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Public Comments Processing  
Attn: FWS-R2-ES-2021-0015  
U.S. Fish and Wildlife Service  
MS: PRB/3W  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

**RE: Livestock Industry Comments on U.S. Fish and Wildlife Service's Proposed Endangered Species Act Listings for the Lesser Prairie-Chicken: Threatened Status with Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment.**

Docket No.: FWS-R2-ES-2021-0015-0285

Submitted via online portal (<https://www.regulations.gov/document/FWS-R2-ES-2021-0015-0285>)

To Whom it May Concern:

The National Cattlemen's Beef Association (NCBA), the Public Lands Council (PLC) and the undersigned livestock organizations appreciate the opportunity to comment on the U.S. Fish and Wildlife Service's (hereafter, "the Service") Proposed Rule to establish Endangered Species Act (ESA) status for two Distinct Population Segments (DPS) of Lesser Prairie-Chicken (LPC). The undersigned livestock organizations have made significant investments in voluntary conservation of the species and have long-sought regulatory certainty related to the efforts of landowners who make largescale habitat conservation possible.

NCBA is the beef industry's oldest and largest national marketing and trade association representing American cattlemen and women who provide much of the nation's supply of food and own or manage a large portion of America's private property. PLC is the only national organization dedicated solely to representing the roughly 22,000 ranchers who hold federal grazing permits and operate on federal lands.

The Colorado Cattlemen's Association, founded in 1867, represents families who graze 70% of the private, state and federal lands in Colorado. CCA members are committed to stewardship of the land, water and air resources that produce a healthy and nutritious protein source for our consumers.

Colorado Livestock Association (CLA) was formed in 1998 through a restructuring of the then 43-year-old Colorado Cattle Feeders Association (CCFA). CLA members are cattle and sheep feeders, cow/calf producers, dairy farmers, swine operations, and industry partners.

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing nearly 5,700 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf, and stocker cattle production; cattle feeding; dairy production; swine production; grazing land management; and diversified farming operations.

Organized in 1914, the New Mexico Cattle Growers' Association (NMCGA) is a non-profit grass roots organization advocating for New Mexico's livestock industry. The Association has members in all 33 of New Mexico's counties and in some 19 states. Its purpose is to promote and protect the interests of its livestock producing members in National, state, and local forums.

The Oklahoma Cattlemen's Association (OCA) has been the trusted voice of the Oklahoma Cattle Industry since 1953. The mission of OCA is to serve, empower and advocate for Oklahoma cattle men and women so they can focus on their livelihood mission of raising their families and outstanding beef by responsibly stewarding the land, water and animal resources.

The Texas Cattle Feeders Association (TCFA) is an agricultural trade association representing cattle feeders and feedyards in Texas, Oklahoma, and New Mexico. TCFA members are committed to responsibly and sustainably producing nearly 30% of the nation's fed beef supply.

The Texas and Southwestern Cattle Raisers Association (TSCRA) was founded in 1887 and is the largest and oldest livestock organization based in Texas. TSCRA boasts more than 17,000 beef cattle operations, ranching families and businesses as members, who manage 4 million head of cattle on 76 million acres in Texas and the Southwest.

*ESA listing incorrectly asserts population stability change across range since 2016; Populations have nearly doubled since 2016*

NCBA, PLC, and our affiliates and members (hereafter, "the Livestock Associations") members depend upon healthy ecosystems and productive natural resources to run successful ranch businesses. The daily activities of these operations provide high quality, well-maintained open space that serves as habitat not only for grazing animals, but also for associated species who depend on resources that provide adequate food, shelter, and protection from predation. Over the last decade, efforts to conserve LPC habitat have been led and sustained by the agriculture producers in the five-state range and beyond. The proposed rule correctly identifies that LPC, particularly male birds, exhibit a high degree of lek fidelity, and without the persistence of those leks and protection of open space that is provided by agriculture, conservation efforts would be less successful.

