWS discuss whether such acreage is on sensitive LPC habitat, or a portion of the LPC’s current or historic range. FWS did not indicate which proportion of the range is currently being managed or how, nor did the Service identify flaws with any individual programs or the collective suite of programs. FWS also failed to draw a nexus between the available data on individual conservation efforts and their cumulative impact. The Service literally made no attempt to determine whether any or all of the 43 measures it listed were effective or protective. FWS simply made a list - and an incomplete one at that. In doing so, FWS violated its obligations under the ESA and its implementing regulations. The Associations request that FWS analyze the adequacy of these conservation measures or provide some support for its decision to not follow FWS rules and guidance.

C. FWS’s “Listed” Conservation Measures Were Not Only Unexamined, They Were Incomplete

FWS’s list, in addition to being analytically and statutorily deficient, is not a complete list of key measures critical to meaningfully understanding the health and abundance of the LPC. Specifically, FWS did not consider the following:

1. Oil and Gas Initiative

Groups of oil and gas companies are developing draft CCAAs for Kansas, New Mexico, Oklahoma, Texas, and Colorado.⁶⁴ The Service must account for the beneficial impacts of CCAAs (that cover a large percentage of the LPC’s historical and current range).

2. Colorado Oil and Gas Conservation Commission’s rules

FWS ignored mandatory LPC-specific conservation regulations that apply to the oil and gas industry in Colorado. Colorado Oil and Gas Conservation Commission (“COGCC”) rules require producers to use online resources to identify sensitive wildlife habitat and areas of restricted surface occupancy. Currently, “sensitive LPC wildlife habitat” is defined as production areas that include 80% of the nesting and brood rearing habitat that surrounds leks

⁶¹ 16 U.S.C. § 1533(b)(1)(A).

⁶² *Id.* § 1533(a)(1).

⁶³ 50 C.F.R. 424.16(b).

⁶⁴ New Mexico has a CCAA already in place that is modeled after the Bureau of Land Management’s RMPA. *See infra* IV(A)(2) (discussing CCAs and CCAAs specifically).

that have been active once in the last 10 years. Restricted surface occupancy areas for LPC are defined as areas within 0.6 miles of leks that have been active once in the last 10 years. Applicants intending to install or operate wells in “sensitive LPC habitat” must consult with Colorado Parks and Wildlife and implement protective measures.⁶⁵ Colorado law clearly contains LPC protections.⁶⁶

3. Land Trusts

FWS also failed to consider major efforts to establish conservation easements through land trusts on private lands throughout the LPC’s range. The Colorado Cattlemen’s Agricultural Land Trust (“CCALT”), the Ranchland Trust of Kansas (“RTK”), and the Texas Agricultural Land Trust (“TALT”) work to obtain conservation easements on ranchlands that can provide long term assurances for LPC habitat. Such conservation easements are significant because the majority of known LPC habitat is on private land. FWS did not consider, or even identify, the three conservation easements that are most likely to help the LPC continue to grow in both population and range.⁶⁷

D. The Conservation Measures That FWS Failed To Identify/Quantify Provide Significant And Meaningful Protection To the LPC

The Service’s failure to quantify the cumulative impact of the numerous conservation measures in place to help LPC population/range continue to grow and expand is not harmless error. The cumulative impact of these measures on the LPC is significant. If LPC abundance and occupied range were in decline (which we continue to dispute), these broad multijurisdictional efforts could negate any need to list the LPC as “threatened.”

The myriad of protective measures encompassed within existing conservation programs are tethered to the identified threats facing the LPC. FWS identified habitat loss, degradation, and fragmentation as the main threat to the LPC.⁶⁸ FWS, however, fails to take a hard look at how the existing conservation measures are designed to improve and expand LPC habitat.

As outlined below, current conservation programs cover a large portion of occupied LPC habitat and are well funded. This chart, which is provided in more detail in Appendix C, tallies

⁶⁵ Under COGCC rules, applicants intending to install or operate oil and gas wells identified within sensitive LPC wildlife habitat must consult with Colorado Parks and Wildlife. During the consultation, conditions of approval are identified and imposed on the applicant, which must “be guided by the list of Best Management Practices [(BMPs)] for Wildlife Resources maintained on the Commission website.” Colo. Code Regs. § 1202.c. The oil and gas industry in Colorado, therefore, must comply with COGCC’s LPC-specific regulations and requirements, including measures for consultation, development planning, surface occupancy restrictions, siting restrictions, avoidance and minimization measures, seasonal operating restrictions, vehicle operation limitations, noise minimization, surface water protections, and detailed reclamation requirements.

⁶⁶ Throughout the proposed rule, FWS criticizes existing conservation measures because they are voluntary, temporary, or do not have the force and effect of law. 77 Fed. Reg. at 73834. For example, FWS incorrectly states, “no laws or regulations currently protect lesser prairie-chicken habitat on private land, aside from State harvest restrictions.” *Id.* at 73883. These statements are patently false. Colorado’s rules impose legally binding obligations on the oil and gas industry to protect LPC.

⁶⁷ See Appendix B.

⁶⁸ 77 Fed. Reg. 73851.

up the known acreage and funding levels of the major LPC conservation measures to provide a greater understanding of the geographic and financial scope of these efforts.

