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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: Farm Bureau Coalition Comments on Proposed Rule for Lesser Prairie-Chicken, FWS-R2-ES-2021-0015

To Whom It May Concern;

We appreciate this opportunity to comment on the United States Fish and Wildlife Service (“FWS”) proposed rule to list the lesser prairie-chicken (*Tympanuchus pallidicinctus*) (“LPC”) in two distinct population segments (“DPS”). One, as a threatened species for the species’ Northern DPS with a proposed 4(d) rule, and secondly as an endangered species for the LPC’s Southern DPS pursuant to the Endangered Species Act of 1973, as amended (“ESA”). The Farm Bureau Coalition consists of Texas Farm Bureau, The Kansas Farm Bureau Legal Foundation, the Oklahoma Farm Bureau Legal Foundation, the New Mexico Farm and Livestock Bureau, the Colorado Farm Bureau, and the American Farm Bureau Federation. The Farm Bureau Coalition members are uniquely affected by the proposed listing of the LPC because their members currently participate in numerous voluntary LPC conservation programs that may be impacted by the proposed listing, including the Rangeland Plan, Conservation Reserve Program, FWS Partners for Fish and Wildlife Program, Candidate Conservation Agreements, the LPC Initiative, and other state and federal programs to conserve LPC habitat. The Farm Bureau Coalition recommends expansion of, and investment in, these habitat conservation programs with their proven track record of preserving LPC habitat.

The Farm Bureau Coalition collectively offers the following comments on the proposed rule for the LPC, which was published in the Federal Register on June 1, 2021. Individually, each member of the Farm Bureau Coalition has a unique interest in the proposed rule and the effects that the listing decision would have on its respective members if adopted. Because of the vital importance of agriculture activities to the global food supply as well as the economies of the Farm Bureau Coalition states, because LPC populations are stable, and because a listing threatens the progress made by voluntary conservation programs to protect the LPC habitat, the Farm Bureau Coalition respectfully submits comments opposing any listing determination by FWS or, in the

alternative, supporting a “threatened” listing with an appropriate 4(d) rule for both the Northern DPS and the Southern DPS.

## **I. Statement of Interest**

Texas Farm Bureau (“TFB”) is the largest grass-roots general farm organization in the state of Texas, representing more than 533,000 member families, many of whom earn their living every day caring for the land and animals that feed, clothe, and fuel the world. Agriculture and value-added industries represent 9.1% of the economy of the state (approximately \$220 billion). TFB advocates on behalf of its membership in legislative, regulatory, and litigation matters.

The market value of the agricultural goods produced in the six Texas counties that make up the proposed designated LPC Northern DPS in Texas is more than \$944 million per year. In these Texas counties, approximately 2,357 family-owned farms and ranches directly employ 1,817 workers. The market value of the agricultural goods produced in the eight Texas counties that make up the proposed designated LPC Southern DPS exceeds \$3.19 billion per year. In these counties, approximately 4,091 family-owned farms and ranches directly employ 6,396 workers.<sup>1</sup> In all fourteen of these counties that would be impacted by a listing, agriculture and related businesses are the major employer.

The Kansas Farm Bureau (“KFB”) is the largest grass-roots general farm organization in the state of Kansas, representing over 105,000 members, including more than 30,000 farmer and rancher member families. Agriculture represents over 43% of the economy of the state (approximately \$70.3 billion). The Kansas Farm Bureau advocates on behalf of its membership in legislative, regulatory, and litigation matters.

Agriculture and related input and value-added industries contribute \$20.7 billion to the economies of the 37 counties that make up the current habitat for the Northern DPS for the LPC in Kansas, directly employing or supporting over 54 thousand jobs. This accounts for approximately 34.27% of the employment in these counties.

In Kansas, these counties produced more than 646.4 million bushels of grain and oilseeds. This represents 43% of all grain and oilseeds produced in Kansas. These counties have an inventory of 3,374,603 cattle and calves. This represents about 54% of all cattle and calves in Kansas. There are 49,549 family farm operations in these counties, approximately 85% of the total farms in Kansas.

Oklahoma Farm Bureau Legal Foundation (“OFBLF”) is a non-profit foundation that supports the rights and freedoms of farmers and ranchers in Oklahoma by promoting individual liberties, private property rights, and free enterprise. OFBLF’s sole member is the Oklahoma Farm Bureau (“OKFB”), an independent, non-governmental, voluntary organization of farm and ranch families formed in 1942. OKFB is the largest grassroots general farm organization in Oklahoma, representing about 85,000 member families, many of whom work daily to raise the crops and

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<sup>1</sup> See [https://www.nass.usda.gov/Publications/AgCensus/2017/Online\\_Resources/County\\_Profiles/Texas](https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Texas) (last viewed 7/6/21).

livestock needed to feed a hungry world. OKFB memberships are held by member families. In the 8 counties in Oklahoma that FWS recognizes as having lesser prairie-chickens, the number of OKFB member families as of July 19, 2021, was: Beaver – 626, Cimarron – 230, Ellis – 489, Harper – 213, Roger Mills – 347, Texas – 489, Woods – 453, and Woodward – 1,018. OKFB advocates on behalf of its membership in legislative, regulatory, and legal matters.

According to a 2015 publication<sup>2</sup> by Oklahoma State University, Oklahoma’s agriculture industry is responsible for 13.8% of total state employment, 11.4% of total state output and 9.8% of the state’s gross domestic product.

In the Oklahoma LPC counties, the market value of the agricultural products sold<sup>3</sup> was more than \$2 billion dollars, according to the 2017 AgCensus<sup>4</sup>. Texas County contributed almost half of that amount and ranked 25<sup>th</sup> in the nation in the market value of agricultural products sold according to the same AgCensus. The high market value of agricultural products in western Oklahoma is due to livestock production, primarily cattle and calves, which benefits from the abundant Mixed-Grass rangeland in the 8 LPC counties.

There are more than 5,000 farms in the Oklahoma LPC counties. Those 8 counties have a smaller human population than many counties in Oklahoma. However, the market value of the agricultural products sold in those counties exceeds numerous counties in Oklahoma. Because of the diminishing population in western Oklahoma and the panhandle, a strong agricultural economy is critical to sustaining on and off-farm jobs and the economic health and welfare of the communities in the area.

New Mexico Farm and Livestock Bureau (“NMFLB”) is the largest grass-roots general farm organization in the state of New Mexico, representing over 20,000 members. Agriculture represents over 13% of the economy of the state (approximately \$3.44 billion). The New Mexico Farm and Livestock Bureau advocates on behalf of its membership in legislative, regulatory, and litigation matters.

Agriculture and related input and value-added industries contribute \$1.89 billion to the economies of the seven counties that make up the Southern DPS for the LPC in New Mexico, directly employing or supporting many jobs in these counties.

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<sup>2</sup> Contribution of Agriculture to Oklahoma’s Economy: 2015.  
<http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-10832/E-1046%20Contribution%20of%20Ag%20to%20Economy.pdf>

<sup>3</sup> Market value of agricultural products sold represents the gross market value before taxes and production expenses of all agricultural products sold or removed from the place in 2017, regardless of who received the payment. It includes sales by producers, as well as the value of any shares received by partners, landlords, contractors, or others associated with the operation. It includes the value of direct sales and of commodities placed in the Commodity Credit Corporation loan program. It does not include payments received for participation in other federal farm programs, or income from farm related sources like custom work and agricultural services, or income from nonfarm sources.

<sup>4</sup> <https://www.nass.usda.gov/Publications/AgCensus/2017/>

In these six counties (Chaves, Lea, Eddy, De Baca, Curry, and Roosevelt), there are 3,231 family farm and ranch operations, totaling approximately 13% of the total farm and ranches in New Mexico.

Colorado Farm Bureau (“CFB”) is the largest grass-roots general farm organization in the state of Colorado, representing over 22,000 members, including more than 4,500 farmer and rancher member families. Agriculture is the second largest contributor to Colorado's economy providing approximately \$47 billion and employing more than 195,000 people. The Colorado Farm Bureau advocates on behalf of its membership in legislative, regulatory, and litigation matters.

Agriculture and related input and value-added industries contribute \$2 billion to the economies of the five counties that make up the Northern proposed habitat DPS for the LPC in Colorado, directly employing or supporting over 1000 jobs. This accounts for approximately 50% of the employment in these counties.

American Farm Bureau Federation (“AFBF”) is America’s largest general farm organization. AFBF’s purpose is to represent the business, economic, social, and educational interests of America’s farmers and ranchers. AFBF was formed in 1919 and currently represents nearly 6 million member families through state Farm Bureau organizations in all 50 states and Puerto Rico.

Each state Farm Bureau organization is an independent entity that is affiliated with AFBF through a membership agreement. All state Farm Bureau organizations are members of AFBF. AFBF is a grassroots organization whose policy and governance are controlled by farmer and rancher members.

AFBF works for the development and implementation of reasonable and lawful public policy for the benefit of farmers and consumers. According to AFBF’s mission statement: “We are farm and ranch families working together to build a sustainable future of safe and abundant food, fiber, and renewable fuel for our nation and the world.”

## **II. Background**

The LPC is a grassland bird primarily found in southeastern Colorado, western Kansas, eastern New Mexico, western Oklahoma, and the Texas Panhandle. Farm Bureau Coalition members farm and ranch in all of the areas within the Northern and Southern DPS for the LPC. In addition, members and their families are intimately involved in the rural communities, schools, churches, and civic causes that make up the landscape of their states. On the farm and ranch, they are directly engaged in conservation practices that support habitat for LPC. Accordingly, FWS’ proposed listing decision is important to the Farm Bureau Coalition and its members, their operations, and ability to earn a living from farming and ranching activities.

The Farm Bureau Coalition respectfully opposes a listing decision for both the Northern and Southern DPS because the LPC population has proven to be stable. There are year to year fluctuations in LPC population counts, but FWS acknowledges that these fluctuations are due primarily to weather conditions – a factor over which no one can control, and upon which a listing

decision has no effect. Instead, the ongoing, robust conservation efforts of agriculture and industry, through state and federal programs, has demonstrated success in protecting the LPC and its habitat. A listing decision threatens these efforts and programs, which is bad for both the species and the agricultural community. In the alternative, the Farm Bureau Coalition offers comments regarding the 4(d) rule proposed for the Northern DPS, and the provision of a threatened listing with a 4(d) rule for the Southern DPS as well. These comments are designed to increase conservation participation, and ensure that the 4(d) rule is adequately protective of routine agricultural activities that drive the economies of the Farm Bureau Coalition states, which in turn provide the food and grains that feed our world.

For these reasons, the Farm Bureau Coalition opposes the proposed endangered listing for the Southern DPS and the threatened listing for the Northern DPS, but in the alternative, if a listing is adopted for the LPC, it should be a threatened listing with a 4(d) rule for both the Southern and Northern DPS. In the event a 4(d) rule is adopted, the Farm Bureau Coalition respectfully offers its suggestions for a protective rule that provides regulatory certainty later in these comments.