The value of agriculture across the range cannot be overstated, both when considering the level of conceptual and tangible investment of time, financial resources, and land certified for habitat. In fact, the proposed rule identifies:

“At the population scale, the most important requirement for the lesser prairie-chicken is having large, intact, ecologically diverse grasslands to complete their life history and maintain healthy populations... Historically these ecologically diverse grasslands and shrublands were maintained by the occurrence of wildfires (keeping woody vegetation restricted to drainages and rocky outcroppings) and by grazing by bison and large ungulates...”<sup>1</sup>

Conservation efforts over the last decade have prioritized management and active conservation of habitat through cultivation and retention of native grass-prairie ecosystems and the use of grazing to cultivate habitats suitable for the bird and associated species. Voluntary conservation efforts like the LPC Range-Wide Plan (LPC RWP) and the Lesser Prairie-Chicken Conservation Initiative (LPCI) have resulted in high levels of investment from private landowners and producers who have enrolled acres in management schemes that specifically target objectives for desirable LPC habitat. In addition to these programs, the Service has pre-approved thousands of additional acres for acceptance into an appropriate conservation program in the future, and have additional conservation initiatives pending final approval. These investments ensure that voluntary conservation will continue to grow into the future.

This coordinated investment has borne fruit, as the populations recorded in the latest iteration of the *Range-wide Population Size of the Lesser Prairie-Chicken: 2012-2020* found that total populations have increased at a statistically significant level over the period surveyed. This includes nearly a doubling of the population (19,913 in 2016 to 34,408 in 2020<sup>2</sup>). The proposed rule draws heavily on population estimates and academic study that concluded in 2016, at which time the population was at the lower end of contemporary population fluctuations. The proposed rule acknowledges that LPC is a “boom-bust species” based on spring precipitation and available forage, but fails to account for the long-term support provided by retention of prairie ecosystems that while, still vulnerable to precipitation fluctuations, are far more stable than other ecosystem types. Given the increasing population, the widespread investment in retained habitat and prevention of further conversion, the Livestock Association believes the Service has incorrectly asserted that ESA protections are warranted at this time.

*Service inaccurately identifies, defines DPSs*

When the Service published the final rule in 2016 removing ESA protections for the LPC to maintain compliance with the decision of the United States District Court for the Western District of Texas, the proposed rule in question had identified the LPC as warranted for listing as threatened, with an associated 4(d) management rule (“4(d) rule”). In the current proposal, however, the Service asserts that there is sufficient evidence to support the listing of two DPSs,

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<sup>1</sup> 86 Fed. Reg. 29,436 (June 1, 2021)

<sup>2</sup> Kristen Nasman, et al., *Western Association of Fish and Wildlife Agencies, Range-Wide Population Side of the Lesser Prairie Chicken: 2012 to 2020*, (West, Inc. ed. 2020).

with one listed as endangered (Southern DPS) while the other is proposed to be listed as threatened with a 4(d) rule (Northern DPS). Despite the use of variable modeling for populations occurring from 1960-present, the range-wide population estimates are, by all accounts, increasing across the range<sup>3</sup> as a result of coordinated conservation efforts resulting from a centralized voluntary conservation model.

The Livestock Associations are concerned with the way the Service has divided the DPSs. To separate the DPSs into distinct regions, separated only by arbitrary boundaries “about halfway”<sup>4</sup> between the habitat defined in the proposed rule, will bifurcate the ability of states to coordinate across the range. Further, the Livestock Associations are concerned that the combination of the arbitrary geographic division, coupled with the difference in regulatory framework, will compromise investments already made by private landowners. If, contrary to current LPC population data as noted above, the Service chooses to advance this proposed rule to the next step in the administrative rulemaking process, the Livestock Associations recommend that the Southern DPS should instead be listed as “threatened” under the ESA, covered by the same 4(d) rule, and included in ongoing voluntary conservation measures. Doing so would substantiate the Service’s true concern and commitment to rangewide conservation of the LPC.

Listing the Southern DPS as endangered, especially without the identification of critical habitat and concurrent removal of encouragement for voluntary conservation, could spell disaster for a species already at risk due to the ongoing drought in 2021. The Livestock Associations agree that the Service likely does not have enough data to support designation of critical habitat at this time, however, we believe the Service cannot arrive at the determination that habitat loss is the defining factor for listing the Southern DPS as endangered while also asserting that data is too sparse to designate critical habitat. The best way to ensure that recent population gains – seen despite low precipitation – is to support habitat longevity. To list the population as endangered without regard to the ongoing voluntary conservation will remove tools from the conservation toolbox, rather than enhance them.

*Contents of 4(d) rule are insufficient; Service must properly address value of grazing*

The proposed rule accurately recognizes that grazing “is not inherently detrimental to lesser prairie-chicken management and, in many cases, is needed to maintain appropriate vegetative structure”, however the proposed rule fails to sufficiently recognize the value of grazing and activities associated with grazing in future management structures.

