

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

**DEFENDERS OF WILDLIFE,
1130 17th Street, NW
Washington, DC 20036,**

**CENTER FOR BIOLOGICAL
DIVERSITY,
378 N. Main Avenue
Tucson, AZ 85701,**

**WILDEARTH GUARDIANS,
516 Alto Street
Santa Fe, NM 87501,**

Plaintiffs,

v.

**SALLY JEWELL
Secretary, U.S. Department of Interior
1849 C Street NW
Washington, DC 20240,**

**DANIEL M. ASHE
Director, U.S. Fish and Wildlife Service
1849 C Street NW
Washington, DC 20240,**

**U.S. FISH AND WILDLIFE SERVICE
1849 C Street NW
Washington, DC 20240,**

Defendants.

Case No. 1:14-cv-1025-BAH

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS
DEFENDANTS OF KANSAS FARM BUREAU, TEXAS FARM BUREAU,
COLORADO FARM BUREAU, NEW MEXICO FARM AND LIVESTOCK
BUREAU, AND AMERICAN FARM BUREAU FEDERATION**

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Kansas Farm Bureau (“KFB”), Texas Farm Bureau (“TFB”), Colorado Farm Bureau (“CFB”), New Mexico Farm and Livestock Bureau (“NMFLB”), and the American Farm Bureau Federation (“AFBF”) (collectively, the “Farm Bureaus”)¹ request intervention as defendants in this cause, as of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissively under FRCP 24(b)(1)(B).

I. BACKGROUND

A. Plaintiffs’ Claims and Requests for Relief

Through this suit, Plaintiffs seek to overturn two final agency actions by the United States Fish and Wildlife Service (“USFWS”), Sally Jewell, and Daniel M. Ashe (the “Federal Defendants”): (1) a final USFWS rule to list the lesser prairie chicken (“LPC”) as threatened, rather than endangered, under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (“ESA”) (79 Fed. Reg. 19,974 (Apr. 10, 2014)) (the “Listing Decision”); and (2) a final rule under ESA Section 4(d) excluding from the ESA’s prohibitions certain use and development activities conducted in conjunction with enrollment in a conservation program and exempting certain agricultural activities (the “4(d) Rule”). The Farm Bureaus move to intervene to defend their interests in the rulemaking processes and the 4(d) Rule and oppose the Plaintiffs’ request that the listing of the LPC be modified from “threatened” to “endangered.”

B. Background and Summary of the Case

The LPC “is a species of prairie grouse endemic to the southern high plains of the United States . . .” (79 Fed. Reg. at 19,998), including expanding portions of Oklahoma,

¹ Pursuant to Local Civil Rule 7(m), counsel for the Farm Bureaus has conferred with counsel for each party, and the Federal Defendants and Plaintiffs take no position on Farm Bureaus’ Motion to Intervene, while NRECA, WAFWA, and the energy industry intervenors do not oppose Farm Bureaus’ Motion to Intervene.

Kansas, New Mexico, Texas, and Colorado. 79 Fed. Reg. 20,009. The Farm Bureaus' members are landowners and leaseholders and engage in, or have plans to engage in, agricultural activity throughout much of the habitat of the LPC. *See* TFB Dec. at ¶ 4; KFB Dec. at ¶¶ 6-7, 9; NMFLB Dec. at ¶¶ 3-4; CFB Dec. at ¶¶ 3-5. The declarations of TFB, KFB, NMFLB, and CFB are attached to this Memorandum as Exhibits 1 to 4, respectively.

The LPC was first classified as a candidate for listing under the ESA in 1998 and assigned a Listing Priority Number ("LPN") of 8 on a 12-point scale, under which "1" represents the highest priority and "12" represents the lowest priority. 63 Fed. Reg. 31,400 (June 9, 1998). USFWS continued to assign the LPC an LPN of 8 until 2008, when it changed the LPN from 8 to 2. 73 Fed. Reg. 75,176 (Dec. 10, 2008); 79 Fed. Reg. at 19,995. A combination of federal, state, and private entities undertook efforts to conserve the LPC by protecting its habitat from fragmentation, degradation, and conversion even before the LPC was considered a candidate species in 1998, and those efforts were increased and expanded during the duration of the LPC's candidate status. The Farm Bureaus' members have participated in various voluntary conservation efforts and in the development of conservation rules that conserve LPC habitat and protect LPCs. *See* TFB Dec. at ¶ 6 (development of Habitat Credit Exchange Program) and ¶ 13 (development of Natural Resource Conservation Service's ("NRCS") Working Lands for Wildlife conservation plan); KFB Dec. at ¶ 11 (development of Habitat Credit Exchange Program); NMFLB Dec. at ¶ 8 (development of Interstate Working Group and Western Association of Fish and Wildlife Agencies Range-wide Plan); ¶ 9 (development of Candidate Conservation Agreement with Assurances ("CCAA")); ¶ 12 (participation in

EQIP, a program providing financial and technical assistance to agricultural producers in order to address natural resource concerns and to incorporate LPC conservation measures on private lands); ¶ 12 (committing acres of LPC habitat to the conservation reserve program (“CRP”), administered through the Farm Service agency).

Notwithstanding these voluntary conservation efforts, the Federal Defendants proposed to list the LPC as threatened under the ESA on December 11, 2012 (77 Fed. Reg. 73,828) and finalized the threatened listing on April 10, 2014 (79 Fed. Reg. 19,973).

Pursuant to this listing, the Federal Defendants adopted the 4(d) Rule. 79 Fed. Reg. 20,074 (Apr. 10, 2014). Significantly, the 4(d) Rule contains an exemption for certain agricultural activities that are at the heart of Farm Bureaus’ members’ agricultural activities. The Rule contains a section entitled “Continuation of Routine Agricultural Practices on Existing Cultivated Lands” that states the following:

The final 4(d) special rule provides that take of the LPC will not be prohibited provided the take is incidental to activities that are conducted during the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, seed-drilled untilled crop, hay, or forage production. . . . Routine agricultural activities covered by this provision include: (1) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands. (2) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as buildings, irrigation conveyance structures, fences, and roads. (3) Use of chemicals in direct support of cultivated agriculture when done in accordance with label recommendations.”

Id. at 79 Fed. Reg. 20078. The 4(d) Rule also allows certain other use and development activities that otherwise would be prohibited under the ESA as long as they are conducted in conjunction with enrollment in a state or federally-regulated conservation program. 79 Fed. Reg. 20,074; 20,079. The Farm Bureaus’ members have a significant and unique interest not shared by the other parties in protecting this agricultural exemption so that

they may continue the agricultural activities necessary to their livelihoods without being found to have committed an incidental take of the LPC. *See* TFB Dec. at ¶¶ 7, 9; KFB Dec. at ¶¶ 10, 13, 18-19; NMFLB Dec. at ¶¶ 14, 18; CFB Dec. at ¶¶ 9, 13. That is why the Farm Bureaus offered comments to USFWS concerning the 4(d) Rule’s exemption of agricultural interests. *See* TFB Dec. at ¶ 8; KFB Dec. at ¶ 12; NMFLB Dec. at ¶ 7.

Further, the 4(d) Rule states that none of the prohibitions that apply to threatened species (such as the LPC) found in 50 CFR 17.31 apply to participants enrolled in, and operating in compliance with, the Range-wide Conservation Plan, a conservation plan developed by the NRCS, or “actions that result from activities associated with the continuation of routine agricultural practices . . . on existing cultivated lands” as described above. *Id.* at 20079. Among the conservation agreements identified in the 4(d) Rule was a plan developed by the Western Association of Fish and Wildlife Agencies (“WAFWA”), intervenor-defendant in this case, in conjunction with each state in the LPC’s range, the scientific community, and other stakeholders. 79 Fed. Reg. at 20,074. WAFWA’s plan, the Lesser Prairie Chicken Range-wide Conservation Plan (“Range-wide Plan”), requires participating landowners to pay fees into a conservation fund, and provides a framework to protect and improve habitat, minimize surface disturbances and fragmentation, and offset and/or mitigate unavoidable development. 79 Fed. Reg. at 20,074. The WAFWA Range-wide Plan, the Habitat Credit Exchange Agreement, the CCAAs, and the NRCS conservation plan have provided Farm Bureaus’ members with assurance that their enrollment and commitment to the terms of these plans would allow them to operate within LPC habitat. *See* TFB Dec. at ¶¶ 8, 13; KFB Dec. at ¶¶ 11, 16; NMFLB Dec. at ¶¶ 11, 12. Farm Bureaus members have relied on these assurances. *Id.*

In the final 4(d) Rule, the Federal Defendants reasonably concluded that the WAFWA Range-wide Plan provided a “sound conservation design and strategy” that “will provide a net conservation benefit to the lesser prairie-chicken . . . [that] will address the needs of the lesser prairie-chicken.” 79 Fed. Reg. at 20,007. The Range-wide Plan identified specific population goals for the LPC, and metrics for monitoring those populations; identified focus areas in each state; listed actions that would be taken to help increase the population; and provided a system for mitigating impacts. Farm Bureaus members participated in the development of the Range-wide Plan. *See* NMFLB Dec. at ¶ 11.

The Farm Bureaus support the Federal Defendants’ reasonable and lawful promulgation of the 4(d) Rule, which recognizes that historic conservation efforts benefit the LPC as well as that sound agricultural practices can coexist with and aid the conservation of the LPC. Farm Bureaus’ members, and other agricultural and livestock private land owners, are meaningfully protecting the LPC and its habitat. Plaintiffs seek relief from this Court that would overturn Federal Defendants’ Listing Rule for failure to list the LPC as endangered [ECF. No 1 at p. 28], and vacate Federal Defendants’ 4(d) Rule based on alleged procedural deficiencies and because Plaintiffs do not believe it “necessary and advisable.” [ECF. No 1 at p.28].

C. Kansas Farm Bureau Members’ Interests

Established in 1919, KFB is a voluntary general farm organization that supports farm families who earn their living in a changing industry. KFB stands up for its members through leadership development, agriculture education, legal defense, environmental advocacy, farm safety, risk management, rural development and

international trade. KFB represents the interests of approximately 40,000 Kansas families directly engaged in agricultural pursuits, or approximately 80% of all Kansas families directly engaged in agriculture, including farmers and ranchers throughout the state. KFB Dec. at ¶ 6. KFB has 107,320 total members, including approximately 20,704 members who reside within areas that are considered to be LPC habitat. *Id.*

The interests of KFB members are involved in this proceeding. Many of its members have a substantial economic and legal interest in the listing of the LPC as well as conservation plans pursuant to the 4(d) Rule, changes to which as a consequence of this suit could significantly impact their farming and ranching operations. KFB therefore brings an important perspective to the issues involved in this case. KFB Dec. at ¶ 10. KFB members commented to USFWS regarding the listing of the LPC and participated in the development of the Habitat Credit Exchange Agreement. *Id.* at ¶¶ 11, 12. If the LPC's listing is changed from threatened to endangered, KFB members will suffer numerous economic impacts regarding their livestock, crop production, and feedlot operations. *Id.* at ¶ 15. Such a change would also have potentially devastating effects for agricultural communities in Kansas. *Id.* at ¶ 15-17.

KFB works to develop national and state legislation and policy that protects the interests of farmers, ranchers, and the rural communities that depend upon them, through the development of KFB policy. KFB policy speaks to the issues raised in this matter.

D. Colorado Farm Bureau Members' Interests

CFB was founded in 1919 by a group of Colorado farmers, ranchers, veterinarians, rural doctors, shopkeepers, and tradesman. CFB Dec. at ¶ 3. CFB helps to

ensure that Colorado's second largest industry is tuned and running at peak capacity, because the success of Colorado's agriculture industry helps make Colorado successful.

CFB is dedicated to helping family farmers and ranchers stay on their land and continue to produce the food, fiber, and fuel needed to feed Coloradans and the world. *Id.* at ¶ 4. CFB provides its members with continuous representation at the local, state and federal level, and seeks to enhance marketing opportunities and to protect the rural lifestyle. *Id.* In doing so, CFB works to strengthen Colorado's farming and ranching families for generations to come. *Id.* CFB works to improve Colorado's state economy, natural resources, environment, and social institutions. *Id.* Through work on education, youth development, environmental quality, sustainability, health care, and rural development, Colorado Farm Bureau is helping to make Colorado a better place to live. *Id.* CFB has over 24,000 members statewide. *Id.* Of these, 5,098 members are located in counties that are considered to be LPC habitat. *Id.* at ¶ 5.

A potential endangered listing of the LPC by USFWS would impact CFB members who produce food and fiber in the LPC habitat region. CFB's interest in this litigation is to protect the 4(d) Rule and its agricultural exemption, as this exemption minimizes the economic impact to its members while also providing for the recovery of the LPC. *Id.* at ¶ 9. An endangered listing would negatively impact CFB members' livestock and crop operations, the accessibility of forage, would affect pesticide use and irrigation, would diminish oil and gas revenue for CFB members, and could force producers to alter their crops, hindering their ability to maximize production. *Id.* at ¶ 12.

E. New Mexico Farm and Livestock Bureau Members' Interests

NMFLB is a voluntary membership organization formed in 1917, representing 18,386 farm and ranch families in the state. NMFLB Dec. at ¶ 3. It is organized in thirty New Mexico counties and many of its members are directly engaged in agriculture. *Id.* New Mexico's LPC habitat encompasses seven counties. NMFLB currently has 1,120 agriculture producing members throughout these seven counties. *Id.* at ¶ 10.

NMFLB's primary function is to promote and protect agricultural interests in the State of New Mexico. *Id.* at ¶ 4. This effort entails representing its members through the legislature, regulatory actions, and when necessary in courts. *Id.* When feasible, NMFLB attempts to promote the development of sound and lawful environmental regulations and regulatory policy that minimizes the impacts to its members' and brings a balanced approach to the issues. *Id.*

NMFLB contracted with and spent valuable resources on behalf of its members to hire a Wildlife Biologist to address the potential listing of the LPC. *Id.* at ¶ 5. NMFLB and its representatives spent many hours on rule-making comments and attending meetings to explore a common sense approach to avoid the listing. *Id.* at ¶ 6. NMFLB and its representatives also commented on the LPC listing as a whole, the 4(d) Rule, the development of the Range-wide Plan, and the Candidate Conservation Agreement with Assurances. *Id.* at ¶¶ 7-9.