### **III. A listing decision is not warranted at this time.**

Under the five listing factors set out in the ESA,<sup>5</sup> the LPC should not be listed as either threatened or endangered. First, the best available scientific and commercial data demonstrates that LPC population levels are stable if not increasing over time, that the occupied range of the species is stable, and that at a minimum agricultural activities are not projected to be responsible for significant future habitat loss. Instead, factors such as invasive trees – which can be controlled through mitigation efforts – are a significant ongoing factor in habitat loss. Second, robust and well-established regulatory and conservation measures are in place to adequately protect the LPC in both DPS ranges. Stakeholders, such as the Farm Bureau Coalition members, have engaged in cooperative, voluntary efforts to conserve the LPC and its habitat. Rather than encourage and expand upon these efforts, the proposed listing of the LPC would disincentivize these successful, ongoing conservation efforts by imposing strict and inflexible control measures and increased costs for agricultural activity. Instead, FWS should work with agricultural stakeholders to expand and invest in these conservation programs to continue the successes in protecting the LPC's habitat, and provide time to measure their results in order to achieve demonstrable goals. Finally, genetic and ecological studies suggest that there are not distinct population segments of the LPC, and therefore no listing is appropriate for either the FWS-designated Northern DPS or Southern DPS.

#### **A. Best available scientific and commercial information shows that the LPC population is stable over time.**

Historically, LPC populations were monitored by ground-based lek surveys and counts of birds attending leks. These are labor-intensive methods that were hampered by limited access. For decades, biologists at state wildlife agencies conducted annual spring counts of the male LPC when they would congregate at leks. Range-wide estimates first occurred in the 1960s, at which

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<sup>5</sup> 16 U.S.C. § 1533(a)(1).

point the total range-wide LPC population was estimated to be between 36,000 and 43,000.<sup>6</sup> By 2003, the LPC's estimated range-wide population was 32,000.<sup>7</sup>

The Western Association of Fish and Wildlife Agencies ("WAFWA") conducts annual aerial surveys of LPC populations in order to document the fluctuation of species counts over time. WAFWA's 2020 aerial survey indicated that the LPC population is stable, and in fact has increased significantly since counts taken in 2013, which followed two years of drought.<sup>8</sup> Although drought and water-availability issues are not uncommon and can decrease LPC abundance, the LPC's high rate of reproduction and large clutch sizes have allowed populations to rebound and in some years expand.<sup>9</sup> The 2020 aerial survey estimated a range-wide breeding population of 34,408, a slight increase from the 2018 estimate of 33,094 LPCs, and a significant increase from the 2013 count of 15,397 birds.<sup>10</sup> WAFWA's 2021 Report on range-wide LPC populations was recently published on August 25, 2021 (the "2021 Report").<sup>11</sup> Although the 2021 Report indicated a decrease of 4,107 LPCs from 2020 to 2021, the decrease was not statistically significant at the 80% confidence level.<sup>12</sup> But moreover, because LPC counts fluctuate year to year, it is important to evaluate longterm trends in the counts; from 2013 to 2021, there was a statistically significant annual rate of increase of 2,616 in the total LPC count.<sup>13</sup> Thus, the LPC population in 2021 is almost at the level seen in the 1960s, and is statistically similar to what it was in 2003.

FWS notes the annual fluctuation in the LPC population, and cautions not to draw conclusions based on these fluctuations.<sup>14</sup> The aerial survey data of total range-wide LPC population from 2012-2020 that FWS relies upon shows a seven-year trend of steady to increasing LPC population counts.<sup>15</sup> Populations have actually increased since FWS published a final rule on July 20, 2016 that removed the LPC's threatened listing and mooted the associated 4(d) rule.

Because LPC populations fluctuate year to year based on weather conditions, the monitoring technique utilized for the WAFWA aerial survey is designed to track longer-term trends. WAFWA concluded that the three and five-year trends for the LPC show a stable population, and attribute this fact to voluntary habitat conservation efforts like the range-wide

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<sup>6</sup> 77 Fed. Reg. 73,846.

<sup>7</sup> *Id.*

<sup>8</sup> <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/> (last viewed 7/13/21).

<sup>9</sup> *Id.*

<sup>10</sup> <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>

<sup>11</sup> See <https://wafwa.org/wpdm-package/range-wide-population-size-of-the-lesser-prairie-chicken-2012-to-2021/?ind=1629920105054&filename=FINAL%202021%20LEPC%20Range%20Wide%20Report%2020210825.pdf&wpdmdl=18495&refresh=6127b855bd5f51629993045> (last viewed 8/25/21).

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

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

<sup>14</sup> 86 Fed. Reg. 29,436 (June 1, 2021).

<sup>15</sup> *Id.*; see Figure 2.

plan.<sup>16</sup> The Farm Bureau Coalition believes FWS should expand and invest in voluntary habitat conservation programs, because they are effective at protecting the LPC habitat.

**B. FWS Data indicates minimal future habitat loss from agricultural activity.**

The proposed listing rule presents the false impression that LPC habitat loss is due to agricultural and ranching activity. *See, e.g.*, Proposed Rule at 29,444 (“The vast majority of the lesser prairie-chicken range (>95 percent) occurs on private lands that have been in some form of agricultural production since at least the early 1900s. As a result, available habitat for grassland species, such as the lesser prairie-chicken, has been much reduced and fragmented . . .”).<sup>17</sup> As a principal note, FWS observes the overall compatibility of agricultural activity with the LPC, because grain crops provide “increased or more dependable winter food supplies” for the LPC.<sup>18</sup> But moreover, as FWS’ data indicates, agricultural activity is not significantly contributing to increased LPC habitat loss and fragmentation today.<sup>19</sup> FWS notes that the historical conversion of grassland to cultivated agricultural lands occurred primarily in the late 19<sup>th</sup> century and the 20<sup>th</sup> century.<sup>20</sup> FWS does not “expect future rates of conversion [to cultivated agriculture] to reach those witnessed historically.”<sup>21</sup> As Tables 9 through 13 of the Proposed Rule indicate, the future projected acreage of LPC habitat loss due to conversion of grassland to cropland is dwarfed by the projected losses due to other factors, particularly the encroachment of woody vegetation.<sup>22</sup> In short, new LPC habitat land is not, by and large, being broken out for conversion to agricultural activity. Total projected acreage losses due to woody vegetation encroachment rangewide in fact more than doubles projected anticipated losses due to cropland conversion.<sup>23</sup>

In contrast, invasion of grasslands by “opportunistic woody species” such as the eastern red cedar and honey mesquite is a much more significant and growing threat to LPC habitat than agricultural activity.<sup>24</sup> The LPC does not use areas with high concentrations of trees.<sup>25</sup> FWS observes that removal efforts are “being outpaced by rates of encroachment” of these trees.<sup>26</sup> For example, in the Mixed-Grass Ecoregion, encroachment of woody vegetation has had the largest impact on habitat loss and fragmentation, almost double the percentage of the habitat lost in the ecoregion due to cropland conversion.<sup>27</sup>

As explained further below, significant, robust conservation programs are in place to assist agricultural and ranching operations to conserve privately owned grasslands for the benefit of the

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<sup>16</sup> <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/>

<sup>17</sup> This statement is incorrect with regard to Oklahoma, and potentially other Farm Bureau Coalition states as well. *See Exhibit 2*, Oklahoma has seen no widespread conversion of grassland to cropland in the LPC counties since 1959. In fact, grassland in the LPC counties has increased during this time, while cropland has decreased. Exhibit 2 is created from data provided by Troy Marshall, Oklahoma State Statistician, USDA, National Agricultural Statistics Service, Field Operations, Southern Plains Region.

<sup>18</sup> 86 Fed. Reg. 29,445 (June 1, 2021).

<sup>19</sup> *Id.* at 29,462-29,454.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 29,461.

<sup>22</sup> *Id.* at 29,462-29,454.

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

<sup>24</sup> *Id.* at 29,448.

<sup>25</sup> *Id.*

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

<sup>27</sup> *Id.* at 29,459.

LPC. Although FWS discusses the extensive conservation efforts in the five states subject to the proposed listing decision, FWS seemingly disregards these significant efforts (and their demonstrated success) in place to protect and improve LPC habitat and connectivity in its proposal to list the Southern DPS as endangered and Northern DPS as threatened.<sup>28</sup> In Section C below, the Farm Bureau Coalition highlights a number of these measures. As discussed above, the control of invasive woody vegetation is a more significant threat to LPC habitat loss going forward than conversion to cropland. But moreover, as recent LPC population trends based on aerial count data indicates, LPC population fluctuations appear to be more dependent on weather events in their range than human agricultural activity. FWS' proposed listing decision does not give appropriate weight to this information

Finally, The Farm Bureau Coalition requests that FWS consider the Plains Cotton Growers' comments on the proposed LPC rule regarding the use of best available geospatial data. The use of the most robust and up-to-date data regarding current cropland use via the United States Department of Agriculture's National Agricultural Statistics Services CropScape and Cropland Data Layer mapping product is vital to determining the significant, threshold questions of LPC habitat: The current extent of habitat, and the relative success of the numerous voluntary conservation programs been in conserving that habitat. The Farm Bureau Coalition shares the Plains Cotton Growers' concerns that out of date data on land conversion may give an inaccurate picture of the LPC habitat and the success of conservation programs, which might lead to a listing decision that is not supported by best available scientific and commercial information.

**C. Extensive local, state, and federal regulation and conservation efforts to protect the LPC have demonstrated success and should be expanded in place of a listing.**

FWS must consider the success of the existing regulatory mechanisms that protect the LPC and its habitat across significant portions of its range. The WAFWA Range-Wide Plan ("RWP"), for example, represents a cooperative conservation effort by five states, state fish and wildlife agencies, stakeholders, and property owners, with input from the public and FWS. Additionally, there has been a substantial investment of resources and land by a wide-range of industries, in partnership with States and local governments. These efforts, which are growing year by year, must be recognized, and should not be discouraged or overwritten by a listing of the LPC as endangered or threatened. Instead, they should be funded with the aim of increased participation. Farm Bureau Coalition members also participate in a number of other programs to conserve and protect the LPC habitat. A non-exhaustive list of these programs, which are working to conserve the LPC habitat while maintaining the agricultural industry and way of life, includes the following:

- **Range-Wide Plan.** The LPC RWP is a collaborative effort of WAFWA and the state wildlife agencies of Colorado, Kansas, New Mexico, Oklahoma, and Texas. It was developed to ensure long-term viability of the LPC through voluntary cooperation by landowners and industry. The plan allows industry and agriculture to continue operations while reducing and mitigating impacts to the LPC and its grassland habitat. The RWP is a conservation strategy that provides the population and habitat needed to expand and sustain the LPC. Pursuant to the RWP, private landowners, including Farm Bureau Coalition members, voluntarily enter into formal agreements, such as the WAFWA Conservation

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<sup>28</sup> See, e.g., 86 Fed. Reg. 29,454-29,456 (June 1, 2021).