	Acres	Total Acres Enrolled in Conservation Management (All Programs)		
		% of Range	Acres	Financial Assistance
Range-wide	16,064,256	46.2%	7,425,720	\$57,027,156
Colorado	1,041,920	53.9%	561,131	\$14,000,000 + portion of Multistate
Kansas	7,198,208	23.3%	1,675,207	\$361,711 + portion of Multistate
New Mexico	2,117,696	148.8%	3,151,131	See multistate
Oklahoma	2,709,888	2.03%	549,591	\$11,100,000 + portion of Multistate
Texas	2,996,544	57.1%	1,712,397	\$300,000 + portion for Multistate
Multistate				\$13,778,445

Perhaps more importantly, these far-reaching conservation measures contain the precise measures that FWS identifies as necessary to protect the LPC. For example, FWS identifies current livestock grazing practices as detrimental to suitable habitat conditions for the LPC.⁶⁹ Since their inception, as shown in Appendix D, the Environmental Quality Incentives Program (“EQIP”) and the Wildlife Habitat Incentive Program (“WHIP”) alone have applied mitigating grazing techniques over 3000 times for a total of 20,000,000 acres.⁷⁰

Similarly, the FWS identifies collision with fences as a significant source of LPC mortality that can be remedied by fence removal⁷¹, but the Service overlooked that the WHIP

⁶⁹ 77 Fed. Reg. at 73861-2.

⁷⁰ See Appendix D, “Summary of Major LPC Management Practices Used in the WHIP & EQIP Programs.” FWS had this very information at its disposal in preparing its Proposed Rule, but the Service failed to discuss it. The information supplied above derived from a presentation given to FWS in May 2012. Ungerer, J. and C. Hagen. 2012. Status of lesser prairie-chickens: A review of the threats and conservation actions: a path forward. Powerpoint presentation provided to USFWS Director Dan Ashe on May 24, 2012.

⁷¹ 77 Fed. Reg. at 73862-3.

and EQIP programs alone have facilitated the removal of 18,000,000 linear feet (equivalent to more than 3,409 miles) of fence in the LPC range.⁷²

FWS also notes that the threats that altered fire regimes and encroachment by invasive woody plants have on LPCs are best remedied by prescribed burning.⁷³ FWS, however, ignores that more than 25% of the LPC range is covered by the WHIP and EQIP programs' prescribed burning practices, and four million acres are subject to controlled burns.⁷⁴

More importantly, nowhere in the listing document or in any of the supporting documentation does the Service indicate what measures beyond those encompassed in existing measures need be undertaken to restore the species to sufficient population levels. Where the Service does identify future conservation efforts, it either overlooked or grossly underestimated the extent to which the measures address the identified threat. By failing to identify any necessary for the conservation of the LPC that is not already being implemented on a wide-spread basis, the Service cannot reasonably conclude that listing the species will provide any meaningful additional protection to the LPC. Although the details of the recovery plan are not the direct subject of the proposed listing, the Service has an obligation to provide a reasonable rationale as to why existing programs are insufficient and what listing will do to further protect the species. FWS should, at a minimum, explain why it did not account for, or attempt to quantify, these measures.

V. IF THE SERVICE CANNOT MAKE A “NOT WARRANTED” FINDING WITH THE DATA BEFORE IT, IT SHOULD DELAY A FINAL RULE UNTIL SUCH DATA IS AVAILABLE

FWS has all the information it needs to fully support a final “not warranted” finding and no credible data to support a final listing as “threatened.” If FWS cannot, for some reason, make a decision based on the data before it, it should take the time to obtain the data it needs to make an informed final listing decision. As explained in Section III, the 2013 Range-wide Study will likely provide that needed data. Using an arbitrary settlement deadline as justification for forcing a final listing by September 2013 undermines the Service’s efforts to promote voluntary conservation measures and forgoes important information from the 2013 Range-wide Survey and the potential impacts from recently minted conservation measures.

A. Regulating On Top Of Conservation Management And Voluntary Efforts Discourages Future Voluntary Efforts

As the issue at hand primarily relates to private land, the Service should be mindful of the implications of listing the LPC on future voluntary conservation efforts in the region. Landowners who became involved in conservation efforts for the LPC may not be inclined to do so in the future for other species if their efforts are met with an unsupported listing of the species. Private landowner participation in conservation measures is essential to the LPC and future conservation efforts in the region. Failure on the part of FWS to account for these

⁷² See Appendix D.

⁷³ 77 Fed. Reg. at 73866.

⁷⁴ See Appendix D.

voluntary private efforts in its listing decision may impact the future of collaborative management in the surrounding area.

FWS recognizes the value of such collaborative management. “Early conservation efforts for declining species can be greatly expanded through a collaborative stewardship approach. A collaborative approach fosters cooperation and facilitates the exchange of ideas among private citizens, Federal agencies, States, local governments, Tribes, businesses and organizations.”⁷⁵ The goal, therefore, should be to encourage, not discourage, voluntary conservation efforts.⁷⁶ In contrast, regulating on top of conservation management and voluntary efforts discourages future voluntary efforts. Landowners currently participating in conservation and management efforts may feel that such efforts were in vain, and, consequently, may opt against participating in future efforts.

FWS also recognizes that incentives are key to achieving conservation goals.⁷⁷ Incentives have therefore been the foundation of existing conservation measures, including CCAAs, WHIP, EQIP, *etc.* By removing the incentives, FWS is discouraging future conservation efforts.

B. FWS Should Not Bind Itself to Arbitrary Settlement Deadlines When Incomplete Science, Inconsistent Surveys, and Ongoing Efforts Require More Time

Information presently before the Service indicates that LPC population is increasing and range occupation is expanding.⁷⁸ As such, the FWS need not delay in issuing a finding that the listing of the LPC is not warranted. The settlement agreement FWS entered with WildEarth Guardians (“WEG”) and Center for Biological Diversity (“CBD”) allows for just such a finding.⁷⁹ Under the terms of the settlement, FWS agreed to issue a proposed rule or “not warranted” finding for the LPC no later than FY 2012.⁸⁰

⁷⁵ 64 Fed. Reg. 32726, 32727 (June 17, 1999). *See also* 69 Fed. Reg. 48570 (Aug. 10, 2004).

⁷⁶ Press Release, U.S. FWS, FWS Announces Joint Policies to Encourage Landowners to Protect Species (June 18, 1999) (“To encourage voluntary conservation efforts by property owners, the [FWS and NMFS] have published joint final policies for ‘Safe Harbor’ and ‘Candidate Conservation Agreements with Assurances’ under the Endangered Species Act. ‘The majority of endangered and threatened species occur on privately owned lands,’ said [FWS] Director Jamie Rappaport Clark. ‘Working with these landowners is critical to the recovery of many of our most vulnerable species.’”).