NMFLB has members who have participated in rule makings and in the development of conservations agreements such as the Range-Wide Conservation Plan, and who have participated and/or are actively engaged in the implementation of conservation agreements or programs. *Id.* at ¶ 11. NMFLB members in the LPC habitat

area have an interest in the 4(d) Rule's agricultural exemption that will be substantially impaired if the listing is reclassified from threatened to endangered. *Id.* at ¶ 14. Such an endangered listing would negatively impact NMFLB members' livestock and crop operations, the accessibility of forage, would affect pesticide use and irrigation, would diminish oil and gas monies for NMFLB members, and could force producers to alter their crops, hindering their ability to maximize production. *Id.* at ¶ 17.

F. Texas Farm Bureau Members' Interests

TFB is a non-profit membership association representing family farmers and ranchers in Texas. TFB Dec. at ¶ 4. TFB is committed to the advancement of agriculture and prosperity for rural Texas. Texas Farm Bureau has over 510,000 member families and is associated with independent county Farm Bureau corporations in 207 counties across the state. *Id.* TFB and its members, many of whom are property owners, farmers, and ranchers, believe that the protection of property rights and the economic interests of its members are of critical importance to the State of Texas and all property owners in the State of Texas. *Id.*

Texas Farm Bureau has 17,587 member families located in counties that are considered to be LPC habitat. *Id.* at ¶ 5. TFB worked on a policy committee that developed the Stakeholder Conservation Strategy for the LPC, which created a mechanism called the Habitat Credit Exchange, which is a mitigation bank for the LPC and creates a mechanism for agricultural and ranching interests to obtain an authorization for incidental take of the LPC. *Id.* at ¶ 6.

TFB and its members have a strong interest in supporting the protections afforded by the agricultural exemption within the 4(d) Rule. *Id.* at ¶ 7. TFB offered comments to

USFWS in support of the 4(d) Rule. *Id.* at ¶ 8. These comments noted that agricultural use of TFB members' land provided beneficial food sources to the LPC, and that many landowners in the LPC's habitat had already signed CCAAs to add to the future improvement of the LPC habitat. *Id.* TFB also noted the negative impact that an endangered listing would have on its members. *Id.*

Private landowners' ranching and farming practices would be severely curtailed if the LPC is reclassified as endangered and the 4(d) Rule exemption is lost. *Id.* at ¶ 10-12. Such a decision would negatively impact TFB members' livestock grazing, forage harvest management, prescribed burning, brush management, firebreak construction, planting of cover crops, critical area planting, forage and biomass planting, water facility construction and maintenance, water wells and pipelines, fencing construction and maintenance, pond construction, weed control, and tree and shrub planting. *Id.* These practices are important for the continued economic viability of TFB members' operations as well as of rural communities in Texas. *Id.*

G. American Farm Bureau Federation's Interests

Formed in 1919 and headquartered in Washington, D.C., AFBF is this nation's largest non-profit general farm organization. AFBF represents family farmer members who produce and raise every type of agricultural crop and commodity in the nation. AFBF is organized as a federation of fifty independent state farm bureaus and the Puerto Rico Farm Bureau, whose members include family farmers in their respective states and Puerto Rico. The Texas, Kansas, Colorado, and New Mexico farm bureaus are members of AFBF.

AFBF's primary function is to advance and promote the interests and betterment of farming and ranching, the farming, ranching, and rural communities in the United States, and the individual families engaged in farming and ranching. The scope of this effort includes advancing, promoting, and protecting the economic, business, social and educational interests of farmers and ranchers across the United States and Puerto Rico. Through its advocacy function on behalf of the nation's farmers and ranchers, AFBF represents its members in legal, regulatory and legislative matters relating to the ESA.

KFB, CLB, TFB, and NMFLB are members of AFBF, and thus their members are members of AFBF. The claims of the Plaintiffs in this case, if recognized, have the potential to apply to virtually all agricultural and ranching activities, as well as ancillary agricultural and ranching activities, conducted by AFBF members who reside within the habitat of the LPC. AFBF members in Texas, New Mexico, Colorado, and Kansas, as well as other states containing LPC habitat, have a direct interest in the issues asserted in this lawsuit. Additionally, AFBF, as a national organization, is also interested in the continued vitality of the 4(d) Rule approach, including the LPC 4(d) Rule.

II. INTERVENTION OF RIGHT

FRCP 24(a)(2) allows the Farm Bureaus to intervene as a matter of right in this action. It states the following:

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Id. Like many circuits, the U.S. Court of Appeals for the District of Columbia Circuit has stated four prerequisites to intervene as of right: "(1) the application to intervene must be

timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). Further, "[t]he D.C. Circuit has taken a liberal approach to intervention," *The Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (citing *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910-911 (D.C. Cir. 1977) ("*NRDC*")), and has emphasized that the standards for intervention must be interpreted flexibly. *Nuesse v. Camp*, 385 F.2d 694, 700-701 (D.C. Cir. 1967).

The Farm Bureaus should be permitted to intervene as of right as defendants under Rule 24(a)(2) because they satisfy each of these four factors.

A. The Farm Bureaus' Intervention is Timely

There is no absolute measure or rule determining timeliness. Timeliness "is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Karsner*, 532 F.3d at 886, citing *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006). The court is to determine timeliness "from all the circumstances . . . [a]nd . . . in the exercise of its sound discretion." *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999). Prejudice to existing parties in the case is the "critical factor" in determining whether the motion for intervention is timely. *Akiachak Native Cmty v. U.S. Dep't of Interior*, 584 F.Supp. 2d 1, 5 (D.D.C. 2008).

The Farm Bureaus have acted promptly to request intervention. The complaint in this proceeding was filed just over four months ago, and the Federal Defendants' answer was filed just over two months ago. The case is still in its initial stages; the administrative record has not yet been filed, and no briefing schedule has been set for dispositive motions. The motion to transfer venue to the Northern District of Oklahoma is still being briefed. No substantive actions have been taken by the Court; no discovery has commenced; and no delay will result from the Farm Bureaus' intervention. Therefore, granting the Farm Bureaus' intervention at this point would not prejudice any existing party.

The Farm Bureaus and, more importantly, their members, would be significantly prejudiced were intervention not granted. What happens in this suit, should Plaintiffs' requests for relief be granted, will affect Farm Bureaus members' agricultural production dependent upon the 4(d) Rule and conservation programs. If Plaintiffs are successful in changing the LPC's listing to "endangered," the 4(d) Rule and its agricultural exemptions will disappear, negatively impacting Farm Bureaus members' ability to engage in present and future agricultural activities on their lands. As discussed below, no one currently in the suit can adequately represent the interests of the members of the Farm Bureaus in the development and cultivation of their agricultural property.

The request for intervention by the Farm Bureaus is timely.

B. The Farm Bureaus Have Direct, Legally-Protected Interests in the Subject Matter of This Complaint

The second requirement for intervention of right is that the would-be intervenor must have legally protectable interests in the subject matter of the suit. *S. Christian Leadership Conf. v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984). The "interest" test is a

practical guide, and not a stringent threshold test of whether the would-be intervenor possesses an independent cause of action: “In a motion to intervene under Rule 24(a)(2), the question is not whether the applicable law assigns the prospective intervenor a cause of action. . . . As the Rule’s plain text indicates, intervenors of right need only an ‘interest’ in the litigation—not a ‘cause of action’ or ‘permission to sue.’” *Jones v. Prince George’s County*, 348 F.3d 1014, 1017-18 (D.C. Cir. 2003). “An intervenor’s interest is obvious when he asserts a claim to property that is the subject matter of the suit.” *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981). Further, the United States Supreme Court has found that economic interests are protectable under the ESA because “economic consequences are an explicit concern of the ESA.” *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). That is because “the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard.” *Hodgson v. United Mine Workers*, 473 F.2d 118, 130 (D.C. Cir. 1972). Thus, protectable interests for purposes of Federal Rule of Civil Procedure 24 include lease rights, ownership interests, and agricultural land operations that could be impacted by a judicial decision on an ESA listing decision or rule. *See, e.g., WildEarth Guardians v. Salazar*, No. 10-cv-2129, 2011 WL 9284, at *2 (D. Colo. Jan. 3, 2011) (intervenors’ “members assert that they own numerous oil and gas leases in potential Lesser Prairie Chicken habitat . . . [therefore, their economic interest] is sufficient to establish an interest in the property that would be the subject of any listing decision . . .”).

Farm Bureaus’ members have the required direct, substantial, and legally-protectable interest in the subject matter and issues of this suit. They are farmers and ranchers who own, lease, and operate agricultural interests throughout the habitat of the

LPC. TFB Dec. at ¶ 4; KFB Dec. at ¶ 6; NMFLB Dec. at ¶ 10; CFB Dec. at ¶ 5. Farm Bureaus' members actively participate in federally-approved conservation measures and agreements that are recognized by the 4(d) Rule; if the Plaintiffs' relief were granted and the LPC were listed as endangered, these programs would end and more onerous mandatory ESA restrictions would take their place, causing Farm Bureaus members increased regulatory uncertainty, costs, delays, and limitations on the use of their property for agricultural purposes. TFB Dec. at ¶¶ 8-12; KFB Dec. at ¶¶ 10, 13, 15-17; NMFLB Dec. at ¶¶ 13, 17; CFB Dec. at ¶¶ 7, 12.

"[T]he participation of the persons most directly affected by the [challenged agency action] is utterly consistent with the notice and opportunity to be heard concerns that lie at the heart of the due process clause." *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 158 (D.D.C. 2001). Farm Bureaus' members participated in the development of the conservation agreements and programs that would be terminated by the relief sought by Plaintiffs. TFB Dec. at ¶¶ 6, 8, 13; KFB Dec. at ¶¶ 11, 16; NMFLB Dec. at ¶¶ 8, 9, 11, 12. The programs that are recognized by 4(d) Rule allow Farm Bureaus' members to engage in their livelihood while protecting the habitat of the LPC. *Id.*; see also CFB Dec. at ¶ 12. The 4(d) Rule's agricultural exemption is crucial for Farm Bureaus members to continue their agricultural enterprises in an economically-viable way, both now and in the future, and the relief sought by Plaintiffs would do away with that Rule and exemption. TFB Dec. at ¶¶ 8-12; KFB Dec. at ¶¶ 10, 13, 15-17; NMFLB Dec. at ¶¶ 13, 17; CFB Dec. at ¶¶ 7, 12. Accordingly, this Court should recognize the Farm Bureaus' right to intervene of right in this suit to protect their members' rights which are directly implicated by the Plaintiffs' Complaint.

C. Farm Bureaus Members' Interests May Be Impaired or Impeded by the Disposition of This Lawsuit

The third requirement for intervention of right is that the would-be intervenor's legally-protectable interests may, as a practical matter, be impaired or impeded by the disposition of the case. Fed. R. Civ. P. 24(a)(2). Here, the court will look at the "practical consequences" of denying intervention, and should find that intervention is appropriate if denial of intervention would make it more "difficult or burdensome" for the would-be intervenor to protect its interests. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003).

Plaintiffs' claims clearly implicate various property rights and economic interests of Farm Bureaus' members, as described above. Where the relief sought would have a direct, immediate, and harmful impact on a third party's interests, that adverse impact is sufficient to satisfy Rule 24(a)(2). *Id.* Further, an entity has sufficient interests to intervene where the proceeding has the potential to subject that party to governmental regulation or to significantly affect the moving party's business operations. *Id.* In the present matter, Plaintiffs have made a direct attack on a prior action – the listing of the LPC as threatened, the development of the 4(d) Rule, and the development of conservation programs as recognized by the Rule – that is favorable to Farm Bureaus' members. Where the government's decision is favorable to the proposed intervenor and the challenge threatens to directly attack that decision, intervention is warranted. *WildEarth Guardians*, 272 F.R.D. at 14; *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996), *citing with approval and quoting Conservation Law Foundation of New England, Inc. v. Mosbacher*, 956 F.2d 39, 43 (1st Cir. 1992) ("the fishing groups seeking intervention are the real targets of the suit and are the subject of the regulatory plan.

Changes in the rules will affect the proposed intervenors' business, both immediately and in the future."'). If the LPC were listed as an endangered species, the 4(d) Rule exemption for certain existing agricultural activities would go away and incidental take permits would be required for many of the Farm Bureaus members' normal agricultural activities; if such incidental take permits were denied, those members might be prohibited from engaging in such activities on property that they own or lease. TFB Dec. at ¶¶ 8-12; KFB Dec. at ¶¶ 10, 13, 15-17; NMFLB Dec. at ¶¶ 13, 17; CFB Dec. at ¶¶ 7, 12. Therefore, what happens in this proceeding, especially if Plaintiffs' requested relief were granted or if a settlement were reached between Plaintiffs and existing party defendants, would directly affect Farm Bureaus members' property rights and agricultural and business interests.

Courts have recognized the importance of participation by affected private parties in ESA listing cases because of the long-term costs such challenges and potential settlements may pose to regulated entities. *Minard Run Oil Co. v. U.S. Forest Serv.*, 894 F. Supp. 2d 642 (W.D. Pa. 2012), *aff'd*, 2013 WL 5357066 (3rd Cir. Sept. 26, 2013). If a settlement were reached in this proceeding without the participation of the Farm Bureaus, an order could be issued that would impair the protected interests of their members without the opportunity to participate in the settlement discussions.

A further reason that the Farm Bureaus request intervention is that "the *stare decisis* effect of an adverse judgment constitutes a sufficient impairment to compel intervention." *Sierra Club v. Glickman*, 82 F.3d at 109-10 (no emphasis added), *citing Espy*, 18 F.3d at 1207. If this court makes any findings related to agricultural activities and their purported effect on habitat fragmentation of the LPC (or other factors that

influence USFWS' consideration of the LPC's listing), the Farm Bureaus members' interests could be impaired in other proceedings involving other species. Further, the effect of this litigation could discourage USFWS from issuing 4(d) Rules in future listing decisions, which would detrimentally affect the Farm Bureaus' members with agricultural operations within the habitat of those species. For a would-be intervenor to raise its concerns and protect its interests in later proceedings would be inadequate and ineffective.

The relief sought by Plaintiffs would impair the Farm Bureaus members' protected interests, and therefore this element of intervention under Rule 24(a)(2) is satisfied.