Agreement and various Candidate Conservation Agreement with Assurances (“CCAA”) agreements, with FWS to maintain and enhance land within the LPC range. Industry contributions support conservation actions implemented by participating private landowners. To date, industry partners have committed over \$60 million in enrollment and mitigation fees to pay for conservation actions, and landowners across the range have agreed to conserve approximately 130,000 unimpacted acres of habitat through 10-year and permanent conservation agreements.<sup>29</sup> As of 2019, there were 111 active contracts with 6,228,136 acres enrolled in the CCAA, and an additional 599,626 acres enrolled in WAFWA’s Conservation Agreement contracts.<sup>30</sup> The LPC population has more than doubled since WAFWA and its partners launched the Lesser Prairie-Chicken Range-wide Conservation Plan in 2014.<sup>31</sup>

- **Conservation Reserve Program.** The Conservation Reserve Program (“CRP”) is a voluntary program for agricultural landowners, administered by the Farm Service Agency, that incentivizes landowners to take cropland and pastureland out of production and instead maintain permanent vegetation (*e.g.* native grasses) in exchange for annual rental payments and cost-share assistance.<sup>32</sup> The conversion of these lands back to permanent vegetation promotes habitat connectivity. CRP enrollment is fluid (and capped nationally) as individual contracts expire at the end of a 10 or 15-year term and new contracts get enrolled in other locations.<sup>33</sup> Currently, approximately 1,822,000 acres are enrolled within the FWS analysis area for the LPC.<sup>34</sup>
- **Partners for Fish and Wildlife Program.** The FWS Partners for Fish and Wildlife Program (“PFW”) restores, improves, and protects fish and wildlife habitat on private lands through partnerships between FWS and landowners.<sup>35</sup> The Oklahoma PFW program has implemented 51 private lands agreements totaling 10,603 acres for the LPC. The PFW program in Texas has executed 66 private lands agreements totaling 131,190 acres for the benefit of the LPC.<sup>36</sup> New Mexico’s PFW program has acquired 855 acres of land in recent years for treatment of invasive species.<sup>37</sup>
- **Candidate Conservation Agreement.** A Candidate Conservation Agreement (“CCA”) and CCAA have been drafted by a team including FWS and the Bureau of Land Management to address habitat needs of the LPC as well as the dunes sagebrush lizard.<sup>38</sup> To date, 1,964,163 acres of land have been enrolled within the historical range of the LPC

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<sup>29</sup> 86 Fed. Reg. 29,454 (June 1, 2021).

<sup>30</sup> *Id.*

<sup>31</sup> <https://wafwa.org/aerial-surveys-document-stable-lesser-prairie-chicken-population-trends/> (last viewed 6/15/21).

<sup>32</sup> 86 Fed. Reg. 29,454 (June 1, 2021).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 29,455.

<sup>36</sup> *Id.* at 29,455-29,456.

<sup>37</sup> *Id.* at 29,456.

<sup>38</sup> *Id.*

by oil and gas companies, and 2,055,461 acres by ranchers in New Mexico.<sup>39</sup> The CCA and CCAA have also treated 79,297 acres of land for invasive mesquite.<sup>40</sup>

- **Lesser Prairie-Chicken Initiative.** The USDA’s Natural Resources Conservation Service (“NRCS”) established the Lesser Prairie-Chicken Initiative (“LPCI”). The LPCI provides technical and financial assistance to landowners, assisting with maintenance and enhancement of LPC habitat while helping farmers and ranchers continue their operations.<sup>41</sup> From 2010 to 2019, NRCS implemented conservation practices on 1.6 million acres of agricultural land within the LPC’s historical range.<sup>42</sup> In New Mexico, for example, a total of 44 contracts have been completed pursuant to the LPCI program, totaling 422,253 acres of LPC lands protected and/or improved.<sup>43</sup>
- **Kansas Department of Wildlife, Parks, and Tourism.** As FWS notes, the Kansas Department of Wildlife, Parks, and Tourism (“KDWPT”) has administered a number of programs to protect LPC habitat by “leveraging landowner cost-share contributions, industry and nongovernmental organizations’ cash contributions, and agency funds toward several federally funded grant programs.”<sup>44</sup> The LPC habitat conservation programs administered by KDWPT include 22,000 acres through the Landowner Incentive Program, 18,000 acres through the State Wildlife Grant Preserve Landowner Program, 30,000 acres through the Wildlife Habitat Incentives Program, and 12,000 acres through the Habitat First Program.<sup>45</sup> KDWPT has also obtained Wildlife and Sport Fish Restoration Funds to administer 19,655 acres.<sup>46</sup>
- **Colorado Parks and Wildlife.** Colorado Parks and Wildlife (“CPW”) began its LPC Habitat Improvement Program in 2009 to assist farmers and ranchers with grazing, field enhancement, and cropland to grassland habitat conversion. Since 2009, CPW has completed 37,051 acres of habitat treatments.<sup>47</sup> CPW has also participated in programs with the United States Forest Service to restore LPC grasslands and relocate LPCs to the Sand Sagebrush Ecoregion.<sup>48</sup>
- **Oklahoma Department of Wildlife Conservation.** The Oklahoma Department of Wildlife Conservation (“ODWC”) administers a CCAA with FWS for the LPC in 14 Oklahoma counties.<sup>49</sup> As of 2019, there were 84 participants with a total of 399,225 acres

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 29,454.

<sup>42</sup> *Id.*

<sup>43</sup> New Mexico Farm and Livestock Bureau LPCI data

<sup>44</sup> *Id.* at 29,455.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

enrolled.<sup>50</sup> ODWC also owns wildlife management areas in the LPC range totaling 75,000 acres.<sup>51</sup>

- **Texas Parks and Wildlife Department.** The Texas Parks and Wildlife Department (“TPWD”) also developed a CCAA for the LPC in conjunction with FWS. The Texas CCAA covers 50 counties in the LPC’s range.<sup>52</sup> As of January of 2020, 91 properties totaling 657,038 acres were enrolled in the CCAA.<sup>53</sup> Texas also has a Landowner Incentive Program, in which 14,068 acres are enrolled.<sup>54</sup> TPWD has also acquired or received donations of significant amounts of land dedicated to LPC habitat preservation. In addition, The Nature Conservancy of Texas donated 10,635 acres, and TPWD acquired 3,402 acres adjacent to the Yoakum Dunes Preserve, 1,604 acres in Cochran County, and 320 acres bordering the Yoakum Dunes site.<sup>55</sup>
- **New Mexico.** Many efforts in New Mexico are devoted to conserving the overlapping habitats of the LPC and the dunes sagebrush lizard. The Bureau of Land Management established a Resource Management Plan Amendment (“RMPA”) for these species in 2008, and since then has closed 300,000 acres to oil and gas activity and 850,000 acres to solar development, while reclaiming acreage for the LPC from buried power lines, abandoned well pads and roads, and mesquite control efforts.<sup>56</sup> A CCA and CCAA were also adopted in 2008; a total of 1,964,163 acres of oil and gas company lands, 2,055,461 acres of ranch lands, and 406,673 acres of New Mexico State Land Office lands have been enrolled for conservation in the LPC’s historical range.<sup>57</sup> The CCA and CCAA have also treated 79,297 acres of mesquite with more scheduled for treatment.<sup>58</sup> The CCA and CCAA are funding numerous projects in New Mexico to remove windmills, orphaned wells, mesquite, and unused roads and install improved fencing and stock tanks in order to enhance LPC habitat.<sup>59</sup> A total of 1,152,030 acres of LPC habitat have been enrolled through these programs.<sup>60</sup> Additionally, the Nature Conservancy manages 28,000 acres of land in New Mexico, and the New Mexico Department of Game and Fish has designed 30 Prairie Chicken Areas totaling 27,262 acres for protection of LPC habitat.<sup>61</sup> The New Mexico State Game Commission has also used funding to acquire 5,285 acres of private ranchland for LPC preservation.<sup>62</sup>
- **Conservation Bank.** Conservation banks are permanently protected lands that contain natural resources that must be protected.<sup>63</sup> These lands are conserved and permanently

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 29,456.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 2021 Quarterly Report, CCA for the LPC and the Dunes Sagebrush Lizard, CEHMM.

<sup>60</sup> *Id.* at 20.

<sup>61</sup> 86 Fed. Reg. 29,456 (June 1, 2021).

<sup>62</sup> *Id.*

<sup>63</sup> [https://www.fws.gov/endangered/esa-library/pdf/conservation\\_banking.pdf](https://www.fws.gov/endangered/esa-library/pdf/conservation_banking.pdf) (last visited 7/13/21)

managed for species that are endangered, threatened, candidates for listing, or otherwise at risk.<sup>64</sup> Conservation banks offset adverse impacts to species that occur elsewhere, a practice also known as off-site mitigation.<sup>65</sup> Common Ground Capital has created a portfolio of conservation banks with approximately 68,000 total acres of private ranches under option across both DPSs set aside for LPC habitat protection.<sup>66</sup> The conservation bank offers mitigation credits approved by FWS.<sup>67</sup>

- **Proposed Wind and Solar Habitat Conservation Plan.** Wind and solar projects often occupy agricultural land and provide supplemental income to farmers and ranchers to help their operations withstand weather-related unpredictability in agricultural markets. LPC Conservation LLC applied for an incidental take permit for a wind and solar energy, power line, and communication tower Habitat Conservation Plan on April 14, 2021.<sup>68</sup> If the incidental take permit is approved, it would authorize the incidental take of the LPC resulting from the approved activities (such as wind and solar generation) as well as incidental take resulting from conservation actions to minimize and mitigate impacts of the incidental take of LPCs resulting from these activities.<sup>69</sup>

As these examples demonstrate, landowner enrollment in voluntary conservation programs in both DPSs has continued to set aside significant amounts of land within the LPC's historical range for the protection of the LPC habitat. This is Congress' intent. Congress expressed its instruction, in its conference report accompanying the FY-19 Interior appropriations bill, that FWS "collaborate with local and regional stakeholders on improving voluntary solutions to conserve [the LPC] with the goal of avoiding the necessity of listing the LPC under the ESA."<sup>70</sup> These programs work, both for the agricultural community and for the overarching goal of preserving the LPC's habitat, and should be funded and expanded. Because approximately 95% of the LPC habitat is on private lands, it is vitally important for FWS to take actions that encourage further participation in conservation programs.