The Livestock Associations believe the Service should: more fully account for grazing’s role in protecting native grasslands from conversion to non-agricultural or crop-related use; clearly delineate the value of grazing activities in protecting landscapes from fire; outline grazing’s role (and livestock/land managers’ role) in preventing encroachment from shrub and woody biomass; and more fully enumerate the risks of catastrophic wildfire and fuel buildup that would have a

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<sup>3</sup> Kristen Nasman, et al., Western Association of Fish and Wildlife Agencies, Range-Wide Population Side of the Lesser Prairie Chicken: 2012 to 2020, (West, Inc. ed. 2020).

<sup>4</sup> 86 Fed. Reg. 29,440 (June 1, 2021).

long-term effect on suitability of habitat for LPC. Despite addressing the risk of anthropogenic noise like roads, energy development or other human developments, the Service has again failed to acknowledge grazing and livestock's role in protecting geographic space around leks – by nature of the large landscape of grazing lands. The Service must have a clearer statement about the benefits of grazing activities in any final rule.

The Livestock Associations appreciate the limited recognition that grazing and prescribed fire<sup>5</sup>, both components of active management of grazing operations, allow for the cultivation of a diversity of vegetation and cover types critical to LPC breeding and rearing habitat. Further discussion of prescribed grazing and general grazing activities should be included, and full benefits of the practice should be enumerated. The benefits of grazing should be clearly covered in the 4(d) rule as a practice that benefits the species and the species' habitat as part of a good faith effort by the Service to recognize the investments made in habitat management in a regulatory framework that is reliant on factors outside the producers' control. The Service admits that livestock grazing can be an "invaluable tool for maintaining prairie ecosystems"<sup>6</sup>, and in the face of challenges that threaten composition of landscape, keeping well-managed livestock grazing on the landscapes is the best way to guard against fragmentation, loss of biodiversity, and loss of resiliency. Grazers should not face regulatory uncertainty because the Service's evaluation of their practice may vary.

*Contents of 4(d) are insufficient; Service must adequately address routine agricultural practices, including those related to grazing*

While the Service asserts that grazing conditions in the Northern DPS are highly site-specific and therefore "broad determinations within this proposed 4(d) would not be beneficial to the species or local land managers"<sup>7</sup>, the Livestock Associations disagree. The omission of grazing in the proposed 4(d) rule is particularly glaring given the protections and regulatory certainty provided to other agricultural practices for which no benefits can be identified for the species. Given the variable grazing practices across the range that adapt livestock grazing to resource type, livestock grazing is a prime candidate for inclusion in a 4(d) rule; 4(d) rules are used to provide regulatory certainty for incidental take that may happen during the course of habitat restoration activities, activities that may be otherwise accounted for under another type of voluntary conservation plan (as in the case of LPC), as well as activities regulated by other areas of law (as in the case of grazing activities on federal land).

It is further concerning that while the Service maintains that grazing is an "invaluable tool for maintaining prairie ecosystems", it also specifically includes "incompatible livestock grazing" in the list of activities that represent "the unauthorized destruction or alteration of the species' habitat"<sup>8</sup> that could result in an enforcement action. Despite this statement, the Service offers no definition or clarification as to what it believes amounts to "incompatible grazing," leaving ranchers to only speculate when the Service might show up to issue a fine or force removal of

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<sup>5</sup> 86 Fed. Reg. 29,452 (June 1, 2021).

<sup>6</sup> 86 Fed. Reg. 29,466 (June 1, 2021).

<sup>7</sup> 86 Fed. Reg. 29,475 (June 1, 2021).

<sup>8</sup> 86 Fed. Reg. 29,476 - 29,477 (June 1, 2021).

livestock from a pasture. Any 4(d) rule must specifically include protection for standard grazing activities and give allowances for disaster events like drought or wildfires.

The Livestock Associations also believe there are omissions from the list of “routine agricultural activities” in the 4(d) rule as proposed. As a species highly sensitive to precipitation and available water resources, the 4(d) rule must provide for resources related to water delivery on the landscape. The 4(d) rule should, at a minimum, be updated to include: watering systems, sideroll sprinklers, center pivot irrigation systems, water tanks, water pumps, solar pump-driven water devices, wells, pipelines, pipe and gates. Further, the Service must clearly address the installation and future use of windmills in the context of a 4(d) protection, as the rule addresses *removal* of a windmill, but not installation.