D. Existing Parties Do Not Adequately Represent Farm Bureaus Members' Interests

The interests of Farm Bureaus' members in this litigation are not adequately represented by the existing parties. The burden of an intervenor to show that it is not adequately represented by existing parties is "not onerous." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). "The applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Id.* For example, a showing that a governmental entity has no financial stake in the outcome of the litigation while a private party does demonstrates that the governmental entity does not adequately represent the interests of the private party. *Id.*, citing *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 912 n.41 (D.C. Cir. 1977). Governmental entities generally cannot represent or protect the "more narrow and 'parochial' financial interest" of a private party that is not burdened, like the

governmental entity is, with the additional responsibility of balancing the competing interests of the public. *Fund for Animals*, 322 F.3d at 737.

The Plaintiffs in this proceeding do not represent the Farm Bureaus' interests. As described above, Farm Bureaus' members own and lease property throughout the LPC habitat in multiple states and use their property to engage in agricultural and ranching enterprise, as well as oil and gas and wind energy development. TFB Dec. at ¶ 4; KFB Dec. at ¶ 6; NMFLB Dec. at ¶ 10; CFB Dec. at ¶ 5. The Farm Bureaus' interest in this proceeding is the protection of their property rights and economic interests. The relief requested by Plaintiffs would vacate the 4(d) Rule and its important exemption for agricultural activities, and the conservation agreements that Farm Bureau members have entered into, and thereby impede Bureau members' ability to exercise their property rights and engage in their livelihoods. TFB Dec. at ¶¶ 8-12; KFB Dec. at ¶¶ 10, 13, 15-17; NMFLB Dec. at ¶¶ 13, 17; CFB Dec. at ¶¶ 7, 12. Plaintiffs' interests are diametrically opposed to those of the Farm Bureaus' members.

The Federal Defendants' interests are not congruent with those of the Farm Bureaus' members, and cannot be expected to adequately represent the Farm Bureaus' members' "parochial financial interests," as the Federal Defendants are obligated to protect the interests of the public at large, not those of any individual or business concern. *Fund for Animals, Inc.*, 322 F.3d at 737. The Federal Defendants have no financial stake in the outcome of this litigation, while the livelihoods of Farm Bureaus' members are dependent on it. *Dimond*, 792 F.2d at 192. The Federal Defendants may have an interest in protecting the process and decision by which they listed the LPC as threatened; in contrast, the Farm Bureaus have an interest in protecting the 4(d) Rule (and its

agricultural exemption) and the voluntary conservation measures in which their members participate. The Federal Defendants would not be – nor should they be – primarily interested in protecting the Farm Bureau members’ individual property rights or economic concerns.

Nor are the Farm Bureaus’ interests completely congruent with those of the energy industry intervenors² or the National Rural Electric Cooperative Association (“NRECA”) intervenors.³ Neither of these organizations represent the interests of farming and ranching families or the business interests thereof, and therefore neither of these intervenors necessarily have an interest in preserving the 4(d) Rule’s agricultural exemption, as do Farm Bureaus’ members. The energy industry intervenors do not adequately represent Farm Bureaus members’ interests in this case. The energy industry intervenors represent “member companies” who conduct oil and gas operations or have plans to do so throughout the LPC habitat,⁴ and have leasing interests to conduct oil and gas operations on federal lands.⁵ The NRECA intervenors represent consumer-owned rural electric cooperatives and public power districts as well as generation and transmission cooperatives.⁶ Both the energy industry and NRECA intervenors represent the separate industrial interests of their members, and the protection of the distinct activities of their respective industries. Neither enjoys the exemption under the 4(d) Rule for agricultural activities that Farm Bureau members intervene to protect. While the

² These include the Oklahoma Independent Petroleum Association, Oklahoma Oil and Gas Association, International Association of Geophysical Contractors, Independent Petroleum Association of America, American Petroleum Institute, and Western Energy Alliance. The energy industry intervenors moved to intervene in this proceeding on or about September 12, 2014. *See* D.E. 11. That motion to intervene was granted on September 30, 2014.

³ The NRECA’s motion to intervene was granted by minute order on October 8, 2014.

⁴ *See* Motion to Intervene on Behalf of Defendants, D.E. 11, at 2.

⁵ *Id.* at 19.

⁶ National Rural Electric Cooperative Association Memorandum of Points and Authorities in Support of Motion to Intervene as Defendant, D.E. 16-1, at 5.

Farm Bureaus also seek intervention in order to protect conservation agreements promulgated under the 4(d) Rule, the Farm Bureaus represent individual farmers and ranchers, and the conservation agreements they seek to protect in this case involve the protection of the LPC with regard to agricultural activities rather than with regard to the energy generation, exploration, and transportation activities of the energy industry and NRECA intervenors.

The other intervenor-defendant, the Western Association of Fish and Wildlife (“WAFWA”),⁷ is an “association of state fish and game agencies from across the west” and a major contributor to and implementer of the 4(d) Rule through its administration of the Range-wide Plan. *See* Motion to Intervene on Behalf of Defendants (D.E. 18) at p. 6. WAFWA disagrees with and will not support the USFWS’ decision to list the LPC as threatened under the ESA, and also opposes Plaintiffs’ contention that the LPC warrants listing as endangered. *Id.* at p. 5-6. Similar to the Federal Defendants, WAFWA – as a quasi-governmental entity representing state fish and game agencies, and as administrator of the Range-wide Plan – cannot be expected to adequately represent the Farm Bureaus’ members’ “parochial financial interests” as WAFWA is obligated to protect the interests of the public at large. *Fund for Animals, Inc.*, 322 F.3d at 737. Nor does WAFWA represent the economic or property rights interests of agricultural or ranching land uses that the Farm Bureaus would represent, if their intervention is granted. Rather, WAFWA’s interest is the “protection and management of fish and wildlife and their habitats.” *See* Motion to Intervene on Behalf of Defendants (D.E. 18) at p. 10. While the Farm Bureaus share WAFWA’s interest in upholding the 4(d) Rule, and as a general goal, the protection of fish and wildlife habitats, the distinctly different interests that the

⁷ WAFWA’s Motion to Intervene was granted on October 8, 2014.

two entities represent could easily diverge in litigation and/or settlement negotiations, therefore the intervention of both parties is appropriate.

None of the existing parties, or their members, including the energy industry, the NRECA, or the WAFWA intervenors, are benefitted by the 4(d) Rule's agricultural exemption, would be adversely affected by the elimination of the 4(d) Rule's agricultural exemption, and therefore none can adequately represent the agricultural interests of the Farm Bureaus and their members. The showing required for this factor is "not onerous." All would-be intervenors need show is that representation of their interests by existing parties "may" be inadequate. *Dimond*, 792 F.2d at 192. This factor is clearly satisfied. The interests, perspective, and objectives that the Farm Bureaus bring to this case are unique to their members and are not adequately represented by the parties to this proceeding.

E. The Farm Bureaus Have Standing in This Proceeding

The Farm Bureaus and their members have standing to participate in this proceeding. An intervenor "participates on equal footing with the original parties to a suit," and therefore a prospective intervenor must satisfy Article III standing requirements. *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court enunciated a three-part test for standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Id.* at 560-61.

Associational standing is established when (1) members would otherwise have standing to sue in their own right, (2) the interests the association seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief

requested requires the participation of individual members in the lawsuit. *Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1135 (D.C. Cir. 2005). The D.C. Circuit has recognized that “any person who satisfies Rule 24(a) will also meet Article III’s standing requirement.” *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *see also WildEarth Guardians*, 272 F.R.D. at 13 n.5.

As discussed above, the Farm Bureaus satisfy both Rule 24(a) and any standing requirements. The relief sought by Plaintiffs, if granted, would directly and immediately adversely affect the interests of Farm Bureaus’ members, while a favorable ruling by this Court denying that requested relief would prevent that injury. *Lujan*, 504 U.S. at 560-61. The Farm Bureaus have established that protection of their members’ rights and obligations under the ESA and, specifically, that the 4(d) Rule’s agricultural exemption and the conservation programs recognized by the 4(d) Rule are germane to their organizational purpose. Finally, the resolution of the issues at stake in this challenge does not require the participation of the Farm Bureaus’ individual members because Plaintiffs have requested declaratory and injunctive relief. *See, e.g., Nat’l Treasury Emps. Union v. Whipple*, 636 F. Supp. 2d 63, 75 (D.D.C. 2009) (individual participation not required where plaintiffs sought declaratory and injunctive relief). Accordingly, the Farm Bureaus meet all requirements to establish standing.

F. All Factors for Rule 24(a)(2) Intervention of Right Have Been Established

The Farm Bureaus therefore satisfy all four requirements for intervention under Rule 24(a)(2): Yimeliness, that their members’ real property and economic interests in the litigation, that their members’ interests will as a practical matter be impeded or impaired by the disposition of the case, and that existing parties will not adequately

represent their members' interests. The Farm Bureaus respectfully request the Court to grant them intervention of right.

In order to promote judicial efficiency, the Farm Bureaus are willing, to the extent practicable, to cooperate, coordinate with, and to file joint briefs with, the other intervening parties. The Farm Bureaus also note that they support the energy industry intervenors' motion to transfer venue to the Northern District of Oklahoma.

III. PERMISSIVE INTERVENTION IN THE ALTERNATIVE

Alternatively, if the court denies leave to intervene as of right, the Farm Bureaus should be granted permissive intervention under FRCP 24(b)(1)(B), because the Farm Bureaus, representing their members' interests, have defenses that are similar to those of the Federal Defendants, and that share common questions of law and fact with the main action; and the Farm Bureaus' motion to intervene is timely and will not unduly delay or prejudice the adjudication of the original parties' rights.

A. Requirements of FRCP 24(c) are Satisfied

A court may grant a motion to intervene under either form of intervention under Federal Rule of Civil Procedure 24 – intervention of right or permissive intervention. FRCP 24(b) allows permissive intervention for anyone who files a timely motion to intervene who “has a claim or defense that shares with the main action a common question of law or fact.” The Farm Bureaus have met these requirements.

As discussed above, the Farm Bureaus' intervention is timely and will not cause undue prejudice or delay to the Federal Defendants, Plaintiffs, or other intervenors.

The second and third factors are also met. The Farm Bureaus share a claim or defense with the Federal Defendants in that the Farm Bureaus have a legal interest in

maintaining the 4(d) Rule as well as conservation agreements and programs promulgated pursuant to or recognized by that Rule. The Farm Bureaus' members' economic and property rights and interests depend on the defense of the 4(d) Rule and its agricultural exemption; the Federal Defendants have filed responsive claims in defense of the 4(d) Rule. In the absence of intervention, the Farm Bureaus will not be able to defend the interests of their members against the relief sought by Plaintiffs. The Farm Bureaus will work with the existing parties to avoid duplicative pleadings so as not to delay any proceeding already scheduled.

CONCLUSION

The Farm Bureaus satisfy each of the four requirements for intervention of right: (1) the motion to intervene is timely; (2) the Farm Bureaus claim an interest on behalf of their members in the subject matter of this case, because the relief sought by Plaintiffs in this suit will adversely affect the Farm Bureaus members' economic and property rights; (3) the Farm Bureaus have shown that the disposition of this case may impair or impede their members' ability to protect these rights; and (4) the Farm Bureaus' interests in protecting their members' rights are not adequately represented by existing parties. The Farm Bureaus have shown that, acting on behalf of their members, they have defenses that share common questions of law and fact with those of the Federal Defendants in this case, their motion to intervene is timely, and its intervention will neither unduly delay the case nor prejudice the rights of existing parties. The Farm Bureaus respectfully ask the

Court to grant them intervention of right under FRCP 24(a)(2) or, in the alternative, permissive intervention under FRCP 24(b)(1)(B).

Respectfully submitted,

Date: October 31, 2014

/s/ Bruce V. Spiva
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**ATTORNEYS FOR INTERVENOR-DEFENDANTS
KANSAS FARM BUREAU, TEXAS FARM BUREAU,
COLORADO FARM BUREAU, NEW MEXICO
FARM AND LIVESTOCK BUREAU, and
AMERICAN FARM BUREAU FEDERATION**

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Support of Motion to Intervene as Defendants of Kansas Farm Bureau, Texas Farm Bureau, Colorado Farm Bureau, New Mexico Farm and Livestock Bureau, and American Farm Bureau Federation was served on October 31, 2014, by electronic filing via the Court's ECF system upon all of the parties and their counsel of record as listed on the docket in this case.

/s/ Bruce V. Spiva

Bruce V. Spiva

Exhibit 1

to

Memorandum in Support of Motion to Intervene as Defendants of
Kansas Farm Bureau, Texas Farm Bureau, Colorado Farm Bureau, New
Mexico Farm and Livestock Bureau and American Farm Bureau
Federation

Declaration of the Texas Farm Bureau

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE,
1130 17th Street, NW
Washington, DC 20036,

CENTER FOR BIOLOGICAL
DIVERSITY,
378 N. Main Avenue
Tucson, AZ 85701,

WILDEARTH GUARDIANS,
516 Alto Street
Santa Fe, NM 87501,

Plaintiffs,

v.

Case No. 1:14-cv-1025

SALLY JEWELL
Secretary, U.S. Department of Interior
1849 C Street NW
Washington, DC 20240,

DANIEL M. ASHE
Director, U.S. Fish and Wildlife Service
1849 C Street NW
Washington, DC 20240,

U.S. FISH AND WILDLIFE SERVICE
1849 C Street NW
Washington, DC 20240,

Defendants.

DECLARATION OF TEXAS FARM BUREAU IN SUPPORT OF INTERVENTION

1. I, Robert Gene Richardson, make this declaration based on my personal knowledge or belief and state as follows:

2. I am a member of the Texas Farm Bureau ("TFB") in McLennan County, Texas. I have been a member of TFB since 1976. I moved to Mississippi but returned to Texas and rejoined TFB in 1995.
3. I am a TFB employee and have been since 1995. I am an Associate Director of Commodities and Regulatory Activities, and have taken the lead role for TFB on lesser prairie chicken ("LPC") issues.
4. TFB is a non-profit membership association representing family farmers, ranchers, and property owners in Texas. TFB is committed to the advancement of agriculture and prosperity for rural Texas. TFB has over 510,000 member families ("Members") and is associated with independent county Farm Bureau corporations in 207 counties across the state. TFB and its Members, many of whom are property owners, farmers and ranchers believe that the protection of property rights and the economic interests of its Members are of critical importance to the State of Texas and all property owners in the State of Texas.
5. Approximately 17,587 TFB member families live within areas in Texas that are considered to be the habitat of the LPC.
6. I have worked on a policy committee representing TFB while developing the Stakeholder Conservation Strategy for the LPC. This program would create a mechanism for agricultural and ranching interests to obtain an authorization for incidental take of the LPC pursuant to Section 10(a)(10(A) of the Endangered Species Act should the species be listed as threatened or endangered. A part of this program is known as the Habitat Credit Exchange, and is a mitigation bank for the LPC. USFWS has not yet approved the Habitat Credit Exchange, but approval is pending.