As WAFWA's aerial survey confirms, LPC populations have stabilized and are growing in several ecoregions; and variations in annual counts are primarily due to weather conditions, not agricultural or ranching activities. Conservation measures have continued to protect the LPC habitat and improve its quality and connectivity, ultimately contributing to the resiliency of the species. With proper incentives, these programs can continue to expand, adding protected habitat for the LPC while fairly compensating the agricultural community for lands that are dedicated to this important purpose. Conversely, the proposed listing of the LPC as threatened in the Northern DPS and endangered in the Southern DPS threatens to reduce the incentive for stakeholders to pursue the conservation initiatives contributing to the demonstrated success in protecting the LPC and its habitat. Based on these circumstances, no listing of the LPC is warranted at this time.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> <http://commongroundcapital.com/lesser-praire-chicken/> (last visited 7/13/21).

<sup>67</sup> *Id.*

<sup>68</sup> <https://www.federalregister.gov/documents/2021/04/14/2021-07475/application-for-an-incidental-take-permit-renewable-wind-and-solar-energy-power-line-and> (last visited 7/13/21).

<sup>69</sup> *Id.*

<sup>70</sup> P.L. 116-6.

**D. There are no meaningfully distinct population segments of the LPC population, therefore no listing decision is warranted for either DPS.**

The proposed listing decision designates two distinct DPSs for the LPC, positing that there are two discrete and significant population segments for the species: the Northern DPS, which consists of the Sand Sagebrush Ecoregion, the Mixed Grass Ecoregion, and the Short Grass/Conservation Reserve Program Ecoregion in Texas, Oklahoma, Colorado, and Kansas; and the Southern DPS, which consists of the Shinnery Oak Ecoregion in New Mexico and Texas.<sup>71</sup> FWS proposed an endangered listing for the Southern DPS, and a threatened listing for the Northern DPS.<sup>72</sup> The ESA applies to distinct taxonomic species, “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature.” 16 U.S.C. § 1532(16). Under FWS’ DPS policy, a population segment may be considered discrete if it either is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors, or if it is delimited by international governmental boundaries in which there are differences in the control of exploitation, management of habitat, conservation status, or regulatory mechanisms.<sup>73</sup>

FWS concluded that the Northern DPS and Southern DPS qualify as “markedly separate” and therefore discrete. While noting that the Shinnery Oak Ecoregion and the three Northern DPS regions are separated by only 95 miles, FWS concludes that there “has been no recorded movement of LPCs” between the two proposed DPSs over “the past several decades.”<sup>74</sup>

However, ecological and genetic studies of the LPC suggest that the populations are not discrete and should not be considered as separate DPSs. “Discrete” or “distinctive” requires that individuals can be identified as such. Recent genetic studies show that the Southern and Northern DPS for the LPC do not meet this standard.<sup>75</sup>

First, there is no clear scientific consensus as to the number of ecoregions (*i.e.* areas of similar vegetation) or their boundaries. FWS has proposed an arbitrary line without ecological significance to define the boundary of the Sandbrush Prairie Ecoregion, Short-grass/CRP Mosaic Ecoregion, and Mixed-Grass Prairie Ecoregion.

Moreover, several studies have been published on the genetics of LPC populations. Two fairly recent studies are those of Pruett *et al.* (2011) and Oyler-McCance *et al.* (2016). Both of these studies relied on variation at microsatellite loci, which are selected because they contain genetic variation, and Pruett *et al.* also studied mitochondrial DNA (mtDNA). These two studies concluded that there is significant genetic structure across the entire range of the LPC.

Pruett *et al.* analyzed LPC populations in Oklahoma and Texas. The study found that 5% of the overall genetic variation in LPC in these areas was explained by the geography. Another way to state this is that 95% of the genetic variation in the LPC is shared between Texas and

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<sup>71</sup> *Id.* at 29,432 (June 1, 2021).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 29,439.

<sup>74</sup> *Id.*

<sup>75</sup> Pruett *et al.* (2011); Oyler-McCance *et al.* (2016).

Oklahoma. Although 5% is statistically significant, it is not biologically significant to the extent necessary to support the FWS standard of being “discrete” populations.

The Oyler-McCance *et al.* (2016) study reported on the results of an extensive geographic sampling based on microsatellite survey of 13 loci (picked because of high variability, not at random) for 640 individuals from across the LPC’s current range. The study found that less than 3.4% of the total genetic variance is explained by geographic area. Again, this cannot support a finding of a “discrete” population under the ESA because the LPC differs in only statistically minute differences in gene frequencies. If such small genetic discrepancies supported a finding of a distinct DPS, nearly every species would support a separate DPS as long as they were sampled at the same or greater geographic distances apart. There are no meaningfully distinct segments of the overall LPC population. For this additional reason, the Farm Bureau Coalition respectfully reiterates its position that no listing decision is warranted for the LPC in any ecoregion at this time.

**E. To the extent FWS designates two DPSs for the LPC, there should be two separate listing decisions.**

For the reasons stated above, the Farm Bureau Coalition does not believe that it is appropriate to designate two distinct and separate DPSs for the LPC as that decision is not supported by best available scientific and commercial information, or that a listing decision is warranted for either DPS. However, to the extent that FWS proceeds with distinct DPSs for the LPC, the Farm Bureau Coalition believes there should be two listing decisions, based on species counts, habitat preservation, and factors contributing to habitat loss that are unique to the two DPS regions.

**IV. In the alternative, a threatened listing with a 4(d) rule that is protective of agriculture and ranching activities should be adopted for both DPSs.**

The Farm Bureau Coalition believes that, based on the data regarding LPC populations and extensive, successful habitat conservation programs, no listing decision should be made at this time for either DPS. However, if FWS decides to adopt a listing rule, the Farm Bureau Coalition respectfully requests that a threatened designation with an appropriately protective 4(d) rule be adopted for both the Southern and Northern DPS. Both DPSs have extensive agricultural and ranching activity and extensive participation in voluntary conservation programs, both of which could be continued and enhanced with a 4(d) rule.

Mitigation costs and the potential for economic devastation in the region continue to be a significant concern, especially if FWS were to proceed to a new LPC listing without appropriate and needed protections for normal farming and ranching activities.

The proposed 4(d) rule for the Northern DPS establishes two exceptions to the prohibited activities within the DPS: Continuation of routine agricultural practices on existing cultivated lands, and implementation of prescribed fire for the purpose of grassland management.

**A. Routine agricultural and ranching practices**

Should FWS determine to list the Northern DPS as threatened, the Farm Bureau Coalition agrees with FWS that routine agricultural practices should be permitted on cultivated land, and

may be continued without detrimental effect on the LPC population. FWS proposes the inclusion of plowing, disking, mowing, as well as maintenance of existing infrastructure (including buildings, irrigation structures, fences, and roads) and the use of chemicals (when in accordance with label recommendations) as “routine agricultural practices.” This definition is protective of ongoing agricultural activity. Additionally, Farm Bureau Coalition recommends the following brush management activities be included (but not limited to) as 4(d) rule exceptions:

- Management or removal of trees and similar forms of woody plants, either through manual/mechanical (chainsaws, feller bunchers, hydraulic shears, masticators, etc.) or chemical means.
- Cut brush may be lopped-and-scattered, piled-and-burned, chipped, or hauled off.
- Felling of brush exceeding 5 ft.
- Burning of slash piles.
- Mechanical brush management (mowing, discing, chopping, cutting or dozing) to reduce but not eliminate brush, if it is done at a time to avoid nest season (April-June).
- Chemical brush management, by spot treatment, to maintain desirable levels of beneficial brush species.
- Chemical brush management, by aerial application or spot treatment, of undesirable brush or woody species that are detrimental to LPC habitat.

Additionally, the Farm Bureau Coalition believes the 4(d) rule requires an exception for ranching and grazing activities. If grazing activities are excluded from the proposed 4(d) rule, the end result will likely be loss of grassland and increased fragmentation of LPC habitat as ranchers likely convert grazing lands into cultivated croplands ahead of implementation of the listing decision so as not to lose all productive value of their land. Absence of 4(d) protection for grazing activities thus would also have the effect of reducing the effectiveness of voluntary conservation programs that protect grasslands.

In the alternative, Farm Bureau Coalition respectfully requests that FWS develop a 4(d) rule that includes a clear, unambiguous, and well-defined exception for ranching and grazing practices. During a hearing on the Proposed Rule conducted by FWS on July 12, 2021, FWS stated that it could not include certain compatible grazing practices in the 4(d) rule because “compatible” grazing depends on certain factors such as rainfall, soils, and vegetation structure.<sup>76</sup> FWS has also stated that ranchers could be required to obtain permits for grazing livestock and spraying herbicides. *See Exhibit 1*, email from Aislinn Maestas, FWS Public Affairs Specialist, dated July 15, 2021. Requiring ranchers to obtain permits for management actions they perform on their own private property is unworkable and would be counterproductive to LPC conservation. However, FWS has expanded 4(d) rule protections for grazing in past listing decisions, and should do so for the proposed LPC listing in order to include routine ranching practices. Ranchers require guidance and regulatory certainty so that they can know what grazing practices are permitted, and what

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<sup>76</sup> The proposed rule states “[w]hile developing this proposed 4(d) rule, we found that determining how to manage grazing in a manner compatible with the Northern DPS of the lesser prairie chicken is highly site specific based on conditions at the local level; thus, broad determinations within this proposed 4(d) rule would not be beneficial to the species or local land managers.” *Id.* at 29475 (emphasis added).

practices are not. A 4(d) rule that does not define and list accepted practices does not provide the certainty and enforceability needed from the proposed listing decision.

The Farm Bureau Coalition therefore respectfully requests that, if a threatened listing is adopted, FWS include 4(d) rule protection for grazing and ranching activities, but in the alternative that FWS include a thorough definition of permitted grazing practices within the 4(d) rule. Instead, it appears that FWS intends to engage in conferencing with stakeholders of these programs pursuant to Section 7 and/or Section 10 of the ESA to determine which grazing practices are approved and thus do not constitute a take. The problem for Farm Bureau Coalition members is, again, the regulatory uncertainty this engenders, particularly as the consultations will not be complete until after comments on the Proposed Rule must be submitted. The Farm Bureau Coalition recommends adoption of a definition of “routine ranching operations” that adopts, at a minimum, the practices as defined in the 4(d) rule for the California Red-Legged Frog, which includes maintenance of stock ponds, fence construction for grazing management, planting, harvest, and rotation of unirrigated forage crops, maintenance and construction of corrals, ranch buildings, and roads, discing of field sections for fire prevention management, control of noxious weeds by prescribed fire or by herbicides, placement of mineral supplements, and rodent control.<sup>77</sup> The specific and more detailed routine ranching operations adopted for the Red-Legged Frog 4(d) rule are found in 50 C.F.R. ¶ 17.43(d)(3). The Farm Bureau Coalition asks that FWS use this list as a guide for adopting a definition of routine ranching operations for the LPC listing.