⁷⁷ Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32726 (June 17, 1999) (“This policy is intended to facilitate the conservation of proposed and candidate species, and species likely to become candidates in the near future by giving citizens, States, local governments, Tribes, businesses, organizations, and other non-Federal property owners incentives to implement conservation measures for declining species by providing certainty with regard to land, water, or resource use restrictions that might be imposed should the species later become listed as threatened or endangered under the Act.”)

⁷⁸ 77 Fed. Reg. at 73846, 73850. *See supra*, § II

⁷⁹ *In re Endangered Species Act Section 4 Deadline Litig.*, No. 10-337, slip op. (D.D.C. May 10, 2011), *aff’d In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. 1 (D.D.C. 2011); *aff’d* No. 11-5274, slip op. (D.C. Cir., Jan. 4, 2013).

⁸⁰ *Id.*, at ¶¶ 1, 20, Exhibit B at 4.

If FWS is unwilling to make the proper “not warranted” finding in a final rule, it should not bind itself to listing the LPC as “threatened” simply because an arbitrary settlement deadline. The FWS need not reach a decision sooner than one year after the December 2012 publication of the listing.⁸¹ In addition, the ESA provides procedural protections that permit FWS to extend the one-year period by an additional six months where there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to a listing determination.⁸² In establishing the ESA, it appears clear that Congress included this six-month extension as a procedural protection to help ensure that the Service was not compelled to reach a listing decision when additional data was still being gathered and analyzed. The CBD/WEG settlement does not preclude FWS from seeking to utilize this procedural protection and includes mechanisms to seek extensions to listing deadlines. The Service has availed itself of these terms and conditions before. There is simply no better justification for seeking more time than knowledge that a critical survey that utilizes methodologies that FWS considers the best available will be imminently available.

Again, FWS has all the information it needs to issue a “not warranted” finding. It presently has no information to support a threatened listing. If the Service believes it needs more information to confirm the “not warranted” finding, it should take the time necessary to obtain the information and make a rational and informed decision. An arbitrary settlement deadline should never get in the way of rigorous scientific analysis.

VI. THE SERVICE’S ANALYSIS OF THE OIL AND GAS INDUSTRY IS FLAWED

A. Even If FWS Could Demonstrate the LPC Was “Threatened,” It Mischaracterizes and Improperly Links Those Threats to Oil and Gas Activities

FWS cannot isolate impacts of oil and gas operations from other variables that may affect the LPC. FWS relies on an analysis (Hunt & Best 2004) that lumps multiple variables together and attributes all of their effects to the oil and gas industry.⁸³ For example, the study’s “factor analysis” looked at the total number of wells, total number of active wells, length of roads, presence of power lines, and noise levels in a presence/absence analysis at leks. What is attributable to each subfactor is not discernible. Moreover, many of the factors, such as roads and power lines, exist regardless of whether oil and gas activities occur in the area.

The study also lacks a baseline, and instead relies on presence/absence surveys. For instance, the study counts the number of abandoned leks near wells and attributes each of those abandonments to the presence of the well. However, the study’s authors do not evaluate the lek abandonment rate in areas devoid of anthropogenic structure. There is no way to determine whether, or to what extent, the wells “cause” lek abandonment. These factors’ cumulative effects, therefore, likely are overstated as being attributable to the oil and gas industry. Further, the study also recognizes the presence of active and occupied leks near oil and gas operations.

⁸¹ ESA §4(b)(6)(A).

⁸² ESA §4(b)(6)(B).

⁸³ Hunt & Best, 2004, at 128.

Neither the study authors nor FWS attempt to explain how those LPC continue to thrive in the presence of threats identified by FWS.

FWS also makes an unsupported assertion that absence of LPCs in the southern region of its range is attributable to the oil and gas industry. However, recent population studies (*i.e.*, the 2012 Range-wide Survey, which the Service considers to be the best survey available) show that the LPC population is moving north and LPCs are found in areas that were not known to support LPCs.

Furthermore, FWS draws conclusions about oil and gas operations' density that are not indicative of current operations. The footprints of drilling operations are decreasing, not increasing. Just because an oil or gas permit may allow for increased well density or an increased spatial footprint does not mean that oil and gas structures will be stacked up in close proximity. Indeed, operational density is declining because of advancements in the industry such as horizontal and directional drilling that allow multiple wells to be drilled from a single pad. These industry advances have allowed the oil and gas industry's footprint, and any corresponding impact on the LPC, to decrease, not increase. The information before FWS simply does not support a determination that oil and gas operations are a threat to the LPC.

VII. PROPOSED LISTING IS FLAWED BECAUSE IT IMPROPERLY ALLEGES CLIMATE CHANGE THREATS

The ESA defines a "threatened" species as one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."⁸⁴ In the proposed listing, and in previous rulemakings, the Service relies upon the climate models set forth in the *IPCC Fourth Assessment Report* to predict climate-related species impacts.⁸⁵ As a threshold matter, the Associations question whether these models have the ability to accurately predict future global or geographically specific temperatures. However, for purposes of these comments, we set aside the debate regarding the accuracy of climate modeling, and instead focus upon the Service's application of the best available climate modeling data in the proposed listing

The Service has regularly applied a mid-century "foreseeable future" time horizon when analyzing the projected impacts of climate change on species petitioned for listing under the ESA. The rationale supporting this approach is documented most extensively in the Service's polar bear determinations. Specifically, in 2008, the Service completed a comprehensive analysis of climate change modeling uncertainty and the reliability of future forecasts in connection with its polar bear listing decision.⁸⁶ The Service concluded that there is a scientific consensus that predictions of climate change on at least a broad scale extending to mid-century are relatively unaffected by emissions assumptions, but that longer-term projections and forecasts at the regional or local scale are considerably less certain.⁸⁷ The Service further found that climate predictions extending to the end of the century far exceed the existing credibility of

⁸⁴ 16 U.S.C. § 1532(20).