7. TFB and its Members have a strong interest in supporting the granting of permits for incidental take by normal agricultural practices and are concerned that agriculture's protection by the 4(d) Rule adopted by the United States Fish and Wildlife Service ("USFWS") would be lost if Plaintiffs were successful in forcing an endangered listing of the LPC.
8. TFB has offered comments to USFWS concerning the LPC 4(d) Rule's exemption of agricultural interests. *See Exhibit A*, January 9, 2014 comment of Robert Gene Richardson, Associate Director of Commodities and Regulatory Activities, Texas Farm Bureau. TFB's comments noted that agricultural use of its members' land provided beneficial food sources to the LPC, and that many landowners in the LPC's habitat had already signed CCAAs to add to the future improvement of the LPC habitat. TFB commented that the CCAA is the best protection for landowners. TFB's comments also noted the negative impacts that an endangered listing would have on its Members.
9. The vast majority of the surveyed LPCs are found on private land. Private landowners' ranching and farming practices will be severely curtailed if the LPC is reclassified as "endangered" and the 4(d) Rule agricultural exemption is lost. Some of the practices that may continue under the 4(d) Rule exemption include: Livestock grazing, forage harvest management, prescribed burning, brush management, firebreak construction, planting cover crops, critical area planting, forage and biomass planting, water facility construction and maintenance, water wells, water pipelines, fencing construction and maintenance, pond construction, herbaceous weed control, and tree and shrub planting. The continuation of these practices are important for the continued economic viability of farmers, ranchers and rural communities, and for a healthy ecosystem that improves

wildlife habitat. Individuals and communities rely on continued livestock and farming operations for their economic viability, the loss of which would be devastating.

10. Prescribed grazing by livestock is beneficial to the LPC in that it improves wildlife habitat. Grazing improves and maintains the vigor of desired species of plants which results in a better food supply and cover for wildlife, including the LPC. Proper grazing reduces soil erosion and improves water quality and quantity for a sustainable ecosystem. If left un-grazed, large fuel loads can accumulate, resulting in large hot fires that can be very damaging to habitat and wildlife. The loss of the 4(d) Rule exemption for livestock grazing would have a negative economic impact on farmers and ranchers as well as a substantial adverse impact on the LPC.
11. Fencing is another practice that must be included under the 4(d) Rule exemption in order to allow landowners to continue livestock grazing. Fences must be constructed and maintained around livestock to keep them contained within the livestock owner's property. Further, internal fences within a parcel of property must be utilized to accomplish prescribed grazing techniques. Livestock are allowed to graze on one section of property for a period of time and then the livestock may be moved to another section. This type of grazing, known as rotation grazing, provides optimal benefits as described in the previous paragraph for the producer as well as for the habitat for the LPC.
12. Routine farming practices for cropland are allowed under the 4(d) Rule exemption. Farmers are allowed to cultivate, till, plant, and harvest crops, hay, and forage on cropland. Farmers depend on being able to continue to grow their crops for their economic livelihood. These cultivated lands are also a benefit to the LPC because they provide it an additional food source.

13. TFB Members have been active in commenting on and the process of developing LPC conservation measures. TFB Members have participated in the Natural Resource Conservation Service's (a division of the United States Department of Agriculture) Working Lands for Wildlife program ("WLFW"). See **Exhibit B**, brochure of WLFW program. WLFW is a partnership between USDA-NRCS, USFWS, and private landowners whereby landowners may become exempt for any incidental take of the LPC caused by the implementation and maintenance of conservation practices laid out in the WLFW conservation plan. *Id.* The program has the dual purpose of protecting and restoring populations of the LPC while strengthening rural economies by protecting the productivity of working lands. *Id.* As long as the specified practices are implemented according to NRCS standards, no additional changes or requirements will be needed or imposed later. *Id.* Landowners who voluntarily sign up for WLFW receive the predictability with regard to the ESA that they will be exempted from any incidental take of the LPC caused by the implementation of WLFW conservation practices and measures. *Id.* If the LPC were to become listed as endangered rather than threatened, TFB Members who have entered into a WLFW conservation plan would lose the time, money, and resources spent in implementing conservation measures as well as predictability of how their lands can be used pursuant to the ESA.

SUBSCRIBED AND SWORN TO BEFORE ME on this 29 day of October, 2014.



Kelly D Moore
 NOTARY PUBLIC IN AND
 FOR THE STATE OF TEXAS

Robert Gene Richardson

Robert Gene Richardson

Associate Director of Commodities and Regulatory Activities, Texas Farm Bureau

Exhibit A

January 9, 2014

Public Comments Processing

Attn: FWS-R2_ES-2012-0071

Division of Policy and Directives Management, U.S. Fish and Wildlife Service

4401 N. Fairfax Drive, MS 2042-PDM

Arlington, VA 22203

Comments on Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie Chicken as a Threatened Species with a Revised Special Rule

Texas Farm Bureau thanks you for the opportunity to make comments on the revision of the Endangered Species Act Section 4(d) rule for the proposed listing as threatened of the lesser prairie chicken. Texas Farm Bureau works for the benefit of over 500,000 member families in Texas. Some of our members are landowners in the panhandle of Texas. These members reside and pay taxes in their communities. They either have businesses, work for someone else, farm or ranch in areas that are in or adjacent to lesser prairie chicken habitat. These communities will be affected by a listing. The difficulties that they encounter will be determined by the approach taken by the Fish and Wildlife Service.

Texas Farm Bureau requests that a not warranted decision to prevent the impact to these communities. This area of Texas has had a prolonged drought and the people have struggled to make ends meet. The lesser prairie chicken habitat is mostly range land and in the past good years the chickens have benefited from crop land as they were able to glean grain from the fields; grain such as wheat in the summer and sorghum and corn in the fall. The drought did not allow for this sharing of harvest for either the chickens or the farmers. While the drought was hard on the chickens it was also hard on these communities. The drought is showing signs of lessening and could give a reprieve to this part of our state. Many landowners have signed CCAA's adding to the improvement of future habitat. This equates to more movement toward improving conditions for this species, allowing again for a not warranted decision.

Should the Fish and Wildlife Service list the lesser prairie chicken as endangered, the 4(d) rule as written would be used to give coverage for an incidental take. The current revision of the 4(d) rule would give coverage to only those landowners who have signed an agreement under the WAFWA range wide plan (RWP) or have a NRCS LEPC Initiative plan. There are those who ranch in that area that will not sign

an agreement with any state or federal agency. These people have managed their land for generations and take ownership for chickens still existing on their property. They should not have fewer protections for not agreeing to a government document. Some landowners cannot participate in the RWP because it is not financially viable to their operation. The payment for mitigation to the landowner in this plan is neither sustainable nor static. The RWP prohibits activities around the lek or nesting areas within one and quarter miles during seasons that conflict with planting or harvest of certain crops. A prohibition of normal agricultural practices will preclude many participants as it disrupts their farming operations. The one economic boon to these communities during the drought has been the new production of oil and gas. The main goal of the RWP is avoidance of habitat by both agriculture and industry. These communities will have no options to mitigate for this loss.

The Fish and Wildlife Service will not do justice for this species by trying to funnel landowners into a bad agreement with the RWP. The 4(d) rule should be available to any approved conservation plan. If the lesser prairie chicken is a threatened species, then broaden the door for participants. The best alternative for protection for landowners without the 4(d) rule is a CCAA. Why are Kansas and Colorado farmers left without that opportunity? Landowners in all states should be allowed the protections of a broader 4(d) rule.

Sincerely,

A handwritten signature in black ink, reading "Gene Richardson". The signature is fluid and cursive, with the first name "Gene" and last name "Richardson" clearly legible.

Gene Richardson
Associate Director of Commodities and Regulatory Activities
Texas Farm Bureau

Exhibit B



United States Department of Agriculture

Natural Resources Conservation Service

Working Lands for Wildlife



Photo by Linda Rockwell

USDA-Natural Resources Conservation Service (NRCS) has entered into an agreement with the Department of Interior United States Fish and Wildlife Service (USFWS) referenced as the Working Lands for Wildlife (WLFW) partnership whereby land owners/producers will receive predictability, exempting them from any incidental take of the Lesser Prairie-Chicken caused by the implementation and maintenance of conservation practices in a conservation plan.

The USFWS, who administers the Endangered Species Act (ESA), is expected to make a final listing determination for the Lesser Prairie-Chicken no later than March 30, 2014. The proposed listing for the Lesser Prairie-Chicken is threatened under the ESA as published in the Federal Register.





Q&A

What does listing as Threatened mean?

The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

What does this mean for land owners/operators?

Two-thirds of federally listed species have at least some habitat on private land, and some species have most of their remaining habitat on private land. The USFWS and NRCS have developed an array of tools and incentives to protect the interests of private landowners while encouraging management activities that benefit listed species and other at-risk species.

What tool/incentive does NRCS offer?

WLFW is a partnership between the NRCS, the USFWS, and private landowners. The voluntary effort:

- Provides farmers and ranchers with ESA predictability options through a conservation plan
- Helps restore populations of specific declining wildlife species, in this case the Lesser Prairie-Chicken
- Strengthens rural economies by protecting the productivity of working lands

What is ESA Predictability?

ESA Predictability protects the landowner from incidental take of Lesser Prairie-Chicken if it is listed, provided the landowner is applying conservation practices as planned in the WLFW plan.

What is exempt?

Exempt means that as long as practices are implemented according to NRCS standards and specifications and associated conservation measures no additional changes or requirements are needed or imposed later.

What is Incidental Take?

The ESA makes it unlawful for a person to take a listed animal without a permit. Take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in such conduct.” Through regulations, the term “harm” is defined as “an act which actually kills or injures wildlife.” Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential breeding patterns, including breeding, feeding, or sheltering.” Landowners who voluntarily sign up for WLFW receive the ESA Predictability that they will be exempted from any incidental take of the species caused by the implementation of WLFW conservation practices and associated conservation measures.

Where to go to find out more about Working Lands for Wildlife?

Interested landowners should contact their local NRCS Service Center. An NRCS planner will determine if habitat on the property is suitable or can be improved or created to benefit the Lesser Prairie-Chicken. If so, the NRCS planner and the landowner will jointly develop a conservation plan that will recommend a combination of conservation practices and measures for the landowner to apply in order to create or improve the habitat for the species.

Exhibit 2

to

Memorandum in Support of Motion to Intervene as Defendants of
Kansas Farm Bureau, Texas Farm Bureau, Colorado Farm Bureau, New
Mexico Farm and Livestock Bureau and American Farm Bureau
Federation

Declaration of the Kansas Farm Bureau

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

**DEFENDERS OF WILDLIFE,
1130 17th Street, NW
Washington, DC 20036,**

**CENTER FOR BIOLOGICAL
DIVERSITY,
378 N. Main Avenue
Tucson, AZ 85701,**

**WILDEARTH GUARDIANS,
516 Alto Street
Santa Fe, NM 87501,**

Plaintiffs,

v.

Case No. 1:14-cv-1025

**SALLY JEWELL
Secretary, U.S. Department of Interior
1849 C Street NW
Washington, DC 20240,**

**DANIEL M. ASHE
Director, U.S. Fish and Wildlife Service
1849 C Street NW
Washington, DC 20240,**

**U.S. FISH AND WILDLIFE SERVICE
1849 C Street NW
Washington, DC 20240,**

Defendants.

DECLARATION OF KANSAS FARM BUREAU IN SUPPORT OF INTERVENTION

I, Jim Sipes, make this declaration based on my personal knowledge or belief and state, as follows:

1. The following statements are based on my personal knowledge and experience.

2. I reside in Stanton County, Kansas. My wife and I own and operate a farm near the community of Manter, in Stanton County. We also farm in Morton County, Kansas, and Baca County, Colorado.

3. My wife and I operate the farm as a family business, solely for our benefit and that of future generations of our family. My farm is located in an area that is known to contain the habitat of the Lesser Prairie Chicken ("LPC").

4. I am a Kansas Farm Bureau ("KFB") member and have been since October 1989.

5. I am a KFB Board member and have been since 2009. As a Board member, I represent eleven (11) counties in southwest Kansas, including Stanton and Morton Counties. In addition, I have taken the lead role for the KFB Board on LPC issues.

6. KFB is a voluntary general farm organization formed in 1919, representing more than forty thousand Kansas farm families directly engaged in agricultural activities. This is approximately eighty percent of all Kansas families in Kansas's one hundred five counties who are directly engaged in agricultural activities. KFB has 107,320 total members, including approximately 20,704 members who reside within areas that are considered to be LPC habitat.

7. KFB's primary function is to advance and promote the interests and betterment of farming, the farming community, and families engaged in farming in Kansas. This effort entails advancing, promoting, and protecting the economic, business, social, and educational interests of farmers across the State of Kansas, including farmers and ranchers in the LPC's claimed habitat. As part of this primary function, KFB routinely makes efforts to promote the development of reasonable and lawful environmental regulations and regulatory policies that affect the use and development of its members' lands.

8. Based on a Biological Assessment and Opinion provided by the United States Fish and Wildlife Service ("USFWS"), the projected range or habitat region of the LPC was expanded to an eighty-five county area located in Colorado, Kansas, New Mexico, Oklahoma and Texas. Thirty-nine of these counties are located in western Kansas.

9. Almost nine thousand of the KFB member families in western Kansas living in the LPC habitat region own or operate farms that produce the row crops, livestock and poultry that provide safe and affordable food for America and a growing global population. Those members manage their livestock, poultry and fertilizer applications as good stewards of the land. However, the listing by the USFWS of the LPC, even merely as "threatened," sets limits on the

production capacity for farmers and ranchers located within the LPC's claimed habitat. Ultimately, the decision to list the LPC impacts not only the management and business decisions made by each and every KFB member across the proposed habitat region in Kansas but all of the rural communities in which those KFB members work and live.