To the extent that FWS ultimately finds that a listing of the LPC is warranted, such 4(d) provisions for agricultural and ranching operations should be adopted for both the Southern and Northern DPS. This is particularly true because, as FWS notes, agricultural activity does provide benefit to the LPC:

Lesser prairie chickens travel from native rangeland and CRP lands . . . to forage within cultivated fields supporting small grains, alfalfa, and hay production. Lesser prairie chickens also maintain lek sites within these cultivated areas, and they may be present during farming operations. Thus, existing cultivated lands, although not a native habitat type, may provide food resources for lesser prairie chickens.<sup>78</sup>

However, the proposed 4(d) rule contains an unduly burdensome, costly, and unnecessary restriction on routine agricultural activities. Namely, FWS proposes that only cultivated lands that have been tilled, planted, or harvested within the 5 years preceding the proposed routine agricultural practice can be eligible for the 4(d) rule exception. FWS categorizes such lands as “new conversion of grasslands into agriculture.”<sup>79</sup> This is incorrect, and should be amended in any final adopted listing decision for two reasons. First, cultivated lands might not have been planted, tilled, or harvested for a five year stretch for a variety of reasons. Drought may have made cultivation of those lands nonproductive or impracticable. Farmers may have lacked a market to cultivate all of their lands. A lack of equipment or chemicals necessary to cultivate all of their lands might also result in some land not being harvested or tilled for a five year stretch of time. Farmers shouldn’t lose the use of their lands because of such external factors, when it is part of

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<sup>77</sup> 71 Fed. Reg. 19,243 (April 13, 2006).

<sup>78</sup> 86 Fed. Reg. 29,476 (June 1, 2021).

<sup>79</sup> *Id.*



routine agricultural practice for some lands not to be harvested or tilled for five years. Second, the Proposed Rule impermissibly amends the definition of “cropland” found in 7 C.F.R. § 718.2, which in section (7) includes “land that has newly been broken out for purposes of being planted to a crop,” a determination that is only forfeited if harvesting or tilling practices aren’t used other than for reasons beyond the producer’s control. In the Proposed Rule, FWS takes the rule’s definition of cropland and adds a “within five preceding years” requirement. In order to properly amend the definition of cropland, an administrative rulemaking is the appropriate mechanism. A better and simpler approach for the purposes of the 4(d) rule would be to use the definition of cropland from Section 718.2 without reference to being “tilled, planted, or harvested in the last five years.”

Further, as discussed above, invasive trees are a more significant factor contributing to loss of LPC habitat. Agricultural land conversion is not increasing significantly in area within the LPC habitat, whereas the proposed 5 year exclusion from “routine agricultural practices” would remove even more cultivated lands from the Farm Bureau Coalition states, without compensation. This aspect of the 4(d) rule is not supported by best available scientific and commercial information. Farm Bureau Coalition respectfully requests that the exclusion be revised to apply to lands that have not been tilled, harvested, or planted for the 10 years preceding the proposed routine agricultural practice. This is more in accordance with routine agricultural activity and practice.

#### **B. Implementation of prescribed fire for the purpose of grassland management.**

The second practice permitted under the 4(d) rule is prescribed burns to manage grassland. FWS notes that it “want[s] to encourage the use of prescribed fire on the landscape; thus, we provide an exception for this action below.”<sup>80</sup> FWS believes that this method is “often the best method to control or preclude tree invasion of grasslands.”<sup>81</sup> However, as FWS also notes, “burning of grassland can be perceived as unnecessary for meeting [landowners’ and land managers’] management goals, costly and burdensome to enact, undesirable for optimizing production for cattle, and likely to create wind erosion or ‘blowouts’ in sandy soils.”<sup>82</sup> The Farm Bureau Coalition agrees with and echoes these sentiments. Particularly in the western portion of the LPC habitat, burning is a disfavored practice for these reasons, but also because prevailing high winds make prescribed burns difficult to control and thus a significant risk to life and property. For these reasons, the Farm Bureau Coalition notes that disking and mowing will continue to be the preferred methods for grassland management, and supports a 4(d) rule that broadly defines these practices as routine agricultural activities and thus do not constitute a take.

The Farm Bureau Coalition also notes that, unlike previous listing decisions for the LPC, the proposed 4(d) rule does not include exceptions for either the WAFWA Rangewide Plan or the Natural Resources Conservation Service’s Lesser Prairie Chicken Initiative (“LPCI”), which “provides conservation assistance, both technical and financial, to landowners throughout the LPCI’s administrative boundary” and “focuses on maintenance and enhancement of lesser prairie-chicken habitat while benefiting agricultural producers by maintaining the farming and ranching

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<sup>80</sup> 86 Fed. Reg. 29,475 (June 1, 2021).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

operations throughout the region.”<sup>83</sup> The protections of these programs are important to Farm Bureau Coalition members. It appears that FWS intends to engage in conferencing with stakeholders of these programs pursuant to Section 7 and/or Section 10 of the ESA to determine which practices are approved and thus do not constitute a take. However, because comments on the LPC proposed listing rule are due before the conferencing will be complete, this process creates uncertainty and makes it difficult for the Farm Bureau Coalition to submit complete and meaningful comments on the proposed 4(d) rule before the deadline for comments on the Proposed Rule.

**V. Local, state, and federal regulation and conservation efforts to protect the prairie chicken are underway and should be expanded with greater investment.**

Although FWS apparently finds that no regulatory or conservation measures adequately protect the LPC habitat, to the contrary, landowners, industry groups, local governmental entities, and state and federal agencies are working in tandem to protect and enhance the existing LPC habitat within both DPS regions. Many of these programs have been in place for years, and have improved water and sediment quality and quantity in the stream segments that host the species. The Farm Bureau Coalition believes that FWS should focus on the segments that are demonstrable, proven current species habitat, as programs are in place (and which can be expanded and developed) to advance the mutual goal of building a sustainable, reliable LPC habitat.

**VI. Concerns regarding property rights and economic impacts.**

The Farm Bureau Coalition is concerned that an endangered listing for the Southern DPS subjects farmers and ranchers to limitations on their use of their property in contravention of their investment backed expectations, and to the detriment of local and state economies.

In addition to agriculture, oil and gas activity is widespread in the Southern DPS. Given the significance of agriculture, ranching, and oil and gas production to the economies of the LPC states, designating the LPC as endangered within the Southern DPS would impose unnecessarily significant costs to these operations by rendering agricultural or oil and gas activity economically impracticable on most lands, and prevent private landowners from developing their agricultural products and/or minerals.

The Farm Bureau Coalition believes, as discussed above, that the better course to mitigate such concerns would be to not list the LPC at this time, and continue to fund and expand the numerous habitat conservation programs detailed above. Through such programs, farmers and ranchers continue to use their land, as they have for generations, for the good of their families, their communities, and their state economies, while working in tandem with state and federal programmatic assistance to protect the habitat of the species. In the alternative, the Farm Bureau Coalition asks that FWS adopt a threatened listing with a 4(d) rule for both DPSs which adequately protects existing agricultural activity, while continuing to provide incentives and support to landowners who are preserving species habitat through voluntary conservation programs.

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<sup>83</sup> *Id.* at 29,454.

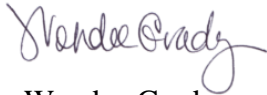
## VII. Concerns regarding the SSA Process.

As noted in its proposed listing decision, FWS sent its draft SSA report to six independent peer reviewers; and received responses from four.<sup>84</sup> However, no members of the Farm Bureau Coalition, or anyone with an agricultural background, was asked to provide peer review of the draft SSA, or for input as to which reviewers were selected. The Coalition respectfully requests that, in the future, FWS solicit peer review from a broader group of potential reviewers that includes knowledgeable stakeholders such as Farm Bureau Coalition members. This would give FWS a greater likelihood of receiving valuable feedback and suggestions to improve the SSA process and the report itself. This process is particularly important because, as the proposed rule notes, when FWS determines which areas should be designated as critical species habitat, its “primary source of information is generally the information from the SSA report. . . .”<sup>85</sup>

For these reasons, the Farm Bureau Coalition respectfully submits that no listing decision for the LPC is warranted, and that in the alternative, a threatened designation with a 4(d) rule should be adopted for both the Northern and Southern DPS, which exempts routine farming, ranching and agricultural activities.

Thank you for the opportunity to comment.

Sincerely,



Wendee Grady  
Director, The Kansas Farm Bureau Legal Foundation



Jay Bragg  
Associate Director of Commodity and Regulatory Affairs, Texas Farm Bureau



Marla Peek  
Director, Oklahoma Farm Bureau Legal Foundation



Chad Smith  
CEO, New Mexico Farm and Livestock Bureau

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<sup>84</sup> 86 Fed. Reg. 29,433 (June 1, 2021).

<sup>85</sup> *Id.* at 29,478.



Sam Kieffer  
Vice President of Public Affairs  
American Farm Bureau Federation



Zach Riley  
Senior Director Of Public Policy, National Affairs  
Colorado Farm Bureau

# EXHIBIT 1



The FWS suggests ranchers may need permits to graze livestock and spray herbicides on their property.

Most of the LPC habitat is on private lands.

It is unlikely that ranchers managing their own property would apply for permits. A permitting program would create ill will among ranchers and landowners and would be counterproductive to LPC conservation.

See the email from the FWS on the following pages.

**From:** [Maestas, Aislinn M](#)  
**To:** [Marla Peek](#)  
**Subject:** Follow-up to LEPC Public Info Session  
**Date:** Thursday, July 15, 2021 11:52:45 AM

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Good morning Marla,

Apologies for the late response. Here is our answer to your question submitted at last week's LPC proposed listing public information session:

**Question:** "Can you explain why permits would be needed for grazing and application of herbicides?"

**Response:** If finalized as proposed, anyone who believes that their otherwise-lawful activities will result in the "incidental take" of a listed wildlife species needs a permit. For the lesser prairie-chicken actions that cause direct mortality or result in changes to vegetative structure and composition which affects the reproductive success of the lesser prairie-chicken, even if short-term could result in take. It is important that projects are analyzed to determine if take will occur as there are many variables which must be included and thus blanket statements around these issues would not be appropriate. For example, if the purpose of herbicide application is to eradicate mesquite, no permit would be required as the lesser prairie-chicken avoids areas infested by mesquite.

Livestock grazing is a tool, which can be used to shape and manage grasslands and shrublands in ways that result in different outcomes. Depending on the approach, livestock grazing has the ability to significantly influence habitat suitability for the LEPC. When managed to produce habitat conditions which are required by the LEPC, grazing is an invaluable tool for maintaining healthy prairie ecosystems. However, if grazing is managed in a way that is focused on maximizing short-term cattle production, this results in rangeland that is uniformly over utilized throughout the entire managed area leaving limited residual cover for spring nesting and decreasing vegetative heterogeneity. This will have significant negative effects on the LEPC by decreasing habitat quality. These issues may be further exacerbated by drought.

Grazing management that alters the plant community to the point where vegetative composition and structure are no longer suitable for the LEPC can contribute to habitat loss and fragmentation, even though these areas remain in grasslands. The biological response of both the LEPC and its habitat to grazing are highly dependent upon many variables and site-specific conditions including pre- and post-disturbance precipitation patterns.