⁸⁵ 77 Fed. Reg. 73866

⁸⁶ See 73 Fed. Reg. at 28212 (May 15, 2008).

⁸⁷ *Id.* at 28253-54.

climate models and forecasts. The Service's conclusions were confirmed through an extensive peer review performed by multiple scientists and, ultimately, upheld in federal court.⁸⁸

In the proposed listing, the Service explains that “[a]lthough projections of the intensity and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for the projections based on scenarios that assume that greenhouse gas emissions will stabilize or decline.”⁸⁹ The Service further concludes that “there is strong scientific support for projections that warming will continue through the 21st century, and that the scope and rate of change will be influenced substantially by the extent of GHG emissions.”⁹⁰

Section 4 of the ESA expressly states that a species may be listed as “threatened” only if the Service determines that it is threatened by impacts that are “foreseeable.” Although the Service seems to acknowledge that the alleged climate change threats to the LPC (increased temperature, drought and decreased precipitation) are not present harms, but will occur over the next 60 years,⁹¹ the available data does not support a conclusion that any of those potential effects are foreseeable. As detailed meticulously by the Service in the polar bear listing decision, for purposes of considering climate-related impacts in the Section 4 context, the “foreseeable future” is limited, at most, to mid-century. Accordingly, the Service’s analysis of potential climate-related impacts in the proposed listing can and should be improved with a clearly stated conclusion that climate-related impacts are not a factor supporting the threatened listing of the LPC because: (i) any such impacts cannot be predicted with any reliability based on the available information; (ii) the lack of data and divergence of available modeling in the IPCC Fourth Assessment Report constrain the “foreseeable future” for purposes of the Section 4 analysis; and, (iii) climate-related impacts sufficient to support the listing decision in this instance are not foreseeable. Listing the LPC as a “threatened” species based on “climate change” is too speculative and, therefore, contrary to the ESA.

Additionally, the Service failed to show that the climate change impacts it alleges (increased temperature, decreased precipitation, drought) are threats to the LPC. Impacts allegedly attributable to increased ambient temperatures either are not cited or analogized from surrogate species without any explanation as to why the surrogate species is appropriate.⁹² Similarly, impacts allegedly attributable to precipitation are acknowledged by FWS and experts to be “disputed.”⁹³ Finally, while threats allegedly attributable to drought risks have more support, the Service does not distinguish the drought risks it foresees based on climate change from the droughts it acknowledges have been periodically occurring since at least the 1920s.⁹⁴ Unless the Service can tie these drought impacts to climate change, it cannot credibly list climate change as a threat to the LPC.

⁸⁸ See *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litig.*, 794 F. Supp. 2d at 95-96.

⁸⁹ 77 Fed. Reg. at 73,866.

⁹⁰ *Id.*

⁹¹ 77 Fed. Reg. at 73868.

⁹² 77 Fed. Reg. at 73867.

⁹³ 77 *Id.* at 73867.

⁹⁴ 77 *Id.* at 73867-68.

In sum, the Associations strongly believe that FWS needs to appropriately recognize the limits to the Service's ability to project localized species harms from a global phenomenon more than a half century into the future. Any threat assumption that glosses over the speculative nature of localized climate change projections is capricious.

VIII. IF THE SERVICE IS DETERMINED TO LIST THE LPC AS "THREATENED," IT SHOULD SIMULTANEOUSLY ISSUE A SPECIAL RULE UNDER SEC. 4(d) TO EXEMPT LAWFUL OIL AND GAS ACTIVITIES FROM INCIDENTAL TAKE LIABILITY

This Administration has acknowledged the economic, employment, and national security benefits that come from a healthy domestic oil and gas industry.⁹⁵ Indeed, President Obama's "All of the Above" energy strategy, while diversified, continues to rely heavily on oil and gas development to fuel America's future.⁹⁶ The International Energy Agency estimates that the United States can be energy self-sufficient in seven years.⁹⁷ However, this estimate is premised on a regulatory structure that allows for increased oil and gas development and the elimination of regulatory hurdles that unnecessarily add costs to oil and gas development without concomitant environmental benefits—including benefits to species near oil and gas operations.

The LPC presents an opportunity for FWS to use its discretion to establish regulations that do not unnecessarily impede oil and gas development without providing clear benefits to the species. As detailed above, the Associations do not believe that the Service's proposed listing is necessary, supported, or timely. In fact, we believe the data shows that LPC populations are rising, occupied range is expanding, and a "not warranted" finding is most appropriate. FWS has not demonstrated that oil and gas operations will, in any meaningful way, adversely impact the continued recovery of the LPC. Indeed, much of the range occupied by the LPC, and on which the oil and gas industry operates, is managed under one or more conservation measures. If the Service is determined to list the LPC as "threatened" however, we strongly urge FWS to simultaneously finalize a sector-specific special rule under Section 4(d) of the ESA that would: (a) not prohibit take that is incidental to lawfully conducted oil and gas development activity; and (b) permit continued enrollment of properties in any industry-developed CCAA even after a decision to list has been reached. As evinced by the data on which the Service relied, excluding lawfully conducted and properly permitted oil and gas development activity from incidental take prohibitions would not undermine the goal of promoting the healthy growth of LPC throughout its entire range. Permitting continued enrollment of properties after a decision to list has been reached will ensure greater participation while accounting for the uncertainties of future oil and gas development.

⁹⁵ <http://energy.gov/articles/president-obama-outline-plan-americas-energy-security> (last visited Jan. 12, 2013)

⁹⁶ "We need an energy strategy for the future – an all-of-the-above strategy for the 21st century that develops every source of American-made energy." - President Barack Obama, March 15, 2012

⁹⁷ "World Energy Outlook, 2012" IEA (Nov. 12, 2012).