10. Additionally, our KFB members in the LPC proposed habitat region have interests that would be substantially impaired if USFWS is forced to reclassify the LPC as "endangered." Under Endangered Species Act (ESA) Section 4(d), USFWS adopted a final special rule for the LPC, outlining the prohibitions applicable to the LPC under ESA Section 9 and USFWS regulations, but also provided exceptions to those prohibitions that were determined by USFWS to be necessary and appropriate for the conservation of the species. The interest that KFB seeks to protect in this litigation is preserving the exemptions offered to the agricultural community under the 4(d) Rule for the LPC. Protecting this interest is directly germane to KFB's purpose.

11. KFB members have participated in numerous meetings involving the LPC, including for the development of a stakeholder-based collaborative exchange program called the "Habitat Credit Exchange Agreement." KFB members promoted a balanced approach, which encouraged voluntary participation in LPC conservation efforts by offering incentives to landowners. Landowners could voluntarily agree to fund and implement the conservation measures to benefit the species, in exchange for assurances from USFWS that their land operations would be able to continue unaffected even if the species were eventually listed in the future.

12. USFWS sought public comments on the listing of the LPC, to which KFB responded by filing, observations, concerns and explanations regarding potential economic hardships and agricultural management problems that might arise because of the potential imposition of USFWS regulation and control of agricultural activities in the LPC habitat region if the LPC were listed.

13. KFB and its members have a substantial stake in the outcome of this action, since their members' operations are already directly affected by the listing of the LPC, and would be much more severely impacted and perhaps even curtailed were the listing status changed from "threatened" (with the exemptions of the 4(d) Rule) to "endangered," which would not have the exemptions of the 4(d) Rule.

14. Ninety-five percent of the surveyed LPCs are found on private land. Most of this land in western Kansas is operated by farmers or ranchers. Many of our members are these

landowners. Any successful strategy for the LPC's longevity will have to involve these private landowners.

15. Private landowners' ranching and farming management techniques will be drastically altered if the LPC were reclassified as "endangered." Here are examples of possible economic impacts:

- **Livestock** – Listing as "endangered" would force livestock ranchers and grazers to implement potentially stringent conservation practices.
 - **Grazing systems** - would be altered to create a mosaic of native grassland patches that would create more grass and shrub cover, resulting in less land for livestock. This would in turn require ranchers to reduce the sizes of their herds and/or require ranchers to acquire more land to pasture existing livestock. Further, the length of time a producer could allow the livestock to graze would be shortened.
 - **Haying** – Haying of native grass or alfalfa grass areas may be prohibited.
 - **Grass Land Burning** - Change late winter and early spring burn times for grass, which may allow invasive species to flourish and reduce grazing productivity.
- **Crop producers** – The final 4(d) Rule exempts most routine farming activities from the prohibitions otherwise imposed by ESA Section 9 prohibiting takes of listed species, and implementing USFW regulations. However, if the LPC is reclassified as "endangered," these producers may be forced to stop, or at least drastically alter, their current farming practices. The change in listing status would in effect prohibit them from operating in their normal routine, prohibit certain activities, and cause them to alter their way of life. This could have potentially significant detrimental impact on their economic and financial security, including diminishing incomes, supporting their families, as well as permitting them to maintain their properties, equipment, and infrastructure for their operations.
 - **Weed and Pest Control** - Restrict or prohibit herbicide and insecticide use.
 - **Land Management** –Force producers to manage and protect cover patches in areas currently utilized for agriculture and grazing.
 - **Irrigation Watering Systems** –Compel irrigators to curtail or even cease operation of irrigation systems if located near LPC Lek areas. This would force the producer to alter crops and would reduce the opportunity to maximize production.
- **Feedlots** – There are numerous livestock "feedlots" in western Kansas that support the livestock industry by holding, feeding and preparing for the livestock packing plants in the region. If grain production were significantly reduced because of adverse restrictions on grain production practices as a result of changing listing status of the LPC to "endangered," the potential loss of a significant volume of locally-produced supply of a major food product for livestock could consequentially reduce the need for packing plants, in turn affecting the economic health and viability of the local livestock industry.

- **Agricultural Community** – Reduction in grain and livestock production would be devastating for the region's economic vitality, not only for the grain producers, livestock ranchers, feedlots, and packing plants that supply the country's meat products, but also for the whole community of citizens that depend on the agriculture production of the region for their economic health or even survival, including banks, insurance companies, implement and car dealerships, retail businesses, schools etc., all of which depend on the health of the agricultural community to exist.

16. Adverse economic impacts will be felt by private landowners in agricultural communities. Here are some of the direct impacts:

- **Conservation Reserve Program (CRP) – Sherman County** - Landowner purchased expired CRP land and as a result of the LPC listing was denied by FSA/NRCS permission to "break out" land and return it to production. **Morton County** – Landowners are being informed that any change to CRP acreage is automatically in the LPC program. Further, landowners have been prevented from breaking out expired CRP land until a Habitat Conservation Plan (HCP) was developed, which prevented the land from being converted to crop land.
- **Farm Service Agency** – Morton County Farm Service Agency indicates that entire acreage of Morton County and some of Stevens County is under the designation of the LPC habitat.
- **Real Estate Values** – Land in the LPC habitat region prior to listing typically sold between an average of \$1,700 to \$1,800 per acre now sells for \$1,100 per acre.
- **County Tax Bases** – Each affected LPC habitat region county tax base will be adversely affected by the 40,000 to 50,000 acre designation, which is being established and which will be placed in permanent habitat easements that will be removed from the county tax roll. These counties will likely be forced to increase property taxes due to the short fall likely to result from reducing the tax base. Also, each county tax base will be affected by reduction in oil and gas exploration and lack of new wind farm development within the areas of prime habitat. See comments below.
- **Financial lending** - Farm Credit of Western Kansas ACA is now required to complete a synopsis of the effect of the LPC and Black-footed Ferrets on value of property in Logan County prior to making loan decisions, including crop loans.

17. There are a number of other indirect economic impacts that will not only be felt by private landowners, but will devastate the surrounding communities whose economies are tied to the agriculture producers and their prosperity. Here are some of the other impacts that will be felt in the thirty-nine Kansas counties located in the proposed LPC habitat region:

- **Wind Energy Development** - Wind energy development projects have been abandoned in Clark County, Kansas, as well as several in Scott County, Kansas. Landowners are paid approximately three thousand to six thousand dollars per wind turbine placed on their land. In the alternative, the landowner will receive between two and six percent of the gross revenue produced by each turbine. Typically there are around one hundred and fifty to two hundred wind turbines within a wind farm.

Further, for the first ten years of wind farm production, each county receives a payment of between \$350,000 to \$700,000 per year in lieu of county taxes. After ten years, the counties are allowed to tax each wind turbine structure.

- **Oil and Gas Industry** – Drilling operations face an uncertain future. A number of drilling companies have indicated that well drilling in LPC habitat will cost jobs and economic income to landowners. This has been reflected in the oil and gas leases that have expired with no sign of renewals. Typically, an oil and gas lease would generate a landowner one hundred and fifty to three thousand dollars per acre per year during the primary term or between one eighth to one quarter in royalties for the gross production per well.

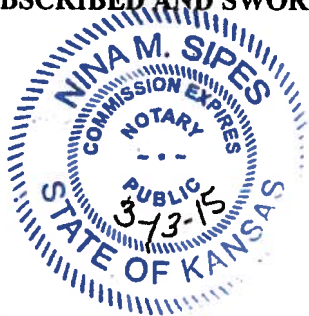
Further, evidence of this exodus is shown in the number of Intent to Drill permits. Kansas Corporation Commission indicates the applications were down by fifty (50) from the end of April through May 2014, and three hundred and twenty nine (329) from the end of May through June 2014. These companies are reportedly diverting dollars to Texas, out of the LPC habitat region. This is due to the refusal to pay \$46,000 to \$55,000 in mitigation fees (or greater, with fees climbing to as high as \$83,000 in Ford County, KS) on each well. Finally, oil and gas companies are reporting that they are prohibited from checking their wells until 9:00 a.m. in order not to disrupt the LPCs between March 1 and July 15 of each year.

- **Seismic Companies** – Report that a seismic company (related to oil and gas production) will no longer shoot seismographs in the LPC habitat region.
- **Electrical Industry** – Kansas Electric Cooperative reports \$11,000 to \$22,000 in mitigation fees for distribution lines or roughly \$870,000 for one (1) mile of transmission line may be required under the WAFWA Range-Wide Plan, if constructed through the proposed LPC habitat region. Many of the KFB members are also members of the rural electric cooperatives that provide electricity to their operations and residences.

18. One of the major threats that KFB members face is the threat of civil and criminal penalties contained under the ESA. If the 4(d) Rule becomes unavailable because the LPC listing is changed from “threatened” to “endangered,” KFB members will constantly be threatened with the prohibition of a “take.” Further, KFB members could face penalties for harming the LPC habitat.

19. Direct and immediate interests of KFB members are implicated in this proceeding. Many KFB members have a substantial economic and legal interest in the subject matter of this case, because they have an interest in preserving the protections of the 4(d) Rule's agricultural exemption and because their farming and ranching operations would be adversely affected by a change in the listing status of the LPC from "threatened" to "endangered" not only now but in the future.

SUBSCRIBED AND SWORN TO BEFORE ME on this 29 day of October, 2014.



Nina M. Sipes
NOTARY PUBLIC IN AND
FOR THE STATE OF KANSAS

James D. Sipes
James Sipes
Farmer and 9th District Kansas Farm Bureau Director

Exhibit 3

to

Memorandum in Support of Motion to Intervene as Defendants of
Kansas Farm Bureau, Texas Farm Bureau, Colorado Farm Bureau, New
Mexico Farm and Livestock Bureau and American Farm Bureau
Federation

Declaration of the New Mexico Farm and Livestock Bureau

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE,
1130 17th Street, NW
Washington, DC 20036,

CENTER FOR BIOLOGICAL
DIVERSITY,
378 N. Main Avenue
Tucson, AZ 85701,

WILDEARTH GUARDIANS,
516 Alto Street
Santa Fe, NM 87501,

Plaintiffs,

v.

Case No. 1:14-cv-1025

SALLY JEWELL
Secretary, U.S. Department of Interior
1849 C Street NW
Washington, DC 20240,

DANIEL M. ASHE
Director, U.S. Fish and Wildlife Service
1849 C Street NW
Washington, DC 20240,

U.S. FISH AND WILDLIFE SERVICE
1849 C Street NW
Washington, DC 20240,

Defendants.

DECLARATION OF NEW MEXICO FARM AND LIVESTOCK BUREAU IN
SUPPORT OF INTERVENTION

I, Chad Smith, make this declaration on behalf of New Mexico Farm and Livestock Bureau ("NMFLB"). This declaration is based on my personal knowledge or belief and state as follows:

1. The following statements are based on my personal knowledge and information gathered.
2. I am the Chief Executive Officer for NMFLB.
3. NMFLB is a voluntary membership organization formed in 1917, and has 18,386 farm and ranch member families in New Mexico. We are organized in thirty New Mexico counties and many of our members are directly engaged in agriculture.
4. NMFLB's primary function is to promote and protect agriculture interests in the State of New Mexico. This effort entails representing our members through the legislature, regulatory actions, and, when necessary, in the courts. When feasible, we attempt to promote the development of sound and lawful environmental regulations and regulatory policy that minimizes the impacts to our members and brings a balanced approach to the issues.
5. NMFLB contracted and spent valuable monetary resources on behalf of our members to hire a Wildlife Biologist to address the proposed listing of the Lesser Prairie Chicken ("LPC").
6. NMFLB and its representatives spent many hours on rule-making comments and attending meetings to explore a common-sense approach to the potential listing of the LPC.

7. NMFLB and its representatives commented on the LPC listing as a whole as well as the 4(d) rule. *See Exhibit C*, March 10, 2014 comments by NMFLB to USFWS; *Exhibit E*, November 22, 2013 letter from TFB, NMFLB, CFB, and KFB to USFWS.
8. NMFLB and its representatives participated in the LPC Interstate Working Group (IWG), Western Association of Fish and Wildlife Agencies, and stakeholders processes across the five LPC-habitat states. Through our comments and in collaboration with IWG our representative participated in the development of a range-wide plan. *See Exhibit A*, January 6, 2014, comments by NMFLB to USFWS regarding range-wide plan; *Exhibit B*, February 11, 2014 comments;
9. NMFLB and its representatives commented on the range-wide Candidate Conservation Agreement with Assurances (“CCAA”). *See Exhibit D*, January 14, 2014 comments by NMFLB to USFWS.
10. New Mexico’s LPC habitat encompasses seven counties in the state. NMFLB currently has 1,120-agriculture producing members throughout these seven counties.
11. NMFLB members/producers participated in the rule makings related to the LPC, participated in the development of conservations agreements such as the Range-Wide Conservation Plan, and have participated and/or are actively engaged in the implementation of conservation agreements/programs. For example, NMFLB members have incorporated LPC conservation practices into their farm and ranch management plans.

12. NMFLB has identified a total of \$2,506,608 that has been spent on EQIP, a program providing financial and technical assistance to agricultural producers in order to address natural resource concerns and to deliver environmental benefits, incorporating 405,091 acres into LPC conservation methods on private lands in New Mexico alone. There have been an additional 308,293 acres committed to LPC habitat through the conservation reserve program (“CRP”). CRP is a program administered through the Farm Service agency where, in exchange for yearly rental payments, farmers enrolled in the program agree to remove environmentally sensitive land from agricultural production and plant certain species that will improve environmental health of the LPC habitat.
13. A change of listing status of the LPC from “threatened” to “endangered” by USFWS would impact many of our members who produce food and fiber for our county in the LPC habitat region. While our members manage their livestock and fertilizer applications as good stewards of the land, an endangered listing of the LPC would set new limits on their operations. Such a listing would not only impact our individual producers and their abilities to produce, it would also have a significant impact on the rural communities in which these members live and work.
14. NMFLB’s interest is to protect the 4(d) rule through this litigation as the 4(d) rule’s agricultural exemptions minimize the economic impact of listing to our members while also providing for the recovery of the LPC.