In addition to impacting the LEPC by altering the vegetative community, domestic livestock have also been documented to inadvertently flush LEPC and trample LEPC nests. Brief flushing of adults from nests can expose eggs and chicks to predation and extreme temperatures. Trampling nests can cause direct mortality to LEPC eggs or chicks or may cause adults to

permanently abandon their nests, ultimately resulting in loss of young.

Thank you for your participation.

Best,

**Aislinn Maestas**

Public Affairs Specialist

U.S. Fish and Wildlife Service

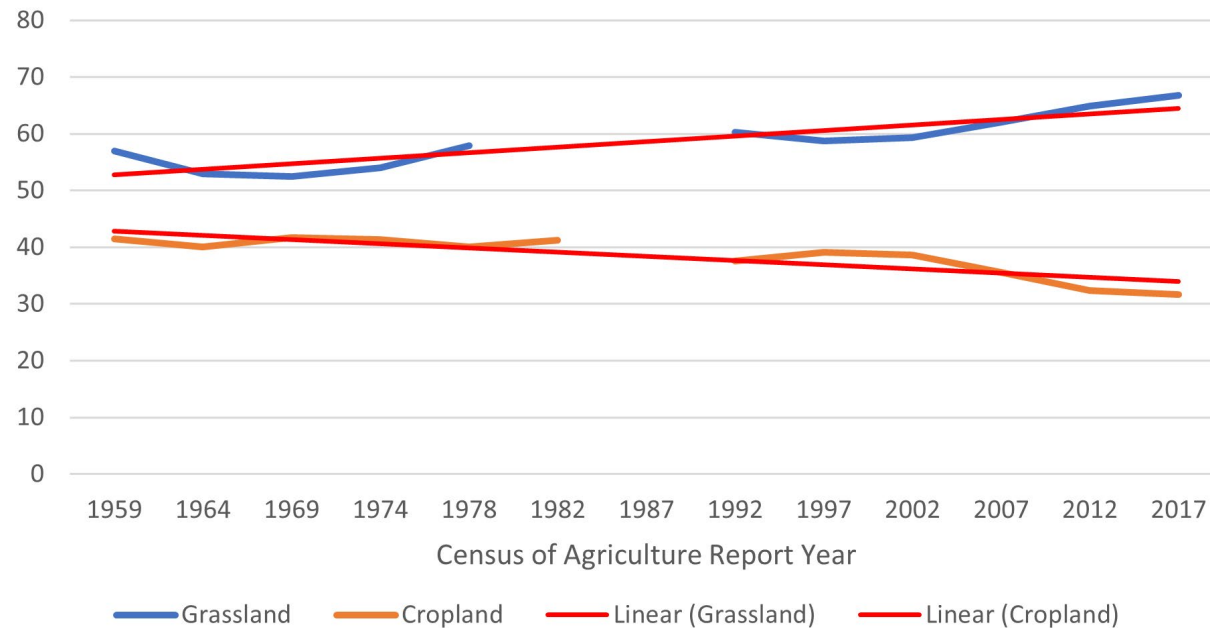
[aislinn\\_maestas@fws.gov](mailto:aislinn_maestas@fws.gov)

Office: 505-248-6599

Cell: 505-331-9280

# EXHIBIT 2 – Oklahoma

8 County Total Grassland vs. Cropland

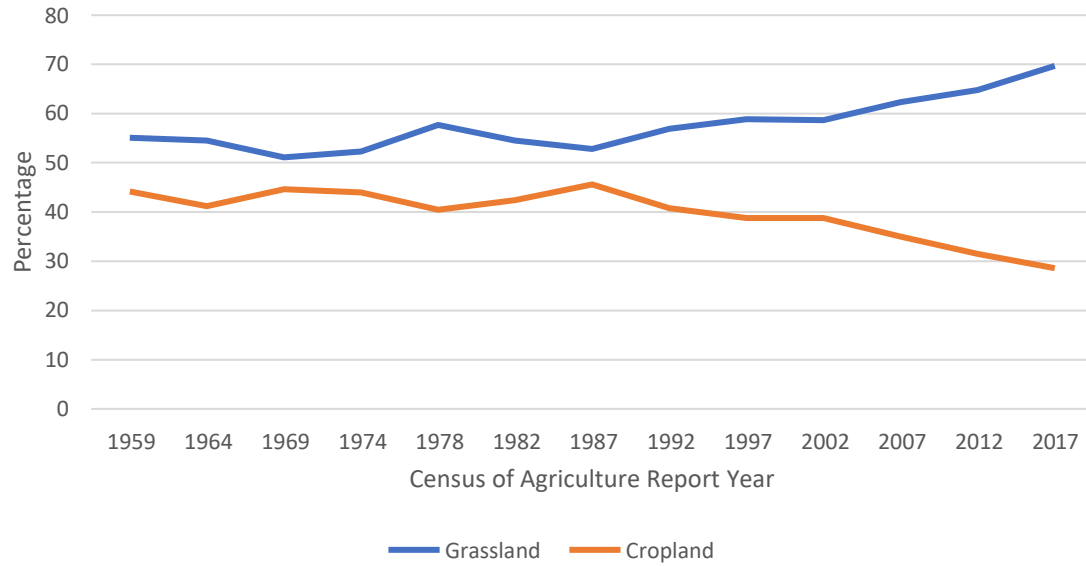


The FWS's broad statements about how conversion of grassland to cropland and habitat fragmentation has harmed the LPC are not accurate for Oklahoma. Figures show since 1959, there has been no widespread conversion of grassland to cropland in the 8 LPC counties. In fact, the trend is toward increasing grassland and decreasing cropland. There is no evidence that will change.

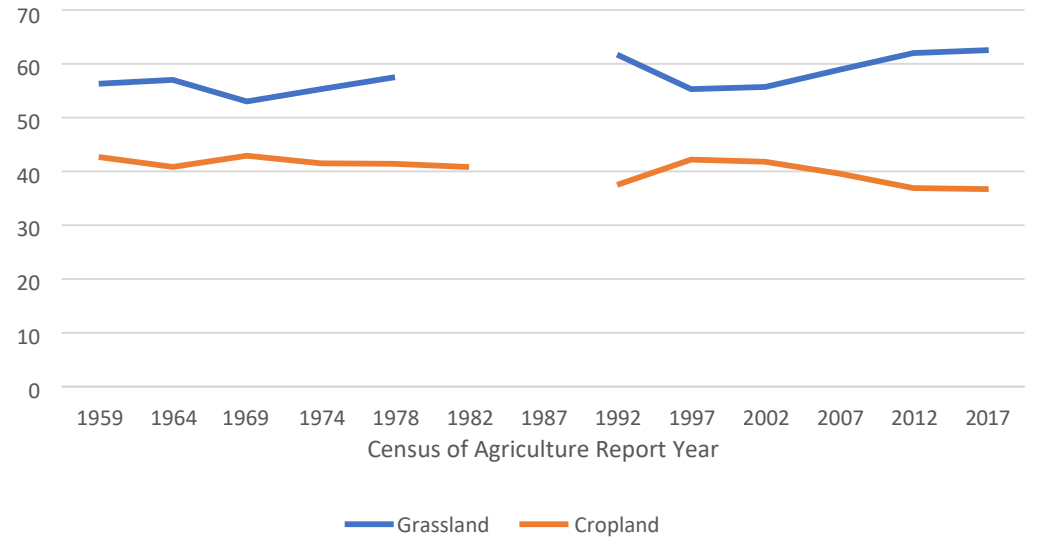
Statistics were provided by Troy Marshall, Oklahoma State Statistician, USDA, National Agricultural Statistics Service, Field Operations, Southern Plains Region.



### Beaver County Grassland vs. Cropland

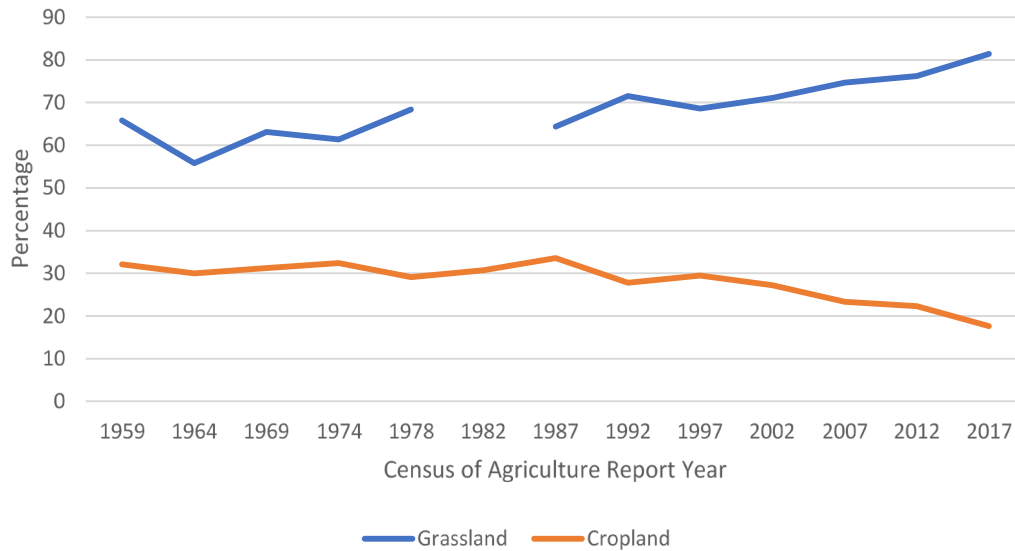


### Cimarron County Grassland vs. Cropland

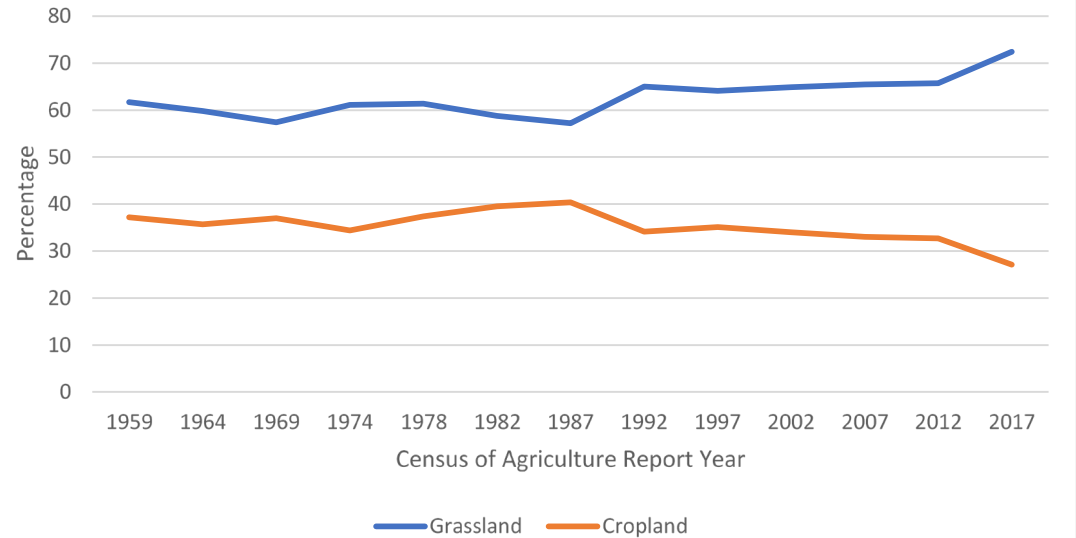


\*Missing values not displayed are withheld due to disclosure.