IX. THE SERVICE HAS AN OBLIGATION TO MAKE AVAILABLE THE STUDIES THAT FORM THE BASIS OF ITS ACTION

Despite the fact that the December 11, 2012, action proposes threatened species status for a species that resides in an extremely broad habitat that crosses five states, the Service failed to provide any docket materials for any of these proposed actions in the regulations.gov docket or on its website. While FWS did provide a bibliography, it is inconceivable that, for a rulemaking of this magnitude, the Service would not make critical docket materials available electronically. This failure is especially harmful here because the Service's threat allegations could potentially impact small businesses, many of which are unable to travel to the Service's only docket repository in Tulsa, Oklahoma.

Adequate opportunity for public participation not only improves agency rulemaking, it is required by the Administrative Procedure Act.⁹⁸ Further, in signing Executive Order 13,463, President Obama recognized that effective public participation in an increasingly web-enabled society requires that important rulemaking information be electronically available. More precisely, Executive Order 13463 directs each agency to provide "for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded."⁹⁹ Not only did the Executive Order give the public the right to electronic access for purposes of commenting on the proposals, it also required "an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings." *Id.*

This proposal fails each of these requirements and stands in stark contrast to this Administration's commitment to open government and transparent processes.¹⁰⁰ The majority of stakeholders in this rulemaking have thus far been denied a meaningful opportunity to understand and comment on the Service's proposal. They are forced to rely on the Service's own characterization of the data on which it relied. Given the Service's selective and conclusion-driven use of species population and occupied range data in the proposal (as discussed above), many stakeholders will have reason to doubt the Service's characterization of its underlying data.

Before it proceeds in listing the LPC, it must, at a minimum, make electronically available each study and report on which it relied in proposing the listing and then reopen a ninety (90) day comment period so that stakeholders can review the rule and effectively participate in the rulemaking process.

X. CONCLUSION

The Associations and their respective members strongly urge the FWS to critically examine the data before it and publish a finding that listing is "not warranted." Any other

⁹⁸ 5 U.S.C. §§ 552(a), 553(c).

⁹⁹ E.O. 13,463 Sec. 2(b).

¹⁰⁰ See Memorandum For the Head of Executive Departments and Agencies: Open Government Directive; Peter Orszag, Director, Office of Management and Budget (Dec. 8, 2012).

conclusion is undermined by the best available science and a proper consideration of existing conservation measures intended to protect the LPC, as required by law and FWS's own policies.

If, at this time, FWS is unable to publish a finding that listing the LPC is "not warranted," it should, at a minimum, exercise its discretion to await key soon-to-be-available surveys that will weigh impacts from recently minted conservation measures. If the Service ultimately finalizes a "threatened" listing after awaiting additional data, it should simultaneously finalize a special rule under Sec. 4(d) of the Act to remove prohibitions for takes incidental to lawfully conducted oil and gas operations.

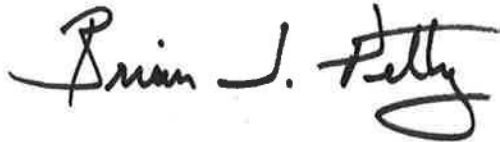
Respectfully submitted,



American Petroleum Institute



Independent Petroleum Association of America



International Association of Drilling Contractors



Mid-Continent Oil and Gas Association of Oklahoma



New Mexico Oil and Gas Association



Oklahoma Independent Petroleum Association



Panhandle Producers & Royalty Owners Association



Western Energy Alliance

APPENDIX A

Conservation Measure	Entity in Charge of Conservation Measure
MULTIPARTY CONSERVATION MEASURES (77 Fed. Reg. at 73830)	
Conservation Reserve Program (“CRP”)	U.S. Department of Agriculture (“USDA”) Farm Services Agency
State Acres for Wildlife Enhancement Program (“SAFE”) (see CRP)	State led conservation practice under CRP
Lesser Prairie Chicken Initiative (LPC Initiative)	Natural Resources Conservation Service (Partnered with the Strategic Watershed Action teams, state conservation agencies, Playa Lakes Joint Venture, Wood Foundation)
Environmental Quality Incentives Program (“EQIP”) (part of LPC Initiative)	
Wildlife Habitat Incentives Program (“WHIP”) (part of LPC Initiative)	
North America Grouse Management Strategy	North America Grouse Partnership, National Fish and Wildlife Foundation
Lesser Prairie Chicken Interstate Working Group	State biologists under oversight of Western Assoc. of Fish and Wildlife Agencies' Grassland Coordinator
Sutton Center’s work on fences	Sutton Center
Habitat Conservation Plan	FWS, five state conservation entities working with 19 wind energy companies
Southern Great Plains Crucial Habitat Assessment Tool (“CHAT”)	5 state conservation agencies
Candidate Conservation Agreements (“CCAs”) and Candidate Conservation Agreements with Assurances (“CCAAs”)	FWS and federal managers working with states
COLORADO (77 Fed. Reg. at 73832)	
EQIP & WHIP (see above)	
Habitat Improvement Program (“HIP”)	
Wildlife Habitat Protection Program	
CRP SAFE (see above)	
Partners for Fish and Wildlife Program (“PFW”)	
Perpetual conservation easements	Colorado Parks and Wildlife, Nature Conservancy, Greenlands Reserve Land Trust
KANSAS (77 Fed. Reg. at 73832)	