Additionally, the Service must more clearly delineate how they will consider infrastructure necessary to carry out grazing activities. In the proposed rule, the Service exempts certain infrastructure necessary to routine activities for cultivated agriculture, but fails to do the same for grazing despite alleging that grazing activities are far less harmful and therefore need no protection under the 4(d) rule.

For instance, in regard to cultivated agricultural activities the proposed rule protects: “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”<sup>9</sup> and the “[u]se of chemicals in direct support of cultivated agriculture when done in accordance with label recommendations.”<sup>10</sup> However, the proposed rule offers no such protections for fences; buildings; or water infrastructure like windmills, solar pumps, or water tanks that support compatible grazing activities. It also fails to protect use of agricultural chemicals on rangeland even if the herbicides are being used to kill noxious or invasive species that degrade LPC habitat.

The grant of such blanket immunity for cultivated agriculture with no such protections for grazing activities appears to be entirely arbitrary or intentionally punitive to grazing activities. Specific protection for supporting activities and structures for grazing activities must be granted in any final 4(d) rule to allow compatible grazing to continue uninterrupted from threat of enforcement action or citizen suit.

*Service disincentivizes voluntary conservation, undermines future conservation outcomes*

Particularly on private land, the Service must have the engagement of private landowners in order to be successful in species conservation; without private engagement and commitment to conservation, future recovery efforts will fail. The success of LPC conservation, across the entirety of the historic range but particularly in the areas defined in the proposed DPSs, relies heavily on the investments made by cattle producers as part of their normal daily operations. Contents of the rule that intentionally or inadvertently penalize cattle producers, must be eliminated or substantially revised. For example, while the proposed rule recognizes the historic

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<sup>9</sup> 86 Fed. Reg. 29,476 (June 1, 2021).

<sup>10</sup> 86 Fed. Reg. 29,476 (June 1, 2021).

value of the Conservation Reserve Program (CRP) in keeping and increasing the acreage maintained in native grassland, the program is one in a suite of tools available to producers who wish to optimize the health of their resources at any given time. The proposed rule, and the associated 4(d) rule must be constructed to recognize that enrollment in programs like CRP and others that target other resource benefit (but are not specific to LPC conservation) must not be the only means for landowners to receive protection and surety under the 4(d) rule. That is, landowners currently enrolled should not face new regulatory uncertainty in the future if they choose to refrain from renewing their CRP contract.

If this is the case under the 4(d) rule, the Service will have inappropriately converted CRP and similar conservation programs into regulatory mechanisms under the ESA, which is outside Congressional intent and counter to voluntary conservation schemes. In particular, the Livestock Associations are concerned that the lack of grazing protections in the 4(d) rule could discourage expiring CRP from transitioning to livestock production and incorporating beneficial grazing practices. At the minimum, the Service should clarify that while CRP and similar landscapes should be included in the consideration of the sum of voluntary conservation, the Service does not consider conversion of previously-enrolled CRP lands to grazing lands a loss of conservation and therefore subject to enforcement actions. By adequately outlining their recognition of the benefits of grazing activities in the substance of any 4(d) rule, the Service would provide meaningful certainty for landowners seeking to continue voluntary conservation and active management.

### *Conclusion*

Generally, the Livestock Associations remain concerned that efforts to list the LPC under the ESA are driven by reliance on data that seeks to remedy historic regulatory process rather than addressing current habitat and species need. In so doing, the Service is directly undermining producer and private landowner confidence in future voluntary conservation schemes.

The Administration and the Service have been clear about their commitment to encourage voluntary conservation, leveraging private investment and public partnerships for resilient landscapes and high-quality habitat; seeking to list LPC after such an incredible and long-standing voluntary conservation effort directly undermines that commitment.

The Livestock Associations, our members, and our partners are committed to cultivation and active management of resilient landscapes that sustain LPC and many other wildlife species. As the Service proceeds with the rulemaking process, we ask you to carefully consider our comments. We appreciate the ongoing conversation and partnership with the U.S. Fish and Wildlife Service and look forward to continued dialogue.

Sincerely,  
National Cattlemen's Beef Association  
Public Lands Council  
Colorado Cattlemen's Association  
Kansas Livestock Association

New Mexico Cattle Growers' Association  
Oklahoma Cattlemen's Association  
Texas Cattle Feeders Association  
Texas and Southwestern Cattle Raisers Association