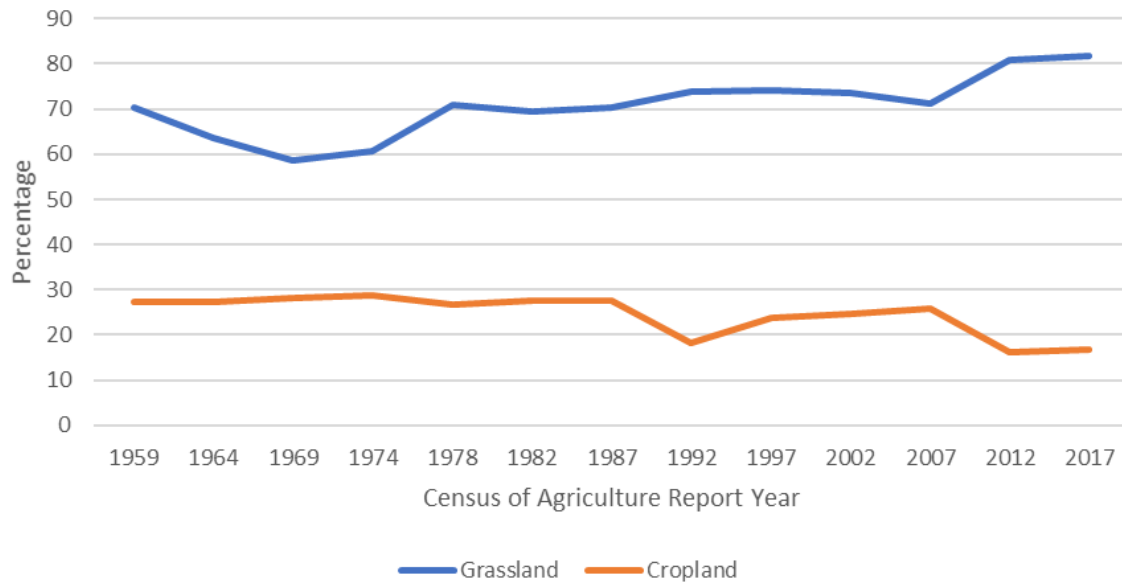
### Ellis County Grassland vs. Cropland



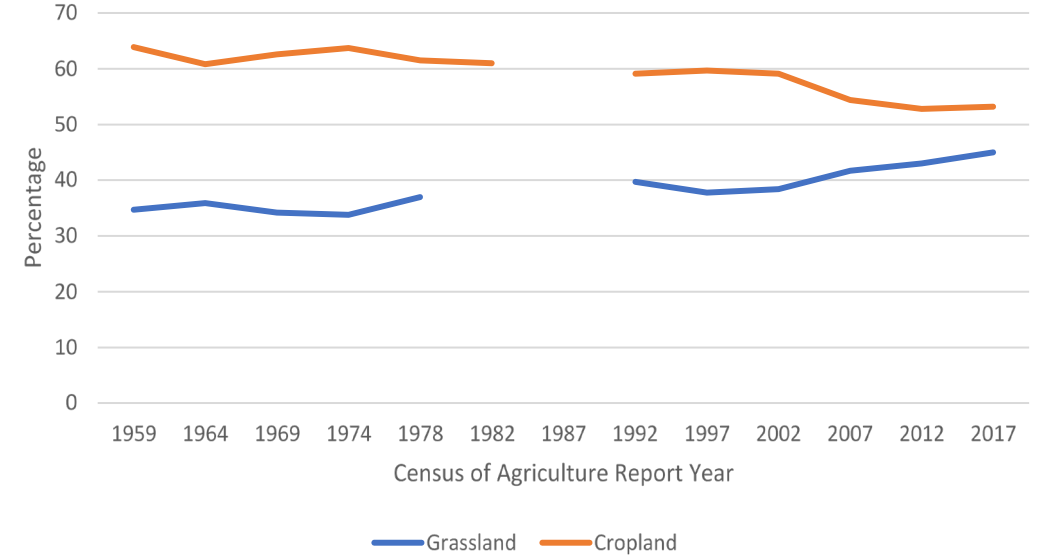
### Harper County Grassland vs. Cropland



### Roger Mills County Grassland vs. Cropland

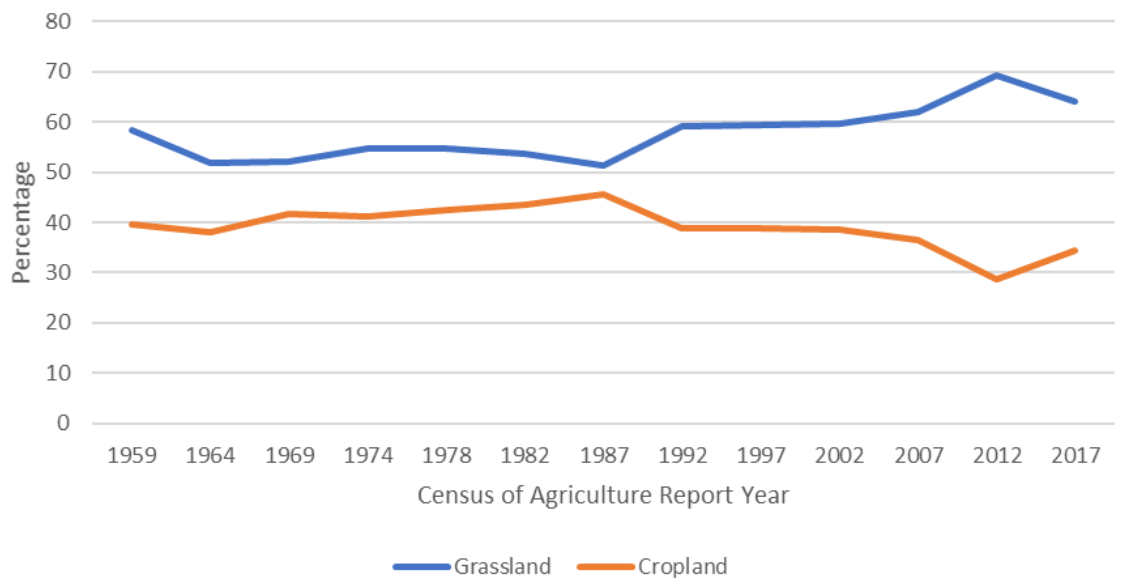


### Texas County Grassland vs. Cropland

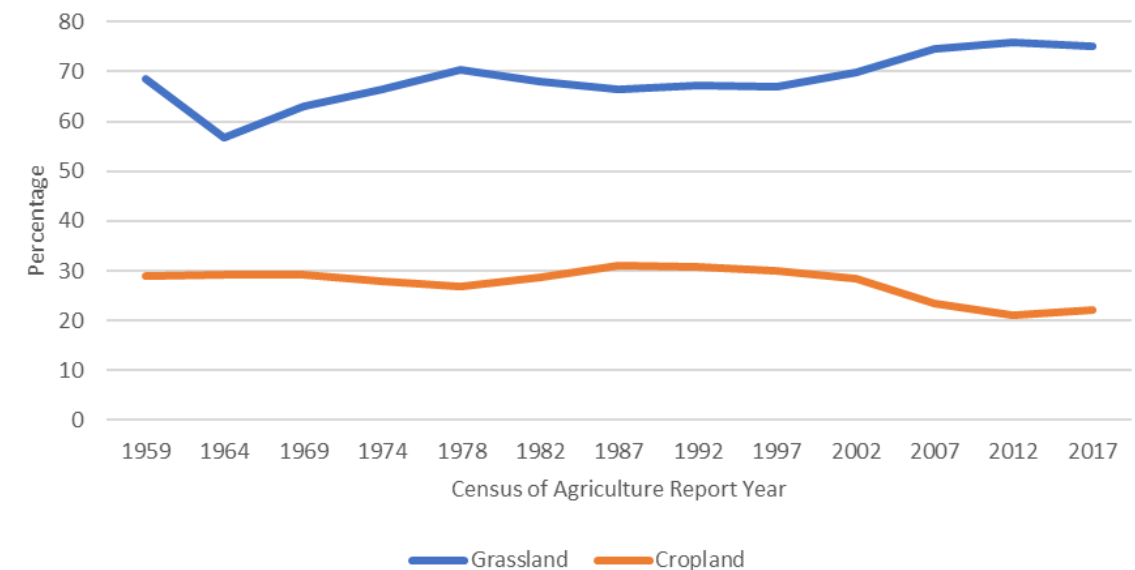


\*Missing values not displayed are withheld due to disclosure.