Conservation Measure	Entity in Charge of Conservation Measure
Landowner Incentive Program (state-level WHIP)	
CRP SAFE (see above)	
Walk-in Hunting Program	
PFW program	
NEW MEXICO (77 Fed. Reg. at 73833)	
Collaborative Conservation Strategies for the LPC and Sand Dune Lizard in NM (provided guidance for BLM's Special Status Species Resource Management Plan Amendment ("SSRMPA"))	New Mexico Lesser Prairie Chicken/Sand Dune Lizard Working Group
Out of SSRMPA, CCAs and CCAAs have been developed	
Land acquisition	
OKLAHOMA (77 Fed. Reg. at 73834)	
PFW program	
Oklahoma LPC Spatial Planning Tool	Oklahoma Department of Wildlife Conservation ("ODWC"), FWS, OK Secretary of Environment, Nature Conservancy, Sutton Center, Playa Lakes Joint Venture Group
Land conservation agreements	ODWC
Fire field days	University of OK
State WHIP	
Ranch conservations	OK High Plains Resource Development and Conservation Office
Memorandum of Understanding	Between OK Wildlife Conservation Commission with OK Independent Petroleum Association
Wildlife credits trading program	OK and USDA
CRP SAFE continuous sign up	
OK LPC Conservation Plan	
CCAA 10(a)(1)(A) permit application (under current review)	ODWC and FWS
PWF	
TEXAS (77 Fed. Reg. at 73835)	
Statewide umbrella CCAA	TX and FWS
State EQIP program	Texas Parks and Wildlife Department ("TPWD")
TX SAFE program	TPWD
Working relationships with wind producers	TPWD
LPC Advisory Committee gives input to State's Interagency Task Force on Economic Grown and Endangered Species	TPWD

Conservation Measure	Entity in Charge of Conservation Measure
Texas universities research	TPWD
Land acquisition	Nature Conservancy of TX

APPENDIX B

a. CCALT - Colorado Cattlemen's Agricultural Land Trust

CCALT protects productive agricultural lands and the conservation values they provide by working with ranchers and farmers, thereby preserving Colorado's ranching heritage and rural communities. CCALT was started in 1995 by the Colorado Cattlemen's Association, who saw a need for a land trust to serve the farming and ranching community. Since inception, it has partnered with over 265 landowners to protect over 394,000 acres throughout the state of Colorado.

b. RTK – Ranchland Trust of Kansas

RTK is a land trust affiliated with the Kansas Livestock Association (KLA). KLA, formed in 1894, is a trade association that represents the state's multi-billion dollar cattle industry at both the state and federal levels, with a focus on legislative and regulatory issues. In 2003, KLA leaders formed RTK as a separate charitable conservation organization, with a mission to preserve Kansas' ranching heritage and open spaces for future generations through the conservation of working landscapes.

c. TALT – Texas Agriculture Land Trust

TALT was founded in 2007 by leaders from the Texas Farm Bureau, Texas & Southwestern Cattle Raisers and Texas Wildlife Association. Today it holds easements on approximately 128,000 acres throughout Texas. TNC also offers conservation easements to interested landowners throughout LEPC range. In Kansas, TNC is in partnership with RTK in a program seeking to conserve mixed grass communities.

APPENDIX C

	Area	% of Range	Acres	Goal Acreage	Financial Assistance	Contracts	Explanatory Notes
Total Occupied Range	Range-Wide		16,064,256				
	Colorado	6.49%	1,041,920				
	Kansas	44.81%	7,198,208				
	New Mexico	13.18%	2,117,696				
	Oklahoma	16.87%	2,709,888				
	Texas	18.65%	2,996,544				
CCAs/CCAAs¹	Range-Wide						
	Colorado	0.00%					
	Kansas	0.00%					
	New Mexico	121.07%	2,564,000				All occupied and/or potentially occupied habitat (likely includes acreage for dunes sagebrush lizard that FWS may or may not have identified as within LPC range) - 30 oil and gas companies and 41 private landowners
	Oklahoma			100,000			Goal Acreage by 2020
	Texas	10.05%	301,022	1,200,000			Acreage from USFWS Q&A Doc (11/30/12)-27 private landowners; Goal acreage by 2030
Grassland Reserve Program (GRP)²	Range-Wide				\$740,117	9	
	Colorado				\$0	0	
	Kansas				\$0	0	
	New Mexico				\$0	0	
	Oklahoma				\$740,117	9	Fiscal Year 2011
	Texas				\$0	0	
Partners For Wildlife (PFW)³	Range-Wide	2.80%	450,330			353	
	Colorado	2.21%	23,000			14	
	Kansas	1.76%	126,878			54	
	New Mexico	3.45%	73,004			65	
	Oklahoma	3.55%	96,258			154	
	Texas	4.38%	131,190			66	
Conservation Reserve Program (CRP)⁴	Range-Wide	14.90%	2,393,427				
	Colorado	45.79%	477,071				
	Kansas	12.46%	897,000				1,483,027 total

							acres of CRP in Kansas
	New Mexico	17.91%	379,356				410,279 total acres of CRP in Oklahoma
	Oklahoma	8.34%	226,000				
	Texas	13.82%	414,000				1,227,695 total acres of CRP in Texas
State Acres For Wildlife Enhancement (SAFE)⁵	Range-Wide	0.79%	126,824	147,700			
	Colorado	1.16%	12,043	21,500			
	Kansas	0.40%	28,527	30,100			
	New Mexico	0.12%	2,600	2,600			
	Oklahoma	0.25%	6,814	15,100			
	Texas	2.56%	76,840	78,400			
Lesser Prairie Chicken Initiative (LPCI)⁶	Range-Wide	4.47%	717,387		\$19,429,992	623	
	Colorado	4.93%	51,378		\$793,834	11	
	Kansas	0.68%	48,783		\$2,964,497	109	
	New Mexico	8.37%	177,165		\$1,547,621	19	
	Oklahoma	1.76%	47,805		\$1,551,993	46	
	Texas	13.09%	392,256		\$12,572,047	438	
U.S. Forest Service⁷	Range-Wide	4.62%	741,414				Programs of plantings and prescribed grazing throughout these grasslands may enhance LEPC habitat (likely includes area beyond LEPC occupied range)
	Colorado	44.47%	463,373				Comanche National Grassland (active management for LEPC on 10,177 ac)
	Kansas	1.50%	108,175				Cimarron National Grassland
	New Mexico	6.48%	137,131				Kiowa National Grassland
	Oklahoma	1.13%	30,710				Black Kettle National Grassland
	Texas	0.07%	2,025				McClellan Creek National Grassland & portion of Black Kettle NG
Bureau of Land Management (BLM)⁸	State-Wide	51.05%	1,081,180				
	New Mexico	17.31%	366,650	683,570			brush management program for mesquite
	New Mexico	17.49%	370,435				acres closed to future oil and gas leasing
	New Mexico	16.19%	342,770				acres closed to wind