15. NMFLB members in the LPC habitat area have an economic interest that will be substantially and directly impaired if the listing of the LPC is reclassified from “threatened” to “endangered.”
16. Any strategy that will be successful for the recovery of the LPC must entail working with private landowners, many of whom are members of NMFLB.
17. If the listing of the LPC is reclassified as “endangered,” private landowners stand the most to lose as farming and ranching management will be drastically impacted. Below are a few examples of these potential impacts:
 - Livestock operations will be forced to implement practices not favorable to their grazing operations, with adverse economic impacts;
 - The reclassification would put greater strain on the availability and accessibility of forage, especially in times of drought, adversely impacting both cattle and dairy operations;
 - Crop producers will have to change their existing best management practices;
 - Could potentially prohibit the use of pesticides, with a direct adverse impact on production yields;
 - Irrigation practices could be stopped or altered;
 - Could force producers to alter crops, therefore hindering their ability to maximize production and economic success;
 - Oil and Gas monies developed in the state will be negatively impacted therefore impacting funding of public schools and higher education in the same agricultural communities;

- Rural economic vitality would be negatively impacted in many small rural communities for which the lifeblood is the farming and ranching community.

18. These are just a few examples of the impacts that a potential listing of the LPC as endangered could have on our members. Without the 4(d) rule and its exemption for agricultural activity, our members could face civil and criminal charges for the “taking” or “harming” of the LPC or its habitat.

Our members have a vested interest in the outcome of this case both legally and economically. The best interests of NMFLB’s members are sought in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME on this 30 day of October, 2014.



Theresa Widner
**NOTARY PUBLIC IN AND
FOR THE STATE OF NEW MEXICO**

Chad Smith
Chad Smith
CEO, NMFLB

Exhibit A

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

New Mexico Cattle Growers' Association
P.O. Box 7517
Albuquerque, NM 87194

January 6, 2014

Public Comments Processing
FWS-R2-ES-2012-0071
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
MS 2042-PDM
Arlington, VA 22203

Re: US Fish and Wildlife Service Proposed Rule for Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule – Docket No. FWS-R2-ES-2012-0071

To Whom It May Concern:

The New Mexico Cattle Growers' Association, the New Mexico Wool Growers, Inc., the New Mexico Federal Lands Council, the New Mexico Farm and Livestock Bureau, and the New Mexico Association of Conservation Districts (Parties) submit the following comments on the U.S. Fish and Wildlife Service (Service) proposal to list the lesser prairie-chicken (*Tympanuchus pallidicinctus*) as threatened under the Endangered Species Act of 1973 (ESA), as amended, and to implement a special rule allowing incidental take under section 4(d) of the ESA. Collectively, the Parties represent individuals and companies in eastern New Mexico that would be negatively affected by listing the lesser prairie-chicken (LPC) as threatened. Therefore, the Parties request that each of the aforementioned organizations be recognized as separate commenters on the proposed listing decision and special rule.

The Service reopened the comment period, in part, "to allow the public an opportunity to provide comment on the final plan as it applies to [the Service] determination of status under section 4(a)(1) of the Act, particularly comments or information to help [the Service] assess the certainty that the Lesser Prairie-Chicken Range-Wide Conservation Plan will be effective in conserving the lesser prairie-chicken and will be implemented." With regard to the above, the Parties request the Service to grant the five states of New Mexico, Oklahoma, Kansas, Colorado, and Texas a two-year extension on the March 31, 2013 deadline for making a listing decision. Such an extension would provide a more reasonable amount of time to implement the Lesser Prairie-Chicken Range-wide Conservation Plan (RWP) as endorsed by the Service on October 23, 2013. The referenced endorsement was historic in its implication and ultimately recognized the RWP "as a comprehensive conservation program that reflects a sound conservation design and strategy that, when implemented, will provide a net conservation benefit to the lesser prairie-chicken."

As developed by the five states, the Lesser Prairie-Chicken Interstate Working Group (IWG), the Western Association of Fish and Wildlife Agencies (WAFWA), and stakeholders across the five states, the RWP provides conservation as defined by section 3(3) of the ESA "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at

which the measures provided pursuant to the Act are no longer necessary.” The RWP not only meets the definition of conservation under the ESA, but actually represents an unprecedented collaborative effort to implement voluntary conservation measures to secure long-term persistence of LPC and thus, preclude the need to list the species under the ESA. Such a far-reaching and meaningful effort must be provided adequate time to show conservation success rather than be short-stopped by litigation-driven and biologically meaningless timelines. As written, the RWP is poised to set the standard and create a new paradigm for long-term voluntary conservation of imperiled wildlife in North America, but will only be successful if given adequate time to be fully implemented. As such, an opportunity exists for the Service to be conservation partner with meaningful participation in a ground-breaking conservation movement. The Parties urge caution to the Service in carrying out its listing decision timeline and ask the Service to show reservation before hastily dismissing the effectiveness of the RWP without ample time for WAFWA to show success and provide the best and most current biological data available.

In the unfortunate case of a Service decision to list LPC as threatened, the conservation measures outlined in the RWP address all known threats and provide a clear framework for recovery and delisting. However, such conservation will only be implemented if participating parties (potentially including many of our members) in the RWP are given regulatory assurance by the Service that their activities are not prohibited by ESA take provisions. Such regulatory assurance will result in RWP enrollment by many of the Parties’ member landowners who have habitat critical to LPC conservation in eastern New Mexico. Thus and only if the Service lists the LPC as threatened, the Parties are in full agreement with the Service proposal “that take incidental to activities conducted by a participant enrolled in, and operating in compliance with the Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan will not be prohibited.” Further, if the Service lists the LPC as threatened, the Parties also support the Service proposal “that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to the conditioned conservation practices that are carried out in accordance with a conservation plan developed by the U.S. Department of Agriculture's NRCS in connection with NRCS's [Lesser Prairie-Chicken Initiative] and related NRCS activities focused on lesser prairie-chicken conservation that provide financial or technical assistance, and which were developed in coordination with the Service.”

The Service further proposes that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to activities that are conducted during the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, hay, or forage production.

- (1) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands in cultivation, provided that the harvest of cultivated lands is conducted by methods that allow wildlife to flush and escape, such as starting operations in the middle of the field and working outward, or by modifying equipment to include flush bar attachments.
- (2) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as irrigation conveyance structures and roads.

While the Parties appreciate the proposed and aforementioned take allowance under a listing scenario, the Parties strongly recommend broadening the allowance to include those lands that were previously cultivated but are currently out of production due to rotation, set-aside, or other normal or dryland agricultural practices that would preclude a landowner from cultivating a particular field in the year previous or concurrent to the listing decision.

Under the ESA definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological

features which are essential to the conservation of the species and may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features essential to the conservation of the species. With regard to designation of critical habitat if the Service lists the LPC as threatened, the Parties request the Service to defer to the RWP and staff within the five states' wildlife agencies for an outline of current occupied range and determination of areas "essential to conservation of the species." The expertise of the staff of the state wildlife agencies (members of the IWG) is unparalleled in the world with regard to LPC biology, conservation, and status. Further, the Parties request and the ESA mandates the Service to consider for critical habitat designation only that habitat *occupied* at the time a listing decision is made. The Parties request the Service to show great caution in potential future suggestion of expanded critical habitat boundaries such as the estimated occupied range plus 10 mile buffer as used in the RWP CHAT 4 category or biologically meaningless boundaries such as historic range or county lines.

In closing, the Parties reiterate our resolute opposition to listing the LPC as threatened or endangered under the ESA. We again encourage the Service to delay a listing decision for a full two years to allow ample time for full implementation of the historic RWP and to assess the status of LPC at the end of such period. As a wildlife species whose populations have historically and naturally fluctuated with drought cycles, the LPC has shown great resilience during times when the species was thought to be extinct. The RWP, if truly supported by the Service and given the chance to be implemented, will prove to be instrumental in keeping LPC on the landscape across its range well beyond the foreseeable future. Such conservation can only be accomplished through continued management by the affected private and federal landowners and strong cooperation with the state wildlife agencies who hold LPC as a state trust wildlife species. Listing the LPC as threatened or endangered based on short-term population trends and political/litigious pressure rather than using the best available science and tools developed around said science would be catastrophic, from the standpoint of LPC conservation and also from the consequences of new litigation by those who are best suited to manage the bird into the future – the states of New Mexico, Texas, Kansas, Oklahoma, and Colorado and landowners who provide the vast majority of all known LPC habitat on their private lands. If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Rex Wilson, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

Don L. (Bebo) Lee, President
NM Federal Lands Council

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

Exhibit B

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

New Mexico Cattle Growers' Association
P.O. Box 7517
Albuquerque, NM 87194

February 11, 2014

Public Comments Processing
FWS-R2-ES-2012-0071
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
MS 2042-PDM
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Re: US Fish and Wildlife Service Proposed Rule for Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule – Docket No. FWS-R2-ES-2012-0071

To Whom It May Concern:

The New Mexico Cattle Growers' Association, the New Mexico Wool Growers, Inc., the New Mexico Federal Lands Council, the New Mexico Farm and Livestock Bureau, and the New Mexico Association of Conservation Districts (Parties) submit the following comments on the U.S. Fish and Wildlife Service (Service) proposal to list the lesser prairie-chicken (*Tympanuchus pallidicinctus*) as threatened under the Endangered Species Act of 1973 (ESA), as amended, and to implement a special rule allowing incidental take under section 4(d) of the ESA. Collectively, the Parties represent individuals and companies in eastern New Mexico that would be negatively affected by listing the lesser prairie-chicken (LPC) as threatened. Therefore, the Parties request that each of the aforementioned organizations be recognized as separate commenters on the proposed listing decision and special rule.

The Service reopened the comment period once again "to allow all interested parties an opportunity to comment on the final Lesser Prairie-Chicken Range-Wide Conservation Plan, which has been prepared by the Lesser Prairie-Chicken Interstate Working Group, and our endorsement of the plan, and we request comments on the plan as it relates to our determination of status under section 4(a)(1) of the Act." In our January 6, 2014 letter regarding the proposed ruling, the Parties commented extensively regarding the range-wide conservation plan. We have attached that letter for reference.

The Parties once again request the Service to grant the five states of New Mexico, Oklahoma, Kansas, Colorado, and Texas a two-year extension on the March 31, 2013 deadline for making a listing decision. Such an extension would provide a more reasonable amount of time to fully implement the Lesser Prairie-Chicken Range-wide Conservation Plan (RWP) as endorsed by the Service on October 23, 2013. In the Service endorsement, the RWP was recognized "as a comprehensive conservation program that reflects a sound conservation design and strategy that, when implemented, will provide a net conservation benefit to the lesser prairie-chicken."

Since submittal of our aforementioned letter, substantial progress has been made toward implementation of the RWP with nearly two million critical acres enrolled over the past month. As

envisioned by the five states, the Lesser Prairie-Chicken Interstate Working Group (IWG), the Western Association of Fish and Wildlife Agencies (WAFWA), and stakeholders across the five states, the RWP is already providing substantive conservation benefits as defined by section 3(3) of the ESA. The RWP not only meets the definition of conservation under the ESA, but is currently delivering the exact protections and on-the-ground conservation and mitigation benefits that are needed to ensure LPC remain on the landscape in healthy numbers far beyond the foreseeable future. Delivery of such conservation in the infancy of the RWP implementation shows incredible promise for LPC populations across the entire range.

As stated in our previous correspondence and reiterated here, such a far-reaching and meaningful effort must be provided adequate time to show conservation success. The success the RWP has shown via enrollment is setting the new standard for long-term voluntary conservation of imperiled wildlife. The Parties again urge caution to the Service in effecting a listing decision of anything other than 'not warranted' and encourage further collaboration with the states and stakeholders to evaluate the true effectiveness of the plan and the biological data gained through RWP implementation and monitoring.

In closing, the Parties reiterate our resolute opposition to listing the LPC as threatened or endangered under the ESA. We again encourage the Service to delay a listing decision for a full two years to allow ample time for full implementation of the historic RWP and to assess the status of LPC at the end of such period. The success shown by WAFWA and the States in implementation of the RWP in the short window subsequent to Service endorsement is proof positive that the stakeholders and States are prepared to voluntarily conserve LPC without the need for federal ESA protection. Indeed, such collaboration across all sectors of society is unprecedented in the history of wildlife conservation in North America and deserves an earnest opportunity to show continued success through a listing decision of 'not warranted'. If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Jose Varela Lopez, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

Don L. (Bebo) Lee, President
NM Federal Lands Council

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

New Mexico Cattle Growers' Association
P.O. Box 7517
Albuquerque, NM 87194

January 6, 2014

Public Comments Processing
FWS-R2-ES-2012-0071
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
MS 2042-PDM
Arlington, VA 22203

Re: US Fish and Wildlife Service Proposed Rule for Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule – Docket No. FWS-R2-ES-2012-0071

To Whom It May Concern:

The New Mexico Cattle Growers' Association, the New Mexico Wool Growers, Inc., the New Mexico Federal Lands Council, the New Mexico Farm and Livestock Bureau, and the New Mexico Association of Conservation Districts (Parties) submit the following comments on the U.S. Fish and Wildlife Service (Service) proposal to list the lesser prairie-chicken (*Tympanuchus pallidicinctus*) as threatened under the Endangered Species Act of 1973 (ESA), as amended, and to implement a special rule allowing incidental take under section 4(d) of the ESA. Collectively, the Parties represent individuals and companies in eastern New Mexico that would be negatively affected by listing the lesser prairie-chicken (LPC) as threatened. Therefore, the Parties request that each of the aforementioned organizations be recognized as separate commenters on the proposed listing decision and special rule.

The Service reopened the comment period, in part, "to allow the public an opportunity to provide comment on the final plan as it applies to [the Service] determination of status under section 4(a)(1) of the Act, particularly comments or information to help [the Service] assess the certainty that the Lesser Prairie-Chicken Range-Wide Conservation Plan will be effective in conserving the lesser prairie-chicken and will be implemented." With regard to the above, the Parties request the Service to grant the five states of New Mexico, Oklahoma, Kansas, Colorado, and Texas a two-year extension on the March 31, 2013 deadline for making a listing decision. Such an extension would provide a more reasonable amount of time to implement the Lesser Prairie-Chicken Range-wide Conservation Plan (RWP) as endorsed by the Service on October 23, 2013. The referenced endorsement was historic in its implication and ultimately recognized the RWP "as a comprehensive conservation program that reflects a sound conservation design and strategy that, when implemented, will provide a net conservation benefit to the lesser prairie-chicken."