### Woods County Grassland vs. Cropland



### Woodward County Grassland vs. Cropland



County	Ag Census	Percent grassland	Perm. Pasture	Percent Cropland	Cropland	Total Acres in County	Acres of Land in Farms	% Percent Farmland	Number of Farms
Beaver	2017	69.7%	722557	28.6%	296108	1161406	1037049	89.3%	805
Beaver	2012	64.8%	722696	31.5%	351901	1161406	1115852	96.1%	965
Beaver	2007	62.3%	703345	35.0%	394934	1164229	1128871	97.0%	952
Beaver	2002	58.7%	597626	38.8%	395247	1161188	1018626	87.7%	960
Beaver	1997	58.9%	627958	38.8%	413434	1161255	1066649	91.9%	816
Beaver	1992	56.9%	561112	40.8%	402241	1161255	986621	85.0%	736
Beaver	1987	52.8%	534375	45.6%	461319	1156812	1011829	87.5%	824
Beaver	1982	54.5%	558688	42.4%	434862	1156812	1025028	88.6%	852
Beaver	1978	57.7%	632307	40.5%	443676	1145600	1095683	95.6%	919
Beaver	1974	52.3%	573149	44.0%	481972	1145344	1096044	95.7%	959
Beaver	1969	51.1%	598217	44.6%	521826	1145344	1169822	102.1%	1193
Beaver	1964	54.5%	606175	41.2%	457705	1147520	1111313	96.8%	1024
Beaver	1959	55.1%	602311	44.2%	483305	1147520	1094022	95.3%	1104
Ellis	2017	81.4%	589573	17.6%	127303	788169	724088	91.9%	677
Ellis	2012	76.2%	577528	22.3%	168731	788172	758323	96.2%	760
Ellis	2007	74.7%	536114	23.3%	167089	788142	718058	91.1%	756
Ellis	2002	71.1%	478670	27.2%	182789	786649	672764	85.5%	727
Ellis	1997	68.6%	450949	29.5%	193694	786712	657651	83.6%	666
Ellis	1992	71.5%	499826	27.8%	194709	786712	699515	88.9%	599
Ellis	1987	64.4%	429669	33.6%	224190	788761	666893	84.5%	622
Ellis	1982	(D)		30.7%	202924	788761	661929	83.9%	612
Ellis	1978	68.4%	485599	29.1%	206712	794880	710002	89.3%	685
Ellis	1974	61.4%	433085	32.4%	228216	794880	705131	88.7%	702
Ellis	1969	63.1%	482564	31.2%	238377	794880	764537	96.2%	799
Ellis	1964	55.8%	401416	30.0%	216204	782080	719610	92.0%	736
Ellis	1959	65.8%	460179	32.1%	224769	782080	699684	89.5%	820
Harper	2017	72.4%	483069	27.1%	180682	664971	667515	100.4%	438
Harper	2012	65.7%	405644	32.7%	201857	664971	617812	92.9%	532
Harper	2007	65.5%	403816	33.0%	203376	665003	616947	92.8%	580
Harper	2002	64.9%	389883	34.0%	204620	664958	601162	90.4%	517
Harper	1997	64.1%	377528	35.1%	206511	665001	589065	88.6%	488
Harper	1992	65.0%	394517	34.1%	206919	685001	607180	88.6%	441
Harper	1987	57.2%	316898	40.4%	224082	664665	554237	83.4%	504
Harper	1982	58.8%	352175	39.5%	236677	664665	598517	90.0%	529
Harper	1978	61.4%	375042	37.4%	228413	666240	610947	91.7%	530
Harper	1974	61.1%	387440	34.4%	218045	666048	634475	95.3%	545
Harper	1969	57.4%	365567	37.0%	235577	666048	636687	95.6%	639
Harper	1964	59.8%	346163	35.7%	206477	661760	579124	87.5%	564
Harper	1959	61.7%	392400	37.2%	237020	661760	636363	96.2%	641
Roger Mills	2017	81.7%	596401	16.9%	123417	730327	730322	100.0%	612
Roger Mills	2012	80.9%	581653	16.3%	117468	730327	719291	98.5%	678
Roger Mills	2007	71.3%	512549	25.9%	186444	730299	719356	98.5%	693
Roger Mills	2002	73.5%	543126	24.6%	181586	730799	738683	101.1%	677
Roger Mills	1997	74.2%	498806	23.8%	160299	730845	672155	92.0%	705
Roger Mills	1992	73.8%	487114	18.2%	119967	730845	660214	90.3%	677
Roger Mills	1987	70.3%	449920	27.5%	175695	733395	639897	87.3%	716
Roger Mills	1982	69.4%	419684	27.7%	167425	733395	604947	82.5%	724
Roger Mills	1978	70.8%	482184	26.6%	181086	729600	681397	93.4%	770
Roger Mills	1974	60.7%	416193	28.7%	196935	729600	686026	94.0%	819

Roger Mills	1969	58.7%	434433	28.1%	208135	729600	740344	101.5%	945
Roger Mills	1964	63.5%	404384	27.2%	173433	718720	636900	88.6%	853
Roger Mills	1959	70.4%	477422	27.3%	184951	718720	677822	94.3%	921
Texas	2017	45.0%	574745	53.2%	680006	1306428	1278196	97.8%	828
Texas	2012	43.0%	553611	52.8%	678815	1306426	1286834	98.5%	1024
Texas	2007	41.7%	503171	54.4%	656356	1306403	1205978	92.3%	1038
Texas	2002	38.4%	453574	59.1%	697744	1303781	1181025	90.6%	1002
Texas	1997	37.8%	420983	59.7%	664273	1303882	1113367	85.4%	882
Texas	1992	39.7%	417348	59.1%	621820	1303882	1051384	80.6%	704
Texas	1987	(D)		(D)		1305580	1177249	90.2%	804
Texas	1982	(D)		61.0%	700161	1305580	1148305	88.0%	795
Texas	1978	37.0%	435858	61.5%	722979	1319680	1176529	89.2%	875
Texas	1974	33.8%	395529	63.7%	744263	1319680	1168836	88.6%	951
Texas	1969	34.2%	430385	62.6%	787206	1319680	1257957	95.3%	1126
Texas	1964	35.9%	449082	60.8%	761183	1315840	1251941	95.1%	959
Texas	1959	34.7%	411066	63.9%	756452	1315840	1183037	89.9%	1019
Woods	2017	64.1%	532054	34.3%	284982	823331	830009	100.8%	710
Woods	2012	69.3%	559976	28.6%	231102	823331	808463	98.2%	751
Woods	2007	61.9%	516447	36.4%	303751	823327	833775	101.3%	840
Woods	2002	59.7%	487003	38.7%	315735	823402	816386	99.1%	761
Woods	1997	59.5%	499242	38.8%	325714	823455	839629	102.0%	786
Woods	1992	59.1%	439124	38.9%	289220	823455	743563	90.3%	677
Woods	1987	51.2%	357494	45.6%	318191	826316	697747	84.4%	752
Woods	1982	53.6%	394417	43.4%	319287	826316	735500	89.0%	819
Woods	1978	54.7%	440310	42.5%	342237	830720	805525	97.0%	849
Woods	1974	54.6%	420644	41.1%	317161	830720	770907	92.8%	861
Woods	1969	52.0%	427101	41.7%	342045	830720	820806	98.8%	1135
Woods	1964	51.9%	430930	38.1%	316431	831440	831094	102.2%	1090
Woods	1959	58.3%	489728	39.6%	333222	813440	840729	103.4%	1205
Woodward	2017	75.1%	591512	22.0%	173629	795135	787796	99.1%	843
Woodward	2012	75.9%	542743	21.0%	149928	795138	714706	89.9%	882
Woodward	2007	74.5%	583345	23.4%	183430	795162	783200	98.5%	892
Woodward	2002	69.8%	506762	28.3%	205806	795072	726473	91.4%	842
Woodward	1997	67.0%	479751	30.0%	214651	795125	715873	90.0%	877
Woodward	1992	67.2%	462048	30.8%	211962	795125	687299	86.4%	746
Woodward	1987	66.4%	454690	31.1%	212996	794846	684626	86.1%	751
Woodward	1982	67.9%	484924	28.7%	205295	794848	714512	89.9%	733
Woodward	1978	70.3%	526977	26.8%	200880	800640	749703	93.6%	772
Woodward	1974	66.4%	504739	28.0%	212762	800832	760374	94.9%	802
Woodward	1969	63.0%	515125	29.2%	239212	800832	818149	102.2%	963
Woodward	1964	56.7%	448781	29.1%	230164	788480	791889	100.4%	867
Woodward	1959	68.6%	562323	29.0%	237291	788480	819344	103.9%	953
7 county total	2017	67.5%	4089911	30.8%	1866127	6269767	6054975	96.6%	4913
7 county total	2012	65.5%	3943851	31.6%	1899802	6269771	6021281	96.0%	5592
7 county total	2007	62.6%	3758787	34.9%	2095380	6272565	6006185	95.8%	5751
7 county total	2002	60.1%	3456644	37.9%	2183527	6265849	5755119	91.8%	5486
7 county total	1997	59.3%	3355217	38.5%	2178576	6266275	5654389	90.2%	5220

7 county total	1992	60.0%	3261089	37.7%	2046838	6286275	5435776	86.5%	4580
7 county total	1987	(D)		(D)		6270375	5432478	86.6%	4973
7 county total	1982	(D)		41.3%	2266631	6270377	5488738	87.5%	5064
7 county total	1978	57.9%	3378277	39.9%	2325983	6287360	5829786	92.7%	5400
7 county total	1974	53.8%	3130779	41.2%	2399354	6287104	5821793	92.6%	5639
7 county total	1969	52.4%	3253392	41.4%	2572378	6287104	6208302	98.7%	6800
7 county total	1964	52.1%	3086931	39.9%	2361597	6227840	5921871	95.1%	6093
7 county total	1959	57.1%	3395429	41.3%	2457010	6227840	5951001	95.6%	6663

County	Ag Census	Percent grassland	Perm. Pasture	Percent Cropland	Cropland	Total Acres in County	Acres of Land in Farms	% Percent Farmland	Number of Farms	
Cimarron	2017	62.6%	686931	36.7%		402669	1174273	1097472	93.5%	447
Cimarron	2012	62.0%	717847	36.9%		426854	1174232	1157186	98.5%	554
Cimarron	2007	58.9%	615415	39.6%		413419	1174229	1044528	89.0%	557
Cimarron	2002	55.7%	624654	41.8%		469046	1174428	1121690	95.5%	545
Cimarron	1997	55.3%	600247	42.2%		458147	1174487	1084981	92.4%	530
Cimarron	1992	61.7%	638324	37.5%		387701	1174487	1034980	88.1%	446
Cimarron	1987	(D)		#VALUE!	(D)		1178585	1006430	85.4%	458
Cimarron	1982	(D)		40.8%		441151	1178585	1080087	91.6%	458
Cimarron	1978	57.5%	615417	41.4%		443303	1179520	1069953	90.7%	490
Cimarron	1974	55.3%	572166	41.5%		429644	1179520	1034710	87.7%	475
Cimarron	1969	53.0%	575657	42.9%		466379	1179520	1086377	92.1%	600
Cimarron	1964	57.0%	617122	41.1%		445536	1172480	1082750	92.3%	502
Cimarron	1959	56.3%	568476	43.0%		433940	1172480	1010266	86.2%	505

8 county total	2017	66.8%	4776842	31.7%	2268796	7444040	7152447	96.1%	5360
8 county total	2012	64.9%	4661698	32.4%	2326656	7444003	7178467	96.4%	6146
8 county total	2007	62.0%	4374202	35.6%	2508799	7446794	7050713	94.7%	6308
8 county total	2002	59.3%	4081298	38.6%	2652573	7440277	6876809	92.4%	6031
8 county total	1997	58.7%	3955464	39.1%	2636723	7440762	6739370	90.6%	5750
8 county total	1992	60.3%	3899413	37.6%	2434539	7460762	6470756	86.7%	5026
8 county total	1987	(D)		(D)		7448960	6438908	86.4%	5431
8 county total	1982	(D)		41.2%	2707782	7448962	6568825	88.2%	5522
8 county total	1978	57.9%	3993694	40.1%	2769286	7466880	6899739	92.4%	5890
8 county total	1974	54.0%	3702945	41.3%	2828998	7466624	6856503	91.8%	6114
8 county total	1969	52.5%	3829049	41.7%	3038757	7466624	7294679	97.7%	7400
8 county total	1964	52.9%	3704053	40.1%	2807133	7400320	7004621	94.7%	6595
8 county total	1959	56.9%	3963905	41.5%	2890950	7400320	6961267	94.1%	7168