							and solar development
	New Mexico	0.06%	1,325				acres of reclaimed well pads and roads
Environmental Quality Incentives Program (EQIP) ⁹	Range-Wide				\$6,958,690	199	
	Colorado	0.00%			\$328,651	3	Fiscal Year 2011
	Kansas	0.00%			\$525,548	6	Fiscal Year 2011
	New Mexico	0.00%			\$1,313,162	17	Fiscal Year 2011
	Oklahoma	0.00%			\$906,460	26	Fiscal Year 2011
	Texas	0.00%			\$3,884,869	147	Fiscal Year 2011
Wildlife Habitat Incentive Program (WHIP) ¹⁰	Range-Wide	1.05%	169,168		\$4,136,646	101	
	Colorado				\$99,866	2	
	Kansas	0.08%	5,844		\$913,159	39	
	New Mexico				\$0	0	
	Oklahoma				\$0	0	Program currently being developed
	Texas	5.45%	163,324		\$3,123,621	60	83,907 ac within estimated historic range, 79,417 acres within unoccupied portion of historic range
Sutton Center/Fence Marking & Removal Programs ¹¹	Range-Wide						
	Colorado						
	Kansas						
	New Mexico						Covered under the PFW program for New Mexico
	Oklahoma		109,000				208 miles marked, 129 miles removed
	Texas						
Wind Energy Programmatic Habitat Conservation Plan (HCP)	Range-Wide						Will cover entire range, and will likely identify and fund acquisition, preservation, and management of habitat as mitigation.
	Colorado						
	Kansas						
	New Mexico						
	Oklahoma						
	Texas						
Colorado (State based) Programs ¹²	State-Wide	41.30%	430,353				
	HIP	0.53%	5,560				Habitat Improvement Program
	WHPP				\$14,000,000		Wildlife Habitat Protection Program

							(LEPC is 1 of 5 priorities)
	CPW	1.06%	11,000				Colorado Parks and Wildlife - Land Acquisition (in concert with The Nature Conservancy (TNC), and Greenlands Reserve Land Trust)
	CCALT	38.64%	402,581				Colorado Cattlemen's Agricultural Land Trust - Lands are throughout Colorado and all may not benefit the LEPC
	LPCHIP	1.08%	11,212	18,625			Lesser Prairie Chicken Habitat Improvement Program (in concert with Pheasants Forever)
Kansas (State based) Programs¹²	State-Wide						
	LIP	0.31%	22,531				Landowner Incentive Program- Kansas Dept of Wildlife, Parks, & Tourism (KDPWT)
	KDPWT	0.10%	6,927		\$361,711	15	5-year grant focusing on LEPC habitat improvements
	Walk-in Hunting Program		1,000,000				Provides funding to landowners throughout Kansas who contract through the program (may indirectly improve LEPC habitat)
	RTK		33,100				Ranchland Trust of Kansas - land preservation and coordination of habitat improvements
New Mexico (State based) Programs¹²	State-Wide						
	NMDGF	3.31%	70,007				New Mexico Department of Game and Fish - Land Acquisition (in concert with Bureau of Land Management)

							(BLM), and TNC)
Oklahoma (State based) Programs¹²	State-Wide						
	ODWC				\$11,100,000		Oklahoma Dept of Wildlife Conservation - Voluntary offset payment program
	ODWC	0.77%	20,989				Land Acquisition
	OIPA						Oklahoma Independent Petroleum Association - BMPS to avoid and minimize impacts to LEPC habitat
	ODWC				\$25,000,000		Statement from state official regarding monies spent to protect the LEPC in the past 5 years (<i>National Wind Watch-Sept 2010</i>)
Texas (State based) Programs¹²	State-Wide						
	LIP	0.47%	14,068		\$300,000		Landowner Incentive Program
	TNC	0.20%	6,000				TNC - Land Acquisition
	TALT	4.81%	144,000				Texas Agricultural Land Trust - Lands are throughout Texas and all may not benefit the LEPC
Non-Governmental Organization Programs¹³	Range-Wide						These groups provide a range of services, including dissemination of information, facilitating other groups and agencies through funding programs, staffing, and coordination of work with landowners, and work on conservation easements
	Pheasants Forever						
	Dorothy Wood Foundation						
	Playa Lakes Joint Venture						

	Rocky Mtn Bird Observatory						
Total in Conservation Management (All Programs)	Range-Wide						
	Colorado						
	Kansas						
	New Mexico						
	Oklahoma						
	Texas						

APPENDIX D

Summary of Major LPC Management Practices Used in the WHIP & EQIP Programs¹⁰¹

NRCS Management Practices/Actions (WHIP, EQIP) ^a	Extent ^{a,b}	Unit of Measure	# of Practices Applied ^c	Conservation Practice Type ^{d,e}	Practice Synopsis
Primary Management Action					
Upland Wildlife Habitat Management	16,000,000 ^a	acres	4,366	Core Management	Provide and manage upland habitats and connectivity within the landscape for wildlife
Secondary Management Actions					
Prescribed Grazing	20,000,000 ^a	acres	3,066	Core Supporting Management	Manage the controlled harvest of vegetation within specific areas with grazing animals
Woody Plant Management	2,200,000 ^a	acres	752	Facilitating Vegetative	Application of management or a method of treatment to remove, reduce, or control perennial woody (non-herbaceous or succulent) plants that are invasive and noxious
Early Succession Habitat Development	500,000 ^a	acres	---	Facilitating Vegetative	Manage plant succession to develop and maintain early successional habitat to benefit desired wildlife and/or natural communities
Installation of firebreaks (re-institute controlled burning)	100 ^a	acres	186	Facilitating Vegetative	A strip of bare land or vegetation that retards either wildfires or controlled burns
Prescribed burning	4,000,000 ^a	acres	574	Facilitating Management	Prescribed burning is applying fire to predetermined areas under conditions that the intensity and spread of fire are controlled, for the purpose of restoring or enhancing wildlife habitat