As developed by the five states, the Lesser Prairie-Chicken Interstate Working Group (IWG), the Western Association of Fish and Wildlife Agencies (WAFWA), and stakeholders across the five states, the RWP provides conservation as defined by section 3(3) of the ESA "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at

which the measures provided pursuant to the Act are no longer necessary.” The RWP not only meets the definition of conservation under the ESA, but actually represents an unprecedented collaborative effort to implement voluntary conservation measures to secure long-term persistence of LPC and thus, preclude the need to list the species under the ESA. Such a far-reaching and meaningful effort must be provided adequate time to show conservation success rather than be short-stopped by litigation-driven and biologically meaningless timelines. As written, the RWP is poised to set the standard and create a new paradigm for long-term voluntary conservation of imperiled wildlife in North America, but will only be successful if given adequate time to be fully implemented. As such, an opportunity exists for the Service to be conservation partner with meaningful participation in a ground-breaking conservation movement. The Parties urge caution to the Service in carrying out its listing decision timeline and ask the Service to show reservation before hastily dismissing the effectiveness of the RWP without ample time for WAFWA to show success and provide the best and most current biological data available.

In the unfortunate case of a Service decision to list LPC as threatened, the conservation measures outlined in the RWP address all known threats and provide a clear framework for recovery and delisting. However, such conservation will only be implemented if participating parties (potentially including many of our members) in the RWP are given regulatory assurance by the Service that their activities are not prohibited by ESA take provisions. Such regulatory assurance will result in RWP enrollment by many of the Parties’ member landowners who have habitat critical to LPC conservation in eastern New Mexico. Thus and only if the Service lists the LPC as threatened, the Parties are in full agreement with the Service proposal “that take incidental to activities conducted by a participant enrolled in, and operating in compliance with the Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan will not be prohibited.” Further, if the Service lists the LPC as threatened, the Parties also support the Service proposal “that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to the conditioned conservation practices that are carried out in accordance with a conservation plan developed by the U.S. Department of Agriculture's NRCS in connection with NRCS's [Lesser Prairie-Chicken Initiative] and related NRCS activities focused on lesser prairie-chicken conservation that provide financial or technical assistance, and which were developed in coordination with the Service.”

The Service further proposes that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to activities that are conducted during the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, hay, or forage production.

(1) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands in cultivation, provided that the harvest of cultivated lands is conducted by methods that allow wildlife to flush and escape, such as starting operations in the middle of the field and working outward, or by modifying equipment to include flush bar attachments.

(2) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as irrigation conveyance structures and roads.

While the Parties appreciate the proposed and aforementioned take allowance under a listing scenario, the Parties strongly recommend broadening the allowance to include those lands that were previously cultivated but are currently out of production due to rotation, set-aside, or other normal or dryland agricultural practices that would preclude a landowner from cultivating a particular field in the year previous or concurrent to the listing decision.

Under the ESA definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological

features which are essential to the conservation of the species and may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features essential to the conservation of the species. With regard to designation of critical habitat if the Service lists the LPC as threatened, the Parties request the Service to defer to the RWP and staff within the five states' wildlife agencies for an outline of current occupied range and determination of areas "essential to conservation of the species." The expertise of the staff of the state wildlife agencies (members of the IWG) is unparalleled in the world with regard to LPC biology, conservation, and status. Further, the Parties request and the ESA mandates the Service to consider for critical habitat designation only that habitat *occupied* at the time a listing decision is made. The Parties request the Service to show great caution in potential future suggestion of expanded critical habitat boundaries such as the estimated occupied range plus 10 mile buffer as used in the RWP CHAT 4 category or biologically meaningless boundaries such as historic range or county lines.

In closing, the Parties reiterate our resolute opposition to listing the LPC as threatened or endangered under the ESA. We again encourage the Service to delay a listing decision for a full two years to allow ample time for full implementation of the historic RWP and to assess the status of LPC at the end of such period. As a wildlife species whose populations have historically and naturally fluctuated with drought cycles, the LPC has shown great resilience during times when the species was thought to be extinct. The RWP, if truly supported by the Service and given the chance to be implemented, will prove to be instrumental in keeping LPC on the landscape across its range well beyond the foreseeable future. Such conservation can only be accomplished through continued management by the affected private and federal landowners and strong cooperation with the state wildlife agencies who hold LPC as a state trust wildlife species. Listing the LPC as threatened or endangered based on short-term population trends and political/litigious pressure rather than using the best available science and tools developed around said science would be catastrophic, from the standpoint of LPC conservation and also from the consequences of new litigation by those who are best suited to manage the bird into the future – the states of New Mexico, Texas, Kansas, Oklahoma, and Colorado and landowners who provide the vast majority of all known LPC habitat on their private lands. If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Rex Wilson, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

Don L. (Bebo) Lee, President
NM Federal Lands Council

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

Exhibit C

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

New Mexico Cattle Growers' Association
P.O. Box 7517
Albuquerque, NM 87194

March 10, 2014

Public Comments Processing
FWS-R2-ES-2013-0134
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
MS 2042-PDM
Arlington, VA 22203

Re: US Fish and Wildlife Service Notice of Intent to Prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, Including Energy Developments, and Agriculture and Conservation Activities Within Six States – Docket No. FWS-R2-ES-2013-0134

To Whom It May Concern:

The New Mexico Cattle Growers' Association, the New Mexico Wool Growers, Inc., the New Mexico Federal Lands Council, the New Mexico Farm and Livestock Bureau, and the New Mexico Association of Conservation Districts (Parties) submit the following comments on the above-referenced U.S. Fish and Wildlife Service (Service) Notice of Intent (NOI). Collectively, the Parties represent individuals and companies in eastern New Mexico that will be affected by potential issuance of federal permits associated with the potential listing of the lesser-prairie chicken (LPC) under the Endangered Species Act of 1973, as amended (ESA). The Parties request that each of the aforementioned organizations be recognized as separate commenters on the NOI.

After several months of comment periods on proposed actions, endorsement of the Range-wide Conservation Plan for Lesser Prairie Chicken (RWP), and associated Candidate Conservation Agreement with Assurances permit issuance, the Service is now inexplicably embarking upon scoping the development of an Environmental Impact Statement to assess the potential impacts of the issuance of an Incidental Take Permit (ITP) under section 10 (a)(1)(B) of the ESA. The Parties remind the Service that such a permit associated with a Habitat Conservation Plan is only relevant and applicable if a species is indeed listed under the ESA. As the Service has yet to make a listing determination, such action appears to be premature and predecisional in nature.

As stated in previous correspondence, the Parties fully support implementation of the RWP as the holistic voluntary conservation mechanism for long-term management and persistence of lesser prairie-chickens. The Parties urge the Service to take into account the recent RWP success of over 2.5 million acres enrolled and collection of over \$12 million for conservation in making the upcoming and looming decision of whether to list the LPC under the ESA. As envisioned by the five State wildlife agencies of Oklahoma, Colorado, Kansas, New Mexico, and Texas and stakeholders across the five states, the RWP is providing substantive conservation benefits as defined by section 3(3) of the ESA. The NOI, on the other hand, outlines a potential strategy and contemplates permit issuance that outwardly undermines the

RWP with untested mitigation schemes and jeopardizes future conservation of LPC. As such, the Parties urge the Service to follow the common-sense path of the No Action alternative and deny issuance of the ITP as described in the above-referenced docket number.

In closing, the Parties reiterate our resolute opposition to listing the LPC as threatened or endangered under the ESA. The recent and substantial success shown by the States in implementation of the RWP since Service endorsement in October 2013 is proof positive that stakeholders and the States are prepared to voluntarily conserve LPC without the need for federal ESA protection. Indeed, such collaboration across such varied sectors of society is unprecedented in the history of wildlife conservation in North America and deserves an opportunity to show continued success through a listing decision of 'not warranted'. Further, the Parties will submit substantive comments regarding the proposed ITP and HCP upon notice of the associated EIS in the federal register. If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Jose Varela Lopez, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

Don L. (Bebo) Lee, President
NM Federal Lands Council

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

New Mexico Cattle Growers' Association
P.O. Box 7517
Albuquerque, NM 87194

January 6, 2014

Public Comments Processing
FWS-R2-ES-2012-0071
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
MS 2042-PDM
Arlington, VA 22203

Re: US Fish and Wildlife Service Proposed Rule for Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule – Docket No. FWS-R2-ES-2012-0071

To Whom It May Concern:

The New Mexico Cattle Growers' Association, the New Mexico Wool Growers, Inc., the New Mexico Federal Lands Council, the New Mexico Farm and Livestock Bureau, and the New Mexico Association of Conservation Districts (Parties) submit the following comments on the U.S. Fish and Wildlife Service (Service) proposal to list the lesser prairie-chicken (*Tympanuchus pallidicinctus*) as threatened under the Endangered Species Act of 1973 (ESA), as amended, and to implement a special rule allowing incidental take under section 4(d) of the ESA. Collectively, the Parties represent individuals and companies in eastern New Mexico that would be negatively affected by listing the lesser prairie-chicken (LPC) as threatened. Therefore, the Parties request that each of the aforementioned organizations be recognized as separate commenters on the proposed listing decision and special rule.

The Service reopened the comment period, in part, "to allow the public an opportunity to provide comment on the final plan as it applies to [the Service] determination of status under section 4(a)(1) of the Act, particularly comments or information to help [the Service] assess the certainty that the Lesser Prairie-Chicken Range-Wide Conservation Plan will be effective in conserving the lesser prairie-chicken and will be implemented." With regard to the above, the Parties request the Service to grant the five states of New Mexico, Oklahoma, Kansas, Colorado, and Texas a two-year extension on the March 31, 2013 deadline for making a listing decision. Such an extension would provide a more reasonable amount of time to implement the Lesser Prairie-Chicken Range-wide Conservation Plan (RWP) as endorsed by the Service on October 23, 2013. The referenced endorsement was historic in its implication and ultimately recognized the RWP "as a comprehensive conservation program that reflects a sound conservation design and strategy that, when implemented, will provide a net conservation benefit to the lesser prairie-chicken."

As developed by the five states, the Lesser Prairie-Chicken Interstate Working Group (IWG), the Western Association of Fish and Wildlife Agencies (WAFWA), and stakeholders across the five states, the RWP provides conservation as defined by section 3(3) of the ESA "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at

which the measures provided pursuant to the Act are no longer necessary.” The RWP not only meets the definition of conservation under the ESA, but actually represents an unprecedented collaborative effort to implement voluntary conservation measures to secure long-term persistence of LPC and thus, preclude the need to list the species under the ESA. Such a far-reaching and meaningful effort must be provided adequate time to show conservation success rather than be short-stopped by litigation-driven and biologically meaningless timelines. As written, the RWP is poised to set the standard and create a new paradigm for long-term voluntary conservation of imperiled wildlife in North America, but will only be successful if given adequate time to be fully implemented. As such, an opportunity exists for the Service to be conservation partner with meaningful participation in a ground-breaking conservation movement. The Parties urge caution to the Service in carrying out its listing decision timeline and ask the Service to show reservation before hastily dismissing the effectiveness of the RWP without ample time for WAFWA to show success and provide the best and most current biological data available.

In the unfortunate case of a Service decision to list LPC as threatened, the conservation measures outlined in the RWP address all known threats and provide a clear framework for recovery and delisting. However, such conservation will only be implemented if participating parties (potentially including many of our members) in the RWP are given regulatory assurance by the Service that their activities are not prohibited by ESA take provisions. Such regulatory assurance will result in RWP enrollment by many of the Parties’ member landowners who have habitat critical to LPC conservation in eastern New Mexico. Thus and only if the Service lists the LPC as threatened, the Parties are in full agreement with the Service proposal “that take incidental to activities conducted by a participant enrolled in, and operating in compliance with the Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan will not be prohibited.” Further, if the Service lists the LPC as threatened, the Parties also support the Service proposal “that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to the conditioned conservation practices that are carried out in accordance with a conservation plan developed by the U.S. Department of Agriculture's NRCS in connection with NRCS's [Lesser Prairie-Chicken Initiative] and related NRCS activities focused on lesser prairie-chicken conservation that provide financial or technical assistance, and which were developed in coordination with the Service.”

The Service further proposes that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to activities that are conducted during the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, hay, or forage production.

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(2) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as irrigation conveyance structures and roads.

While the Parties appreciate the proposed and aforementioned take allowance under a listing scenario, the Parties strongly recommend broadening the allowance to include those lands that were previously cultivated but are currently out of production due to rotation, set-aside, or other normal or dryland agricultural practices that would preclude a landowner from cultivating a particular field in the year previous or concurrent to the listing decision.

Under the ESA definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological

features which are essential to the conservation of the species and may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features essential to the conservation of the species. With regard to designation of critical habitat if the Service lists the LPC as threatened, the Parties request the Service to defer to the RWP and staff within the five states' wildlife agencies for an outline of current occupied range and determination of areas "essential to conservation of the species." The expertise of the staff of the state wildlife agencies (members of the IWG) is unparalleled in the world with regard to LPC biology, conservation, and status. Further, the Parties request and the ESA mandates the Service to consider for critical habitat designation only that habitat *occupied* at the time a listing decision is made. The Parties request the Service to show great caution in potential future suggestion of expanded critical habitat boundaries such as the estimated occupied range plus 10 mile buffer as used in the RWP CHAT 4 category or biologically meaningless boundaries such as historic range or county lines.