¹⁰¹ The WHIP and EQIP programs employ conservation practices categorized by practice code in identified areas where those practices are most needed. The number of times each practice code is used correlates to acreage of historic/occupied range that needs a specified threat reduced.

The embedded footnotes correspond to the following explanations: a - Extent Data from NRCS Core Conservation Practices for Lesser Prairie Chicken Habitat on the LPCI website; b - Data based on anticipated average yearly usage of each practice (from the WS's Lesser Prairie Chicken Conference Report, June 2011); c - The LPC Initiative reported 14,510 practices applied throughout current LEPC habitat during 2010-2011, from Ungerer and Hagen, 2012; d - Required Management Practices (Core Practices), which are applied on all LPC Initiative's contracted acres. Prescribed Grazing is a core practice where cattle are present; e - Facilitating Practices include practices needed to support or implement the core practices, or to address an identified resource concern(s); f - Data not available.

NRCS Management Practices/Actions (WHIP, EQIP) ^a	Extent ^{a,b}	Unit of Measure	# of Practices Applied ^c	Conservation Practice Type ^{d,e}	Practice Synopsis
Obstruction Removal (old fences, dilapidated structures, etc.)	250 ^a	acres	5	Facilitating Structural	Removal and disposal of buildings, structures, other works of improvement, vegetation, debris or other materials in order to apply conservation practices or facilitate the planned land use
Fence	18,000,000 ^a	linear feet	303	Facilitating Structural	This practice facilitates the accomplishment of conservation objectives by providing a means to control movement of animals and people, including vehicles
Habitat Creation (Range Planting)	500,000 ^a	acres	152	Facilitating Vegetative	Establishment of adapted perennial or self-sustaining vegetation such as grasses, forbs, legumes, shrubs and trees to restore the native plant community to a condition similar to the ecological site description. This practice is used to restore important native habitats by converting cropland to grasslands
Habitat Restoration/Enhancement	500,000 ^a	acres	832	Facilitating Structural	Practice is applied annually to those areas of unique or diminishing native terrestrial ecosystems; to restore their original or highest functioning condition
Habitat Creation/Improvement (Watering Facilities)	6,000 ^a	acres	611	Facilitating Structural	A permanent or portable device to provide an adequate amount and quality of drinking water for livestock and or wildlife to meet daily water requirements and improve animal distribution.
Access Control	44,500 ^b	acres	2,290	Facilitating Management	Prevent, restrict, or control access to an area in order to maintain or improve the quantity and quality of natural resources
Forage Harvest Management	26,600 ^b	acres	238	Facilitating Management	This practice is applied during the forage growing season to optimize yield and quality of forage at the desired levels; to promote vigorous plant re-growth; to manage for the desired species composition.
Cover Crop	8,750 ^b	acres	293	Facilitating Vegetative	Planting crops including grasses, legumes, and forbs for seasonal cover and other conservation purposes

NRCS Management Practices/Actions (WHIP, EQIP) ^a	Extent ^{a,b}	Unit of Measure	# of Practices Applied ^c	Conservation Practice Type ^{d,e}	Practice Synopsis
Critical Area Planting	155 ^b	acres	124	Facilitating Vegetative	Establishing permanent vegetation on sites that have, or are expected to have, high erosion rates, and on sites that have physical, chemical, or biological conditions that prevent the establishment of vegetation with normal practices.
Forage and Biomass Planting	3,150 ^b	acres	93	Facilitating Vegetative	Establishing adapted and/or compatible species, varieties, or cultivars of herbaceous species suitable for pasture, hay, or biomass production.
Spring Development	100 ^b	structures	3	Facilitating Structural	Collection of water from springs or seeps to provide water for a conservation need to improve the quantity and quality of water for livestock and wildlife or other agricultural use. Facilitates prescribed grazing.
Pumping Plant	175 ^b	facilities	132	Facilitating Structural	Facility that delivers water at a designed pressure and flow rate to livestock watering facilities to facilitate prescribed grazing.
Water Well	251 ^b	structures	124	Facilitating Structural	To provide water for livestock to facilitate proper use of vegetation through grazing distribution and to provide alternative sources of livestock water.
Pipeline	156,000 ^b	linear feet	255	Facilitating Structural	The purpose of this practice is to convey water from a source of supply to points of use for livestock, wildlife, or recreational purposes.
Grade Stabilization Structure	10 ^b	structures	7	Facilitating Structural	This practice may be applied to stabilize the grade and control erosion in natural or artificial channels; to prevent the formation or advance of gullies, restore associated hydrology to surrounding lands, and to enhance environmental quality by reducing siltation or pollution hazards
Herbaceous Weed Control	22,100 ^b	acres	92	Facilitating Vegetative	The removal or control of herbaceous weeds including invasive, noxious and prohibited plants in order to restore native or desired plant communities and habitat
Pond	7 ^b	structures	12	Facilitating Structural	To provide water for livestock, fish and wildlife, recreation, fire control, and other related uses and to maintain or improve water

NRCS Management Practices/Actions (WHIP, EQIP) ^a	Extent ^{a,b}	Unit of Measure	# of Practices Applied ^c	Conservation Practice Type ^{d,e}	Practice Synopsis
					quality