In closing, the Parties reiterate our resolute opposition to listing the LPC as threatened or endangered under the ESA. We again encourage the Service to delay a listing decision for a full two years to allow ample time for full implementation of the historic RWP and to assess the status of LPC at the end of such period. As a wildlife species whose populations have historically and naturally fluctuated with drought cycles, the LPC has shown great resilience during times when the species was thought to be extinct. The RWP, if truly supported by the Service and given the chance to be implemented, will prove to be instrumental in keeping LPC on the landscape across its range well beyond the foreseeable future. Such conservation can only be accomplished through continued management by the affected private and federal landowners and strong cooperation with the state wildlife agencies who hold LPC as a state trust wildlife species. Listing the LPC as threatened or endangered based on short-term population trends and political/litigious pressure rather than using the best available science and tools developed around said science would be catastrophic, from the standpoint of LPC conservation and also from the consequences of new litigation by those who are best suited to manage the bird into the future – the states of New Mexico, Texas, Kansas, Oklahoma, and Colorado and landowners who provide the vast majority of all known LPC habitat on their private lands. If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Rex Wilson, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

Don L. (Bebo) Lee, President
NM Federal Lands Council

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

Exhibit D

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

New Mexico Cattle Growers' Association
P.O. Box 7517
Albuquerque, NM 87194

January 14, 2014

Public Comments Processing
FWS-R6-ES-2013-N268
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
MS 2042-PDM
Arlington, VA 22203

Re: Endangered and Threatened Wildlife and Plants; Enhancement of Survival Permit Application; Draft Oil and Gas Candidate Conservation Agreement With Assurances for the Lesser Prairie-Chicken; Draft Environmental Assessment – Docket No. FWS-R6-ES-2013-N268

To Whom It May Concern:

The New Mexico Cattle Growers' Association, the New Mexico Wool Growers, Inc., the New Mexico Federal Lands Council, the New Mexico Farm and Livestock Bureau, and the New Mexico Association of Conservation Districts (Parties) submit the following comments on the U.S. Fish and Wildlife Service (Service) notice of availability and request for comments on an application for an enhancement of survival permit under the Endangered Species Act of 1973, as amended (ESA), for take associated with implementation of a lesser prairie-chicken Candidate Conservation Agreement with Assurances (CCAA) throughout the species' range in Kansas, Colorado, Oklahoma, New Mexico, and Texas. Collectively, the Parties represent individuals and companies in eastern New Mexico that are affected by ESA-related actions and decisions regarding the lesser prairie-chicken (LPC). Therefore, the Parties request that each of the aforementioned organizations be recognized as separate commenters on the above-referenced permit application and associated environmental assessment (EA).

As stated in the EA, the proposed range-wide oil and gas CCAA would allow any non-Federal property owner to voluntarily enroll their property under the CCAA. Participants would commit to supporting conservation measures that would benefit LPC and reduce and/or eliminate threats to the species associated with oil and gas development. By participating in the CCAA, non-Federal landowners, operators, or permittees would have regulatory certainty that additional restrictions would not burden their operations should the Service list the LPC under the ESA. In compliance with the National Environmental Policy Act of 1969, the EA presents three options – (a) no action, (b) a range-wide CCAA that covers the states of New Mexico, Colorado, Texas, Oklahoma, and Kansas, and (c) a CCAA as presented in option (b), but exclusive of New Mexico. The EA evaluates the effects of the three alternatives on environmental, socioeconomic, and cultural resources within the proposed CCAA coverage area (estimated occupied range plus a 10-mile buffer).

As proposed, enrollment or participation under the proposed range-wide CCAA would be voluntary with WAFWA enrolling participants into the CCAA through issuance of Certificates of Inclusion. To provide the

appropriate level of conservation and protection and gain the regulatory coverage of the CCAA, participants would be required to implement the conservation measures in the CCAA's conservation strategy. WAFWA would provide technical assistance through which cooperating non-Federal landowners would implement these conservation measures for the LPC on participating properties and/or contribute funds to implement conservation measures in other high-priority areas as defined by the RWP. In return for implementation of approved conservation measures, the Service would provide participating landowners, operators, and producers assurances that for the duration of the range-wide oil and gas CCAA and associated ESA section 10(a)(1)(A) permit, no additional conservation measures or additional land, water, or resource use restrictions beyond those voluntarily agreed to and described in the CCAA would be required by the Service should LPC become listed in the future.

The Parties support the Proposed Action as described above of a range-wide oil and gas CCAA including New Mexico and administered by the Western Association of Fish and Wildlife Agencies (WAFWA). The Parties appreciate that the Proposed Action would not impact the existing New Mexico CCAA as administered by the Center of Excellence for Hazardous Materials Management (CEHMM) and would provide consistent conservation delivery and assessment of impacts across the entire LPC range, thus allowing consistent measurement and monitoring of practice implementation. As described in the Proposed Action, the CCAA is one of the enrollment options for the conservation strategy set forth in The Lesser Prairie-Chicken Range-wide Plan (RWP) as developed by WAFWA, and utilizes the same impact metrics and conservation delivery system outlined in the RWP. Implementation of the proposed CCAA would contribute to long-term LPC conservation and would assist in the sincere conservation effort by stakeholders and the five States to preclude the need to list LPC under the ESA. An approval by the Service of the proposed CCAA will encourage oil and gas operators to voluntarily enroll to conserve and protect LPC by providing regulatory certainty to participating landowners, producers, and operators regarding the ESA and LPC. The regulatory certainty, under the authority of Section 10(a)(1)(A) of the ESA, entails a permit that would authorize incidental take of the LPC associated with implementation of the range-wide oil and gas CCAA should the Service list the species. Issuance of the permit would also convey assurance that the federal government would not impose any further commitments or restrictions on participants for LPC beyond those agreed upon in the approved CCAA. When approved, those assurances will serve as an incentive for landowners to enroll in the CCAA to implement conservation measures for the species. Such an approval will convey a very clear signal to our member landowners and operators that the Service is sincere in its obligation to work with all stakeholders in conservation of LPC.

In opening a comment period for the issuance of an ESA section 10(a)(1)(A) permit regarding range-wide oil and gas development in LPC habitat, the Service has taken a positive step forward for future conservation of LPC. In concert with the Service endorsement of the RWP in October 2013, approval of the CCAA will be a bold new step forward for long-term conservation of LPC across its entire range. Given the looming listing deadline for LPC and that it took two years for the Service to review and approve the agricultural CCAA for LPC in Oklahoma, the Parties strongly encourage the Service, as the responsible official, to approve, post-haste, the range-wide oil and gas CCAA and issue enhancement of survival permits, in accordance with Section 10 of the ESA. The Parties applaud Service Region 6 willingness to work with stakeholders in the oil and gas industry in development of a permitting mechanism and implementation of a strategy that complements the 5-state RWP for conservation of LPC. As stated in our previous letter, working with stakeholders on voluntary long-term conservation is a paradigm that will pay dividends for conservation and will continue reparation of partnerships that are vital to benefit imperiled wildlife species and those that care for them on their lands. If you have any questions regarding the above, please contact the undersigned.

Sincerely,

Rex Wilson, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

Don L. (Bebo) Lee, President
NM Federal Lands Council

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

Exhibit E

November 22, 2013

Director Dan Ashe
United States Fish & Wildlife Service
1849 C St. NW
Washington, DC 20240

Dear Director Ashe:

We have spoken many times about the need for stakeholder developed strategies to address population loss of the Lesser Prairie Chicken (LPC). These strategies will provide habitat to preserve and protect this species and allow for continued agricultural production and energy development opportunities. These measures are achieved through the use of mitigation credits for the preservation and development of habitat or other protective measures.

As you begin final consideration of the petition to list the species, we continue to advocate for the inclusion of the Stakeholder Conservation Strategy for the LPC in the 4(d) rule protections. That inclusion would allow for activities that form the basis of local economies across this historic range. Without those protections, normal farming and ranching practices and the development of energy resources would be severely impacted. Given the economic conditions of these rural communities, the opportunities for future generations would be reduced or eliminated.

The stakeholders considered the need for a creative solution that would be voluntary and incentivize participation by allowing landowners to bid a price that would meet their needs. This solution led to the development of the Habitat Exchange Program. The exchange created a place where industry mitigation transactions could be matched with a ratio of credits to more than offset losses from disturbances. This type of mitigation would help create and preserve habitat in which the LPC could rebuild its population and meet the goals provided by the Service. Those transactions would also work to ensure energy development could continue. These mitigation efforts could make for a dynamic partnership between energy, agriculture, and the service, thus benefitting the species.

We represent thousands of farming and ranching members, each of whom spend each day committed to rangeland management, protecting soil quality, and producing food, fuel and fiber for a growing and hungry world. We request your partnership in that effort through a 4(d) designation and through the expeditious approval of the Habitat Conservation Plan currently before you.

Director Dan Ashe

Page 2

Date:

Thank you for your consideration. If we can provide additional information or be of assistance in any way, please do not hesitate to ask.

Very best regards,



Kenneth Dierschke
President
Texas Farm Bureau



Don Shawcroft
President
Colorado Farm Bureau



Tom Buchanan
President
Oklahoma Farm Bureau



Steve Baccus
President
Kansas Farm Bureau



Michael S. White
President
New Mexico Farm & Livestock Bureau

Exhibit 4

to

Memorandum in Support of Motion to Intervene as Defendants of
Kansas Farm Bureau, Texas Farm Bureau, Colorado Farm Bureau, New
Mexico Farm and Livestock Bureau and American Farm Bureau
Federation

Declaration of the Colorado Farm Bureau

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE,
1130 17th Street, NW
Washington, DC 20036,

CENTER FOR BIOLOGICAL
DIVERSITY,
378 N. Main Avenue
Tucson, AZ 85701,

WILDEARTH GUARDIANS,
516 Alto Street
Santa Fe, NM 87501,

Plaintiffs,

v.

Case No. 1:14-cv-1025

SALLY JEWELL
Secretary, U.S. Department of Interior
1849 C Street NW
Washington, DC 20240,

DANIEL M. ASHE
Director, U.S. Fish and Wildlife Service
1849 C Street NW
Washington, DC 20240,

U.S. FISH AND WILDLIFE SERVICE
1849 C Street NW
Washington, DC 20240,

Defendants.

DECLARATION OF COLORADO FARM BUREAU IN SUPPORT OF
INTERVENTION

I, Brent Boydston, make this declaration on behalf of Colorado Farm Bureau (“CFB”). This declaration is based on my personal knowledge or belief and state as follows:

1. The following statements are based on my knowledge and information gathered.
2. I am the Vice President of Public Policy for CFB.
3. Colorado Farm Bureau is a Colorado nonprofit corporation. It was founded in 1919 by a group of Colorado farmers, ranchers, veterinarians, rural doctors, shopkeepers and tradesmen. The Colorado Farm Bureau’s mission includes enhancing Colorado’s agricultural industry; promoting, protecting and representing the interests of farmers, ranchers, and their communities; and protecting individual freedom and opportunity. The vast majority of Colorado farms, including family farms, operate as incorporated businesses.
4. Colorado Farm Bureau is dedicated to helping family farmers and ranchers stay on their land and continue to produce the food, fiber and fuel we need to feed ourselves and the world. CFB provides its members with continuous representation at the local, state and federal level, and seeks to enhance marketing opportunities and to protect the rural lifestyle. In doing so, CFB works to strengthen Colorado’s farming and ranching families for generations to come. CFB works to improve Colorado’s state’s economy, natural resources, environment, and social institutions. Through work on education, youth development, environmental quality, sustainability, health care, and

rural development, Colorado Farm Bureau is helping to make Colorado a better place to live. CFB has over 24,000 members statewide.

5. Colorado farmers and ranchers often operate their businesses in rural and remote areas of the State. These areas include the geographical areas listed as habitat for the lesser prairie chicken ("LPC"). CFB also 5,098 members located in counties that are considered to be lesser prairie chicken ("LPC") habitat.
6. CFB commented on USFWS' listing of the LPC.
7. A potential "endangered" listing of the LPC by the USFWS would impact many of our members that produce food and fiber for our county in the LPC habitat region. While our members manage their livestock and fertilizer applications as good stewards of the land, an endangered listing of the LPC would set limits on their operations. Such a listing would not only impact our individual producers and their abilities to produce, it would also have a significant impact on the rural communities that these members live and work.
8. CFB members in the LPC habitat area have an interest that will be substantially impaired by USFWS if the listing is reclassified from "threatened" to "endangered".
9. CFB's interest is to protect the 4(d) Rule through this litigation as these exemptions minimize the economic impact to our members while also providing for the recovery of the LPC.
10. CFB members have a substantial stake in the outcome of this action, since their operations and livelihoods will be impacted.

11. Any strategy that will be successful for the recovery of the LPC must entail working with private landowners, many of whom are members of CFB.

12. If the listing of the LPC is reclassified as “endangered,” private landowners stand the most to lose as farming and ranching management will be drastically impacted. Below are a few examples of these impacts:


- Livestock operations will be forced to implement practices not favorable to their grazing operations;
- The reclassification could put greater strain on the availability and accessibility of forage, especially in times of drought, impacting both cattle and dairy operations;
- Crop producers will have to change their best management practices;
- Could potentially prohibit the use of pesticides;
- Irrigation practices could be stopped or altered;
- Could force producers to alter crops therefore hindering their ability to maximize production;
- Oil and Gas monies developed in the state will be negatively impacted therefore impacting funding of public schools and higher education;
- Rural economic vitality would be negatively impacted, with many small rural communities the lifeblood is the farming and ranching community.

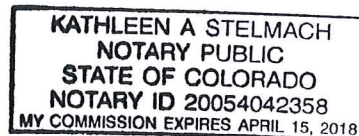
13. These are just a few examples of the impacts that a potential listing of the LPC as endangered could have on our members. Without the 4(d) rule our members could face civil and criminal charges for the “taking” or “harming” of the LPC or its habitat.

Our members have a vested interest in the outcome of this case both legally and economically. The best interests of CFB members are sought in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME on this 27th day of October, 2014.


NOTARY PUBLIC IN AND
FOR THE STATE OF COLORADO





Brent Boydston
Vice President of Public Policy, Colorado Farm Bureau

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

**DEFENDERS OF WILDLIFE,
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Washington, DC 20036,**

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Washington, DC 20240,**

**U.S. FISH AND WILDLIFE SERVICE
1849 C Street NW
Washington, DC 20240,**

Defendants.

Case No. 1:14-cv-1025-BAH

PROPOSED ORDER

Upon consideration of Intervenor-Applicants Kansas Farm Bureau, Colorado Farm Bureau, New Mexico Farm and Livestock Bureau, Texas Farm Bureau, and the American Farm

Bureau Federation's Motion to Intervene on Behalf of Defendants, the Memorandum in Support of Intervention and any response thereto, it is, this _____ day of _____, 2014,

ORDERED that the Motion to Intervene as Defendants is GRANTED.

Honorable Beryl A. Howell
U.S. District Court for the District of Columbia